Filed
Washington State
Court of Appeals
Division Two

March 10, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. P. D. H., Appellant.	No. 52521-6-II UNPUBLISHED OPINION

SUTTON, J. — PDH,[1] a juvenile, appeals from his adjudication of guilty to a charge of threats to bomb or injure property. PDH argues that his First Amendment right to free speech was violated because the evidence was insufficient to prove he made a "true threat." Br. of Appellant at 1, 10. Our independent review of the record supports the conclusion that PDH made a true threat. Accordingly, we affirm.

FACTS

PDH was a student attending Toutle Lake High School. In February 2018, PDH was overheard by several students making a series of statements about school shootings and setting fires. A student reported one of PDH's comments.

After an investigation, the State charged PDH with one count of threats to bomb or injure property. PDH pleaded not guilty and the case was heard by the juvenile court.

[1] Because PDH and several of the witnesses are juveniles, we find that some anonymity is appropriate. Accordingly, we use initials to identify PDH and the juvenile witnesses.

At the adjudicative hearing, Cowlitz County Deputy Sheriff Mark Johnson testified that he investigated the reported threats and interviewed PDH at the sheriff's office. PDH admitted making the statements, but he stated "that he wasn't directing his comments at the Toutle Lake High School specifically." Report of Proceedings (RP) at 43. When Deputy Johnson asked PDH if he could understand how people would take threats like this seriously, PDH "agreed that . . . he could see how that could be taken seriously." RP at 44.

Several students testified about the various comments PDH had made at school starting in mid-February. BF, a Toutle Lake student, testified that she was in line with other students during a kickball game that probably occurred on February 16, and PDH started talking to her about "how he could easily set up a fire in the bathroom and nobody would know it was him or something." RP at 79. This statement made BF "really uncomfortable," because she had experienced "a house fire and it was tragic." RP at 79. BF told KD about this conversation, but BF did not report this statement to a teacher because she did not know how PDH would react if he knew she had reported him. BF avoided contact with PDH after this.

Another student, BR, testified that on February 23, while playing kickball with PDH, and two other students ES and SJ, she (BR) overheard PDH say, "Hey, let's shoot up the school," then "kind of chuckle[ ]." RP at 65. BR observed that PDH also appeared to be "smirking." RP at 65. Although BR could not see ES's face, he appeared to respond by "chuckl[ing]." RP at 65, 69.

BR stated that although she was not scared of PDH after hearing this statement, she "was just kind of weirded out about it" and did not "really know what to do or how to act." RP at 65, 70. After hearing this statement, she and SJ "kept [their] distance" from PDH because SJ "was kind of scared" and wanted BR to stay with her. RP at 65. BR explained that she was not

frightened after hearing PDH "[b]ecause kids usually make that joke all the time" and she "wasn't really worried about [PDH] or how he would act because [she] didn't think he would actually do anything." RP at 70.

SJ testified that on February 23, she had also "heard [PDH] make a statement that said: Why don't we just go shoot up the school." RP at 71. She thought that after PDH made the statement, ES looked "a little uncomfortable." RP at 72. It also made SJ "a little uncomfortable." RP at 72. She testified that she "thought it was a little weird that he would say that" and that "he shouldn't be talking about like shooting up any school in the first place." RP at 72. Although she was concerned, SJ testified that she did not think PDH would actually shoot up the school.

AF, the student who had reported PDH's statements, testified that on February 26, she had passed by PDH in the school hallway and had overheard him say to another student that he (PDH) "[w]anted to" "shoot up the school." RP at 52. Based on the tone of PDH's voice, she believed that he was serious when he made the statement, so she called "the authorities" after she went home. RP at 54. PDH's statement scared her, and AF was concerned enough she stayed home from school for a "couple" of days. RP at 56. AF reported the statement because she did not want to see a school shooting at her school like the one that had recently occurred in Parkland, Florida.

Another student, KD, testified that while walking the track during gym class with PDH and other students on February 26, she overheard a PDH say to one of the other students, ES, "that not only mentally unstable people would shoot up a school but people that play video games would, referring to the Florida shooting." RP at 60. KD had also previously overheard PDH talking "about going to places such as like a hospital, daycare, just to shoot up for fun." RP at 60. Although KD had only known PDH for a couple of weeks because PDH had just started attending

the school and "had no idea if he would follow through or not," she took the threats as a serious matter, not as a joke. RP at 63.

ES testified for PDH. ES characterized PDH as an acquaintance and testified that they only talked during school hours. During these conversations, PDH twice mentioned shooting up a school. When PDH made the statements, ES "took it as a joke because [PDH] didn't really--he didn't really forward it to a certain school, it was just more of a sarcastic joke." RP at 94. ES testified that PDH had once asked him (ES) if he wanted to participate in a shooting; again ES thought this was a joke and he laughed. ES stated that he was not concerned about being in school with PDH and was not worried that PDH would carry out his statements.

On cross examination, ES explained that he had laughed because they had been "joking around," but ES further stated that he did not find the statements funny. He said that he laughed only "[b]ecause it would have ended up in awkward silence and [he did not] really like to lean towards those social positions." RP at 95.

After hearing this testimony, the trial court adjudicated PDH guilty as charged. PDH appeals.

ANALYSIS

PDH argues that the trial court's guilty finding violated his First Amendment right to free speech because there was insufficient evidence of a "true threat." We disagree.

I. LEGAL PRINCIPLES

PDH was adjudicated guilty of violating RCW 9.61.160(1), which provides, in part, "It shall be unlawful for any person to *threaten* to bomb or otherwise injure any public or private school building." (Emphasis added). To avoid violating the First Amendment, a statute

criminalizing threatening language, such as RCW 9.61.160, must also be construed as proscribing only unprotected true threats. *State v. Johnston*, 156 Wn.2d 355, 359-60, 127 P.3d 707 (2006). Thus, the crime of threat to bomb or otherwise injure property requires proof of a "true threat." *Johnston*, 156 Wn.2d at 359-60.

When examining the sufficiency of the evidence of a true threat, the First Amendment demands more than "the usual process of assessing whether there is sufficient evidence in the record to support the trial court's findings." *State v. Kilburn*, 151 Wn.2d 36, 49, 84 P.3d 1215 (2004). "We must independently review the crucial facts in the record, i.e., those which bear on the constitutional question." *Kilburn*, 151 Wn.2d at 52.

In true threat cases,

> [I]t is not just the words and phrasing of the alleged threat that matter, but also the larger context in which the words were uttered, including the identity of the speaker, the composition of the audience, the medium used to communicate the alleged threat, and the greater environment in which the alleged threat was made.

State v. Kohonen, 192 Wn. App. 567, 580, 370 P.3d 16 (2016).

II. TRUE THREAT

A "true threat" is a statement made in a context or under such circumstances where a reasonable person in the position of the speaker would foresee the listener would interpret the statement as a serious expression of intention to carry out the threatened harm rather than something said in jest, idle talk, or political argument.[2] *State v. Williams*, 144 Wn.2d 197, 208-

[2] PDH argues that his statements cannot qualify as true threats because they concerned only property damage, not bodily harm or the death of another person as required in *State v. Williams*, 144 Wn.2d 197, 26 P.3d 890 (2001). *Williams* addressed the evidence of a true threat in the context of a criminal harassment charge, in which the threat was to cause bodily harm. 144 Wn.2d at 208,

09, 26 P.3d 890 (2001); *see also Kilburn*, 151 Wn.2d at 43; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: Criminal 2.24, at 80 (4th ed. 2016). "[T]he First Amendment does not require that the speaker actually intend to carry out the threat in order for a communication to constitute a true threat." *Kilburn*, 151 Wn.2d at 48.

Under the circumstances in which PDH made his statements, a reasonable speaker would foresee that the threat would be considered serious. First, PDH was new to the school and not well known by his fellow students. Second, during his short time at the school, PDH made repeated statements about shooting up or otherwise damaging a school while at school, not just a single casual reference to damaging the school. Third, the students were clearly aware of the school shooting that had occurred in Parkland, Florida and that threats of violence in school were inappropriate. And fourth, PDH himself admitted to Deputy Johnson that he (PDH) could understand "how [his statements] could be taken seriously." RP at 444. These facts lead us to conclude that there was sufficient evidence to establish that PDH made a true threat given the repeated nature of the statements, the sensitive context in which they were made, PDH's lack of a prior relationship with his fellow students that would allow them to understand that his statements were not to be taken seriously, and PDH's own awareness that his statements could be taken seriously.

212. Thus, the test in *Williams* included that the threat relate to bodily harm of another person. Here, however, PDH was charged with threatening to bomb or otherwise injure property, in which the threat was to cause property damage, not bodily harm or death, so there is no requirement that the threat concern bodily harm or the death of another person.

PDH's reliance on *Kilburn* does not persuade us otherwise. In *Kilburn*, our Supreme Court reversed a harassment conviction that was based on a threat made by the defendant to a classmate after the court determined that a reasonable person in the defendant's position would not foresee that the listener would take the defendant's threating statements seriously. 151 Wn.2d at 53. In coming to this conclusion, the court focused on the defendant's past relationship with the listener, his history of joking with the listener and others, his lack of reputation for being "mean or scary," the fact his statements had some relationship to the conversation he was having with the listener before making the statements at issue, and the fact the defendant was laughing or giggling and appeared to be joking when he made the statements. *Kilburn*, 151 Wn.2d at 39, 53.

Kilburn is distinguishable on the facts. Unlike the speaker in *Kilburn*, even though PDH laughed after making one of his statements to ES and BR testified that students were known to make such statements in jest, there was no evidence that PDH made his statements during conversations that could have prompted these statements. PDH new to the school, did not have a history of joking with the other students. PDH also made these statements at a time when the other students were aware of a recent school shooting. And even PDH recognized that his statements could have been considered threatening.

Because we hold that a reasonable person in PDH's position would foresee that a listener would interpret his statements as a serious expressions of intention to carry out the threaten harm, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

SUTTON, J.

We concur:

Maxa, C.J.

MAXA, C.J.

Melnick, J.

MELNICK, J.