

NO. 44278-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AMEL DALLUGE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Kenneth Williams, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied due process when the trial court failed to apply the correct legal standard for determining whether the state proved its case.

Issue Pertaining to Assignment of Error

Under RCW 9A.46.020(2)(b)(ii), before a defendant may be found guilty of felony harassment via threats to kill, the State must prove beyond a reasonable doubt that the defendant subjectively knew that he was communicating a threat and that the communication constituted a threat to cause death. When determining whether the State had met its burden, however, the trial court did not apply this subjective standard and, instead, applied only the objective standard used for determining whether a communication constitutes a "true threat" for First Amendment purposes. Is this reversible error?

B. STATEMENT OF THE CASE

1. Procedural History

On May 16, 2011, the Clallam County prosecutor charged Amel Dalluge with five counts of felony harassment via threats to kill. CP 178-80. Upon Dalluge's pre-trial motion, three counts were dismissed for insufficient evidence. CP 165-74; CP __ (sub

no. 23, "Demurrer," 10/21/11). A bench trial was held in November 2012, at which Dalluge represented himself. CP 78. The trial court found Dalluge guilty of Count I but not guilty of Count II. CP 7-12. Dalluge was sentenced to 56 months of confinement. CP 14-26.

2. Substantive Facts¹

In 2010, Dalluge attempted to file a citizen complaint in the district court of Clallam County, alleging a correction officer was refusing to allow him to wear a turban. RP 166-67; 233. Clallam County District Court Administrator Sabrina Bees sent Dalluge a letter telling him he needed to exhaust all remedies within the institution first and, if unsuccessful, contact to the Clallam County Prosecutor. RP 167.

Shortly afterward, Dalluge filed a federal suit against Bees. RP 44; Ex. 1. It was a §1983 suit that, among other things, was also intended to exhaust international law issues, as Dalluge claimed Bees had violated a war crime prohibition against genocide. Ex. 1, RP 58; 215, 226. In the relief section of the complaint, Dalluge asked for standard §1983 remedies and, for the alleged war crime violation, execution by hanging. Ex. 1; RP 169.

¹ These facts focus primarily on those relevant to Count 1.

Attorney Sarah Mack was hired by the County to represent Bees. RP 43. She filed a notice of appearance on January 14, 2011. RP 51. On January 21, 2011, Mack received a letter from Dalluge. RP 52; Ex 8. Dalluge began the letter by stating he was an unrecognized "sovereign." RP 57. He warned that if Mack violated any law, "More than likely the Taliban is going to run Black Ops against those you love and then you." RP 57. He also explained that he was the victim of a "bluecoat cover-up" and said he was the subject of a highly classified international investigation being run against the United States and Washington State. RP 58. Dalluge then stated: "You have no legal standing (defense that is just) and all I can say is you're going to do something stupid and in retaliation get hit with a bioweapon..., to give you cancer ..." RP 58.² Dalluge later testified the letter was intended as political hyperbole. RP 227.

² This letter was the communication at issue in Count 1.

Mack took the contents of the letter very seriously, however, and considered it to be a death threat.³ RP 59, 65. After Mack determined Dalluge's release date was May 28, 2011, she reported the incident to the Clallam County Sheriff but did not seek a protection order. RP 65, 92-93, 183.

C. ARGUMENT

APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD.

When the trial court concluded the State had met its burden under RCW 9A.46.020(2)(b)(ii), it applied only the objective legal standard that is used to determine whether the threats constitute a true threat for First Amendment purposes. However, as shown below, the statute places additional burdens on the State to prove beyond a reasonable doubt that Dalluge subjectively knew he was communicating a threat and subjectively knew that the threat he was communicating constituted a death threat. By not applying this subjective standard, the trial court failed to determine whether the State sufficiently proved all statutory elements and violated

³ Mack had been misinformed by law enforcement as to Dalluge's criminal past, with law enforcement attributing to Dalluge a far more violent history than he actually had. RP 49, 149. Mack also believed she was targeted because she is a woman, but the trial court found this not to be the case. CP 10; RP 137.

Dalluge's due process rights. See, State v. Allen, 176 Wn.2d 611, 627, n. 10, 294 P.3d 679 (2013) (failure to hold the State to its burden to prove all elements is constitutional error).

Washington citizens enjoy the right to speak freely under both the First Amendment and Washington Constitution Article 1, section 5. "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245, 122 S.Ct. 1389, 1399, 152 L.Ed.2d 403 (2002).

While the scope of the First Amendment is broad, it does not extend to "unprotected speech." State v. Kilburn, 151 Wn.2d 36, 42-43, 84 P.3d 1215 (2004). However, there are only a few categories of speech that are not protected under the First Amendment -- defamation, fighting words, direct incitement of lawless action, true threats, false advertising, illegal obscenity, and child pornography. R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); State v. Kilburn, 151 Wn.2d at 43. These categories of speech are considered of such "slight social value" that the government may regulate them, but only if the government's regulation is precisely written to avoid sweeping beyond these narrow categories. E.g., Sable

Communications of Cal., Inc. v. F.C.C., 492 U.S. 115, 124, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989); State v. Williams, 144 Wn.2d 197, 207, 26 P.3d 890 (2001).

Even criminal statutes regulating harassment are subject to scrutiny under the First Amendment when regulating pure speech. E.g., State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010); City of Bellevue v. Lorang, 140 Wash.2d 19, 26-30, 992 P.2d 496 (2000); Seattle v. Huff, 111 Wn.2d 923, 767 P.2d 572 (1989); Everett v. Moore, 37 Wn. App. 862, 867, n. 2, 683 P.2d 617 (1984). The First Amendment prohibits the State from criminalizing communications that bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole. Schaler, 169 Wn.2d at 283.

RCW 9A.46.020 regulates pure speech. Kilburn, 151 Wn.2d 41. It provides in relevant part:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person ...

(b) The person by words or conduct places the person threatened in reasonable fear that the

threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2)... A person who harasses another is guilty of a class C felony if ... the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

To assure this statute passes constitutional muster, the Washington Supreme Court has interpreted it as criminalizing only speech that constitutes a "true threat." Schaler, 169 Wn.2d at 283-84. This is because "true threats" are unprotected speech. Kilburn 151, Wn.2d at 43.

In order to establish that a communication is a "true threat," the State must show the statement was made "in a context or under such circumstances ~~wherein~~ a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Id. This is an objective test. Kilburn, 151 Wn.2d at 48.

However, even if the State meets its constitutional burden under the objective test, the inquiry does not end there. The State must still prove all the statutory elements of the crime beyond a reasonable doubt. See e.g., Watts v. U.S., 394 U.S. 705, 708, 89

S.Ct. 1399, 22 L.Ed.2d 664 (1969) (explaining the Government must prove a true threat and then look at additional statutory requirements); Kilburn, 151 Wn.2d at 48 (same). That was not done here.

The “knowingly” element in RCW 9A.46.020 requires the application of a subjective test in addition to the constitutional objective test. In Kilburn, the Washington Supreme Court was asked to determine whether the State must show that the defendant intended to actually carry out his threat to establish that his communication constituted a “true threat.” It concluded that for constitutional purposes there is not a mental element, and the test is purely objective. Kilburn, 151 Wn.2d at 48; see also, State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006).

In so ruling, however, the Washington Supreme Court recognized the statute placed additional burdens on the State:

We add, however, that the harassment statute itself does require a mental element. The statute requires that the defendant “knowingly threatens....” RCW 9A.46.020(1)(a)(i). This means that “the defendant must subjectively know that he or she is communicating a threat, and must know that the communication he or she imparts directly or indirectly is a threat to cause bodily injury to the person threatened or to another person.” J.M., 144 Wn.2d at

481, 28 P.3d 720.^[4]

Kilburn, 151 Wn.2d at 48; see also, Schaler, 169 Wn.2d at 284 (applying the Kilburn reasoning to death threat prong of the statute). Given this interpretation, when prosecuting someone for felony harassment, the State is required to meet both the objective test for constitutional purposes and the subjective test outlined above for statutory purposes.

Applying Kilburn's interpretation of the statute in this case, the State was required to prove beyond a reasonable doubt that Dalluge subjectively knew he was communicating a threat to Mack, and he subjectively knew that the communication constituted a death threat. The trial court's written findings show it did not apply this standard when determining whether Dalluge knew his communication constituted a death threat. Instead, it rested its verdict on the fact that State had met the objective test.

Specifically, the trial court found:

A reasonable person in this context would see that language of Exhibit 8 as a threat, whether the person were the sender or the receiver. The Court finds that a reasonable person would interpret the indication

⁴ The trial court cited this language in general when reviewing case law in its oral ruling (RP 295); however, it did not apply the subjective standard when determining whether Dalluge knew his communication constituted a death threat. RP 299-312; CP 7-12.

that Ms. Mack would be attacked by a bioweapon as a threat to have her death caused by a slow and lingering disease, cancer, and would foresee that the statement would be interpreted as a serious expression of intention to carry out the threat, rather than as something in jest or idle talk.

CP 10-11. From this, the trial court went on to conclude:

Under the objective standard, the statutory elements of Harassment, Threats to Kill have been met. A reasonable person would not have sent that letter without deeming that it would have a reaction in the receivers and the reaction would be to see it as a threat to cause death.

CP 11. As shown above, this is the wrong legal standard for determining guilt.

The closest the trial court came to addressing the subjective standard is in the following finding of fact:

The next question is whether the words of Exhibit 8 constitute a threat to kill. As to Ms. Mack, the suggestion is that she'll be given cancer. Certainly in the context of the letter, one would assume that the intent would be to cause Ms. Mack death from disease. The court therefore finds that the threat was a threat to kill."

CP 10 (emphasis added).

However, a careful reading of this finding reveals that the objective standard is still being applied. The trial court did not find Dalluge subjectively knew that the suggestion that Mack would suffer cancer constituted a death threat, as opposed to a threat to

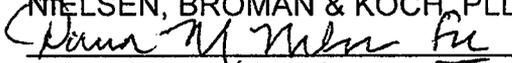
cause bodily harm or psychological discomfort. Instead, it found that "one would assume the intent" was to send a death threat. This falls short of affirmatively finding Dalluge knowingly communicated a death threat. Moreover, when this language is read in conjunction with the trial court's express application of the objective standard in other findings and its conclusions of law (see those cited above), this finding cannot be fairly read as applying the necessary subjective standard.

D. CONCLUSION

In conclusion, the trial court's findings and conclusions reveal it only applied the constitutional objective standard when determining Dalluge's guilt, not RCW 9A.46.020's subjective standard. This violated Dalluge's due process right and relieved the State of its full burden. Consequently, Dalluge's conviction should be reversed.

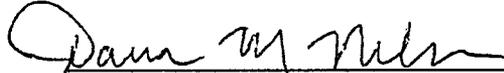
DATED this 12th day of July, 2013.

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12TH DAY OF JULY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AMEL DALLUGE
DOC NO. 779283
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF JULY, 2013.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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