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NO. 62579-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO JAKO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

"True threat" is a term of art used to delineate the permissible scope of threat statutes for First Amendment purposes. Should this Court reject the defendant's claim that State v. Tellez¹ was wrongly decided, and that the language defining a true threat is actually an element of every statute wherein an element of the crime involves a threat?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged in Count I with Residential Burglary, and in Count II with Felony Harassment. CP 8-9. He was tried by jury, the Honorable Judge Catherine Shaffer presiding.² The jury found the defendant guilty as charged. CP 33. With six prior felony convictions, the defendant received a standard range sentence of 57 months on count I, concurrent with a standard range sentence of 43 months on count II. CP 75-83.

¹ 141 Wn. App. 479, 170 P.3d 75 (2007).

² The verbatim report of proceedings is cited as follows: 1RP--8/6/08; 2RP--8/7/08; 3RP--8/11/08; 4RP--8/12/08; 5RP--8/13/08; 6RP--9/26/08; 7RP--10/31/08.

2. SUBSTANTIVE FACTS

The defendant has raised challenges to the jury instructions and charging document. Due to the nature of the issues raised, the substantive facts supporting the convictions are not relevant.

C. ARGUMENT

1. THE TERM "TRUE THREAT" IS A TERM OF ART USED TO DELINEATE THE PERMISSIBLE SCOPE OF THREAT STATUTES FOR FIRST AMENDMENT PURPOSES; IT IS NOT AN ELEMENT OF ANY CRIME.

The defendant contends that the trial court erred in failing to include a "true threat" "element" in the "to convict" instruction. He also contends that the charging document was deficient because it did not include this "true threat" element. Both these arguments depend upon the incorrect premise that a "true threat" is an element of the crime of harassment. As this court found in Tellez, it is not.

The term "true threat" is a term of art. The term refers to the definition that is used to delineate the permissible scope of threat statutes for First Amendment purposes. Specifically, the language courts have used to delineate what is unprotected speech--a "true threat"--defines the "threat" element itself, but the language is not

itself an element, and thus, the language does not need to be included in the "to convict" instruction or the charging document.

a. The Charging Document And Jury Instructions.

By amended information the defendant was charged as follows:

That the defendant ANTONIO J. JAKO in King County, Washington, on or about March 25, 2008, having been previously convicted on February 6, 2008, of the crime of Harassment against Shontrell Lynette Franks, the same victim of this offense, without lawful authority, knowingly did threaten to cause bodily injury immediately or in the future to Shontrell Lynette Franks, with respect to her physical health or safety; and the words or conduct did place Shontrell Lynette Franks in reasonable fear that the threat would be carried out.

CP 8-9.³

The court gave a "to convict" instruction that read as follows:

To convict the defendant of the crime of felony harassment. . .each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about March 25, 2008, the defendant knowingly threatened to cause bodily injury to Shontrell Franks; and

³ A threat to cause bodily harm, other than a threat to kill, is generally a misdemeanor. The crime is elevated to a felony if the person has a prior conviction for harassment against the same victim or member of the victim's family. RCW 9A.46.010(2)(a). Here, the defendant stipulated that he had a prior qualifying conviction. 5RP 52-53.

2. That the words or conduct of the defendant placed Shontrell Franks in reasonable fear that the threat would be carried out; and
3. That the defendant acted without lawful authority; and
4. That the defendant was previously convicted of committing a qualifying statutorily defined crime against Shontrell Franks; and
5. That the acts occurred in the State of Washington.

CP 49; see also WPIC 36.07.03.⁴

The court gave the following definitional instruction:

Threat means to communicate directly or indirectly the intent to cause bodily injury in the future to the person threatened. To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intent to carry out the threat.

CP 50; see also WPIC 2.24.⁵

b. The Elements Of The Crime.

As charged and convicted here, a person commits the crime of felony harassment if he or she, with a prior qualifying conviction

⁴ Besides objecting to calling the crime "felony harassment," instead of just "harassment," the defendant agreed to the giving of this instruction. 5RP 45-48.

⁵ The defendant agreed to the giving of this instruction. 5RP 46.

of harassment, knowingly threatens to cause bodily injury immediately or in the future to the person threatened, and the words or conduct place the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a). The statute sets out all the elements of the crime.

In defining the constitutional limits of the harassment statute, the Washington Supreme Court has stated that to avoid unconstitutional infringement on protected speech, the harassment statute must be read as prohibiting only what it termed "true threats." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004); State v. J.M., 144 Wn.2d 472, 28 P.3d 720 (2001); State v. Williams, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001). A "true threat," the Court said, is "a statement 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." Kilburn, 151 Wn.2d at 43.

Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Kilburn, at 44. The relevant question is whether a reasonable person in the defendant's place would foresee that in context, the listener would

interpret the statement as a serious threat. Kilburn, at 46. Here, the court gave an instruction properly incorporating the definition of what constitutes a "true threat." Because the court provided proper instructions that included all the elements in the "to convict" instruction, and proper definitional instructions encompassing the First Amendment concerns expressed in Kilburn, J.M., and Williams, the defendant's argument fails. State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988) (due process is satisfied if the jury was "informed of all the elements of the offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted").

Still, the defendant cites to State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006), and contends that the Supreme Court has held that a "true threat" is an element. To the contrary, the Court in Johnston discussed the fact that a "true threat" is a definition and that the jury "must be instructed on the meaning of a true threat." Johnston, 156 Wn.2d at 366. Neither the Johnston Court, nor any other court, has ever held that a "true threat" is an actual separate element that must be included in the "to convict" instruction for felony harassment or any other statute that contains a threat element. This very same argument was rejected in Tellez,

supra; see also State v. Sloan, 149 Wn. App. 736, 205 P.3d 172 (2009); State v. Schaler, 145 Wn. App. 628, 186 P.3d 1170 (2008).

Johnston was charged with threats to bomb under RCW 9.61.160(1). In pertinent part, the statute provides that:

It shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy.

RCW 9.61.160.

At trial, Johnston proposed a definition of threat that included "true threat" language. The trial court refused to give the instruction. On appeal, Johnston claimed it was error not to have provided the jury with a definition of "true threat." Johnston, at 358, 364.

Johnston and the State were in agreement that for First Amendment purposes, the threats to bomb statute must be construed to limit its application to "true threats." Johnston, 156 Wn.2d at 359, 363. The parties were in further agreement, and the Supreme Court concurred, that the jury instructions "were erroneous because they did not *define* 'true threat.'" Johnston, 156 Wn.2d at 364, 366 (emphasis added). Because the trial court

had not provided the jury with a definition of "true threat," the Supreme Court remanded the case, requiring that the jury be "instructed on the meaning of a true threat." Id.

Johnston did not argue, nor did the Supreme Court hold, that "true threat" was an actual element of the crime. That issue, contrary to the defendant's claim here, was not even before the Court. Rather, consistent with Kilburn, J.M., and Williams, the Court iterated that threat statutes must be limited to proscribing "true threats" and that in defining the word threat to the jury, the court must use language that will limit the scope of the conduct prohibited under the statute to "true threats."

The defendant's argument that a "true threat" has now become an element of the crime is simply without merit. These same arguments were made and rejected in Tellez, and the defendant provides no new argument to the contrary.

Further, in July of 2008, the Washington Supreme Court Committee on Jury Instructions issued the newest criminal pattern jury instructions. The harassments instructions are consistent with the above arguments, Tellez and Johnston. See 11 Wash. Pattern Jury Instructions: Criminal 36.06--09 (2008). Had the Court in Johnston held, as the defendant claims the Court did, that the "true

threat" language is actually an element of the crime of harassment, then the pattern instructions approved by the Court two years after Johnston are incorrect. It is unlikely the Court would approve instructions that conflict with their own decision.

c. The Information Included All The Necessary Elements.

In conjunction with his argument that a "true threat" is now an element of the crime of harassment, the defendant contends that the charging document was defective because it did not contain the essential element that the threat was a true threat. This claim has no merit because, as discussed above, a "true threat" is not an element, it is a definition.

When the sufficiency of an Information is first challenged on appeal, the court applies the two-prong test adopted by the Supreme Court in Kjorsvik: (1) do the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so (2) can the defendant show he or she was actually prejudiced by the inartful language. State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). As the cases cited in the sections above demonstrate, "true threat" is a term of art used

to indicate the definitional language for First Amendment purposes. The "threat" or "threaten" element was included in the charging document. That is all that is required. This is the element of the crime; the rest is definitional language that is not required to be in the Information.

D. CONCLUSION

For the reasons cited above, this Court should decline the defendant's invitation to find that State v. Tellez was decided incorrectly.

DATED this 27 day of October, 2009.

Respectfully submitted,

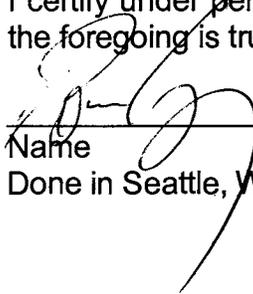
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JAKO, Cause No. 62579-9-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name

Done in Seattle, Washington

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