

65064-5

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NO. 65064-5-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHARLES READ,

Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant assigns error to the last sentence of Finding of Fact No. 10, which is mislabeled and which is a Conclusion of Law. That sentence provides: “The totality of Mr. Read’s words and conduct clearly amounted to a threat.”

2. Appellant assigns error to that part of Finding of Fact No. 12 which states, “The motivation for him getting out of the truck and starting a confrontation was based on his perception of Ms. Zwedu’s race and national origin.”

3. Appellant also assigns error to that part of Finding of Fact No. 12 which states that Mr. Read “eventually threatened her by the totality of his words and conduct of future harm.”

4. Appellant assigns error to Finding of Fact No. 13.

5. Appellant assigns error to Conclusion of Law No. II(1).

6. Appellant assigns error to Conclusion of Law No. II(3).

7. Appellant assigns error to Conclusion of Law No. III.

8. Appellant assigns error to Conclusion of Law No. IV.

9. Appellant assigns error to the trial court’s entry of a judgment of conviction in this case.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In the absence of proof that the defendant selected his victim as the target for criminal conduct “because of” her race, does the infliction of criminal punishment for having expressed racial bias during commission of the offense violate the First Amendment?

2. Does the First Amendment rule requiring independent *de novo* appellate review of the facts bearing upon criminal liability for speech apply to the determination that the defendant selected the victim as a person to make threats against “because of” her race?

3. Assuming *arguendo*, that the *de novo* appellate review standard applies, are the judges of this appellate court convinced beyond a reasonable doubt that the defendant selected the victim as a person to threaten “because of” his perception of her race?

4. Does the First Amendment require findings that a defendant’s racial bias was the “but for” cause and the “proximate cause” of his threatening criminal conduct before a defendant can be punished under the malicious harassment statute?

- Where there is more than one motive for engaging in criminal conduct, and one of them is a race-based motive and the other is not, does the First Amendment require the State to prove that the race-based motive was the primary motivating factor?
- Where the trial judge found only that the defendant’s motive for threatening his victim was “at least in part” because of his

perception of the victim's race, must the defendant's conviction be set aside because it permits criminal punishment simply for voicing unpopular racist views in violation of the First Amendment prohibition against laws that discriminate against speech on the basis of its content?

- Does the First Amendment permit conviction of a defendant for malicious harassment based on the fact that while the defendant engaged in threatening criminal conduct he also repeatedly used the word "nigger" when speaking to the alleged victim, even if it was just a temporal coincidence that the words said and the conduct engaged in occurred simultaneously, and the sentiments expressed did not motivate the criminal conduct?

5. Must the defendant's conviction be reversed because the trial judge made no finding that he *intended* to frighten the victim, a necessary component of a true threat under the rule of *Virginia v. Black*, 538 U.S. 343 (2003)?

- Does the record contain sufficient evidence such that the judges of this court are convinced beyond a reasonable doubt that the defendant's conduct constituted a true threat?

C. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY OF THE CASE

Charles Read was charged by information with one count of malicious harassment for threatening Saba Zwedu because of her race. CP 1-3. Read waived a jury trial and on January 27 and February 1, 2010, the case was tried to the Honorable Michael Heavey. CP 104. Judge Heavey

found Read guilty as charged. RP III,250.¹ On February 26, 2010, Judge Heavey sentenced Read under the First Offender Waiver provisions of RCW 9.94A.650 to 720 hours of community service, a \$2,000 fine, and 12 months of community custody. CP 170-176. Findings of Fact and Conclusions of Law were entered on March 10, 2010. CP 186-189. On March 10, 2010, Read filed timely notice of appeal. CP 177-185.

2. SUBSTANTIVE FACTS

On May 7, 2009, Charles Read, age 63, and his wife Arlene, went to dinner at a restaurant called Maggie's Bluff. RP III, 145, 174. Read was in poor health, having recently had heart surgery. RP III, 143-144. He has artery disease, an enlarged heart, and in October of 2008, he had stints put in. RP III, 175.

The Reads drove to the restaurant in their truck; Mr. Read was driving and he parked in a Diamond parking lot near the restaurant. RP III, 146. There were very few cars in the lot. RP III, 146, 181. They walked to the restaurant and arrived there between 4:45 and 5:00 p.m. RP III, 147, 181.

Their waiter informed them that the Diamond parking lot people had been "giving tickets like mad" and that the restaurant had been hearing

¹ The four volumes of the verbatim report of proceedings are referred to as follows: RP I – pretrial hearing of January 26, 2010; RP II – trial proceedings of January 27, 2010; RP III – trial proceedings of February 1, 2010; RP IV – sentencing hearing of February 26, 2010 and post-judgment hearing of March 1, 2010 on entry of findings of fact and conclusions of law.

complaints about this from its customers; but Read was confident that he had parked properly and he did not go back to the lot to move his truck. RP III, 148, 182. The Reads took about 45 minutes to have dinner and then paid their bill and left the restaurant at 5:46 p.m. RP III, 148,181. When they got to their truck they discovered that they had received a parking ticket. RP III, 183. The ticket said simply that the truck was “improperly parked,” but the Reads did not think there was anything improper about the way it was parked. RP III, 149,

Both of the Reads were upset by the ticket. RP III, 151, 153. Mr. Read wanted to talk to the person who wrote the ticket. RP III, 149. He drove over to where Brian Smith, a parking valet for another restaurant (Palisades), was standing. Smith is a white male. FF No. 7; CP 187. Read asked Smith in “a bit of a hostile tone: ‘What is this? Who wrote this? I am not going to pay it. This is bullshit.’” RP III, 121. Read did not get out of his truck when he spoke to Smith. RP III, 122. Smith testified that Read’s tone of voice was threatening, but that no specific threats were made by Read towards him. RP III, 127. In a pretrial interview, Smith described Read as “quote/unquote, extremely angry, very, very, very angry.” RP III, 127. At trial Smith described Read as “fairly angry.” RP III, 121. Mrs. Read said her husband swore at Smith and spoke to him “very aggressively wanting to find out why we were

given the ticket.” RP III,151. The trial court found that Read “yelled at Brian Smith: “Did you give me this fucking ticket?” FF 6, CP 187.

Smith said he was not intimidated by Read, and that in his experience working there as a valet, he had encountered a lot of people who were made about having received a parking ticket. RP III, 122. “They think I wrote them, so they are mad at me.” RP III, 122. According to Smith, he saw that Read had parked in a place that was legal for people patronizing the restaurant to park in without paying anything. RP III, 126. Smith advised Read to call the phone number of the parking ticket and explained that it “won’t do any good to talk to” the parking lot attendant who wrote the ticket. RP III, 128.

A. He wanted to talk to somebody, specifically the person that wrote the ticket. I told him it was not me, and the only way to solve the problem was to call the parking company, because they were the one that wrote the ticket; it had nothing to do with our restaurant or the marina. And that there was a number on the back of the ticket that he could call, that that was the only real solution to the ticket.

Q. At that point did you know who wrote the ticket?

A. Yes.

Q. Who was that?

A. It was the young lady.

Q. Did you know what ethnicity she was?

A. She was African-American, possibly Ethiopian.

Q. Did you point out where she could be found to the defendant?

A. I pointed out the general direction that I believed her to be at.

Q. What did you see the vehicle he was in do after that?

A. It drove to the other side of the parking lot at the location to where I pointed and slowly – all I witnessed was it slowly drive and then kind of stop a little bit and then drive a little bit farther on the other side of the lot.

RP III, 123. Smith did not witness the confrontation between Read and Zwedu. RP III, 124.

When Read got to where Zwedu was, he asked her the same thing he had asked Smith: “Did you fucking give me this ticket?” RP II, 67; RP III, 154, 187; FF No. 7. Zwedu told him to call the phone number listed on the back of the ticket. RP II, 87; RP III, 189.

Read then got out of his truck and walked towards her, carrying his cell phone in one hand and the parking ticket in his other hand. RP II, 87; RP III, 187. Read called her a nigger several times. RP II, 67. When she said she was not a nigger but an Ethiopian he called her a fucking Ethiopian. RP II, 68-69; FF No. 8, CP 187.

Read’s face was very red and his hands were clenched. RP II, 68. However, Zwedu agreed that Read’s face normally looked that way and his face was “pretty red” when he appeared in court on the day of trial. RP

II, 90. The investigating detective agreed that Read looked red on the day when the detective contacted him at his office, and that he looked similarly red in court. RP II, 111. Zwedu is five feet two inches tall and about 120 pounds. RP II, 80. The detective listed Read as six feet tall and 240 pounds. RP II, 113. The way Read looked and as big as he was, Zwedu did not know what he was capable of doing. RP II, 73.

Zwedu said she was going to call the police. RP II, 70. Read said he didn't give a fuck and that he knew where she worked. RP II, 70, 74. This scared her because it meant he could come back at any time and do something to her. RP II, 74. Zwedu had her phone out and she turned her back on Read. RP II, 90. When she turned back around to face Read he was getting back into his truck. RP II, 90. Zwedu then left the lot and as she was leaving Read drove past her. RP II, 91. Zwedu ran to the harbor master's office. RP II, 93. She waited there until responding police officer Robertson arrived and spoke to her. RP II, 55.

Zwedu admitted that she told Officer Robertson that she thought that Read threatened her because she gave him a ticket, *not* because she was Ethiopian:

Q. Do you remember speaking to Sergeant Robertson, the officer that came to the marina?

A. Yes.

Q. You told him that this whole altercation started because of the parking ticket.

A. Yes.

Q. And you believed that Mr. Read wanted to kill you?

A. After he got the ticket, he came at me angry.

Q. And you thought because he was angry about the ticket that he wanted to kill you?

A. I didn't know what he was capable of doing.

Q. But he didn't tell you that he was going to kill you, right?

A. No.

Q. Okay. But you thought he wanted to kill you, but *you thought he wanted to kill you because you had given him a parking ticket?*

A. *Yes.*

Q. *Not because you were Ethiopian?*

A. *No.*

RP II, 94-95 (bold italics added). Officer Robertson confirmed that this is what Zwedu told him on the day of the incident. RP II, 59.² Read denied

² "Q. At the very end of your report, you attribute to the alleged victim that she told you she didn't believe the suspect wanted to kill her because of her race. Do you remember putting that in your report?

A. Yes.

Q. But because of the ticket?

A. Yes, that is what she told me."

that he “selected [Zwedu] based on her race for any reason whatsoever,” and said that when he approached her he had no intention of threatening her. RP III, 209.

D. DE NOVO STANDARD OF APPELLATE REVIEW

As set forth below in section E(2) of this brief, appellant submits that this Court is constitutionally required to conduct an independent review of the facts and to apply a *de novo* standard of review to all factual determinations which bear upon the ultimate question of whether the appellant can be found guilty of the felony offense of malicious harassment for having allegedly committed his offense “because of” his perception of the victim’s race.

E. ARGUMENT

- 1. THE PROSECUTION MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT SELECTED HIS VICTIM “BECAUSE OF” HIS PERCEPTION OF HER RACE. WITHOUT SUCH PROOF, ENHANCED PUNISHMENT OF THE DEFENDANT FOR HAVING MADE A RACIALLY DEROGATORY REMARK PUNISHES BIGOTRY IN VIOLATION OF THE FIRST AMENDMENT.**

It is now well settled that a defendant’s beliefs about racial inferiority or superiority, “however obnoxious to most people, may not be taken into consideration by a sentencing judge.” *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993). The State cannot punish bigotry “without

offending the First Amendment.” *State v. Talley*, 122 Wn.2d 192, 205, 858 P.2d 217 (1993). But the State can punish a defendant more harshly “where the crime is made more harmful because the actor selected the victim based on the victim’s association in a protected class.” *Id.* at 218.

Former RCW 9A.36.080(1)(c), under which Read was charged and convicted, provided in relevant part:

A person is guilty of malicious harassment if he or she maliciously and intentionally commits one of the following acts ***because of*** his or perception of the victim’s race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical or sensory handicap: . . . Threatens a specific person . . . and places that person . . . in reasonable fear of harm to person or property . . . Words alone do not constitute malicious harassment unless the context or circumstances surrounding the words indicate the words are a threat. Threatening words do not constitute malicious harassment if it is apparent to the victim that the person does not have the ability to carry out the threat.

(Bold italics added).

As the *Talley* Court noted:

The statute is aimed at criminal conduct and enhances punishment for that conduct where the defendant chooses his or her victim because of their perceived membership in a protected category. ***The statute punishes the selection of the victim***, not the reason for the selection. It increases punishment where the perpetrator acts on particularly offensive beliefs, not the beliefs themselves. . .

Talley, 122 Wn.2d at 201 (bold italics added).

If the reason for victim selection is *not* one of the enumerated reasons,

then the conduct may be punished as a misdemeanor under a different criminal statute:

Absent prohibited victim selection, the conduct described in [the statute] is punishable elsewhere in state law and in some municipal criminal codes as misdemeanor violations. However, when the victim is targeted because of perceived membership in one of the enumerated categories, then the criminal conduct is punishable as a felony. RCW 9A.36.080(3). . . .

Talley, 122 Wn.2d at 201.

Consistent with *Mitchell*, Washington appellate courts have held that the phrase “because of” requires proof of a nexus between the victim’s race (or gender) and the defendant’s motive for selecting the victim as a person to offend against. “A person may not be convicted of uttering biased remarks during the commission of another crime without proof that the victim was *selected* on an impermissible basis, here gender.” *State v. Johnson*, 115 Wn. App. 890, 896, 64 P.3d 88 (2003), citing *State v. Pollard*, 80 Wn. App. 60, 65, 906 P.2d 976 (1995). “Proof that the accused committed a prohibited act ‘because of’ the victim’s membership in a prohibited category is characterized as the element of ‘victim selection.’” *Johnson*, at 896.

2. APPELLATE COURTS ARE CONSTITUTIONALLY OBLIGATED TO ENGAGE IN *DE NOVO* REVIEW OF THE FACTS IN CASES WHERE FREE SPEECH RIGHTS ARE ISSUE.

In an ordinary bench trial case, appellate courts review findings of fact

under the substantial evidence standard, a standard which is met when there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.. *State v. Halstein*, 122 Wn.2d 109, 128-129, 857 P.2d 270 (1993). But in cases involving the right of freedom of speech, appellate courts are obligated to engage in an independent *de novo* review of the factual findings. In *State v. Kilburn*, 151 Wn.2d 36, 48-49, 84 P.3d 1215 (2004), a case involving the same crime for which Read has been convicted, the Court explained how important it was to “carefully determine and apply the correct standard of review”:

As we have explained, RCW 9A.46.020’s criminalization of threats is a proscription of pure speech. An appellate court must be exceedingly cautious when assessing whether a statement falls within the ambit of a true threat in order to avoid infringement on the precious right to free speech. ***It is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court’s findings. The First Amendment demands more.***

Kilburn, 151 Wn.2d at 49 (bold italics added).

The rule of independent appellate fact finding was first adopted in defamation cases. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 285 (1964) (“the rule is that we ‘examine for ourselves the statements in issue and the circumstances under which they were made . . . to see whether they are of a character which the principles of the First

Amendment . . . protect”); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989) (“[J]udges in such cases have a constitutional duty to ‘exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.’”); *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 499 (1984) (this Court has “repeatedly held that an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’”).³ But the rule is not confined to defamation cases. It applies in any case where there is the possibility of imposing either civil or criminal liability for speech. The Supreme Court has applied independent *de novo* review in cases where the issue is whether the speech was unprotected because it constituted obscenity,⁴ child pornography,⁵ fighting words, or incitement to riot⁶:

³ Washington appellate courts have followed and applied the rule of independent *de novo* review in defamation cases for decades. See, e.g., *Richmond v. Thompson*, 130 Wn.2d 368, 388, 922 P.2d 1343 (1996); *Margoles v. Hubbart*, 111 Wn.2d 195, 199 n. 6, 760 P.2d 324 (1998); *Tilton v. Cowles Publishing Co.*, 76 Wn.2d 707, 720, 459 P.2d 8 (1969); *Mellor v. Scott Publishing Co.*, 10 Wn. App. 645, 657, 519 P.2d 1010 (1974) (“we are obliged to review the record *de novo*”).

⁴ “[A]lthough under *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), the questions of what appeals to “prurient interest” and what is “patently offensive” under the community standard obscenity test are “essentially questions of fact,” *id.* at 30, 93 S.Ct. at 2618, we expressly recognized the “ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary,” *id.* at 25, 93 S.Ct., at 2615.” *Bose*, 466 U.S. at 506 (footnote omitted).

⁵ See *New York v. Ferber*, 458 U.S. 747, 774, n.28 (1982).

⁶ “We have exercised independent judgment on the question whether particular remarks “were so inherently inflammatory as to come within that small class of ‘fighting words’

In each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance. In such cases, ***the Court has regularly conducted an independent review of the record*** both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.

Bose, 466 U.S. at 504 (bold italics added).

The *de novo* review standard applies regardless of whether the facts on the trial court were found by a judge or by a jury:

The rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether that factfinding function be performed in the particular case by a jury or by a trial judge.

Bose, at 500. “The simple fact is that First Amendment questions of ‘constitutional fact’ compel this Court’s *de novo* review.” *Id.* at 508, n.27.

The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. . . . It reflects a deeply held conviction

which are ‘likely to provoke the average person to retaliation, and thereby cause a breach of the peace,’” *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 1365, 22 L.Ed.2d 572 (1969), and on the analogous question whether advocacy is directed to inciting or producing imminent lawless action, *Hess v. Indiana*, 414 U.S. 105, 108-09, 94 S.Ct. 326, 328-329, 38 L.Ed.2d 303 (1973) (per curiam); compare *id.* at 111, 94 S.Ct. at 330 (REHNQUIST, J., dissenting) (“The simple explanation for the result in this case is that the majority has interpreted the evidence differently from the courts below”); *Edwards v. South Carolina*, 372 U.S. 331, 335, 66 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963) (recognizing duty “to make an independent examination of the whole record”); *Pennekamp v. Florida*, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed.2d 1295 (1946) (“[W]e are compelled to examine for ourselves the statements in issue ... to see whether or not they do carry a threat of clear and present danger ... or whether they are of a character which the principles of the First Amendment ... protect”).” *Bose*, 466 U.S. at 505-506.

that judges – and particularly Members of this Court – must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.

Bose Corp., 466 U.S. at 510-511.

In *Kilburn* the Washington Supreme Court engaged in de novo review and reversed the defendant’s malicious harassment conviction because a majority of the justices were not convinced that the words spoken by the defendant constituted a true threat.

De novo review is required, and is particularly appropriate, in cases such as the present case, where the views expressed are highly unpopular:

The principle of viewpoint neutrality that underlies the First Amendment itself also imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected.

Bose, 466 U.S. at 505 (footnote omitted). Courts “must ‘make an independent examination of the whole record,’ ‘so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.’ ” *Bose*, 466 U.S. at 508, quoting *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964), and quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

Understandably, in the present case, the trial judge expressed his extreme distaste for the defendant’s use of the word “nigger,” stating “I cannot think of a more offensive word.” RP III, 246. There is no doubt

that this word is highly offensive. But that is precisely why careful independent, *de novo* review is required in this case.⁷ The members of this Court must decide this case for themselves, in order to be sure that the defendant is not found guilty of malicious harassment merely because the views he expressed were extremely offensive.

3. THE EVIDENCE IS NOT SUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THAT THE DEFENDANT SELECTED ZWEDU AS A PERSON TO THREATEN “BECAUSE OF” HER RACE.

In this case, the prosecution has relied upon two facts to support its argument that Read selected Zwedu as a person he wished to threaten “because of” her race. First, the prosecution notes that Read did not get out of his truck when he spoke to Brian Smith, and did not make any threats of personal violence against Brian Smith. Yet Read *did* get out of his truck when he spoke to Saba Zwedu, and (allegedly) made threats against her.

⁷ Appellant notes that in *State v. Pollard*, 80 Wn. App. 60, 906 P.2d 976 (1995), this Court did not apply *de novo* review when deciding whether Pollard selected his victim “because of” his perception of the victim’s race. Instead, this Court used the usual standard of whether any rational trier of fact could have found this element of the crime of malicious harassment. *Id.* at 67. Similarly, in *State v. Lynch*, 93 Wn. App. 716, 970 P.2d 769 (1999), this Court used the Green standard for sufficiency of the evidence instead of engaging in *de novo* review of whether the defendant selected his victim “because of” his sexual orientation. Appellant respectfully submits that this Court erred in both *Pollard* and *Lynch*, and that the subsequent Supreme Court decision in *Kilburn* has overruled both cases in this respect. Accordingly, neither *Pollard* nor *Lynch* is still good law on this point.

In *State v. Johnson*, 115 Wn. App. 890, 64 P.3d 88 (2003), Division III also failed to use *de novo* review and instead employed the substantial evidence test in reviewing a trial judge’s finding that the defendant selected his victim because of her gender. *Johnson* was also decided before *Kilburn* and appellant Read submits that it too was incorrectly decided and is no longer good law.

Smith is a white person and Zwedu is a black person. Therefore, the State argues, the difference in Read's behavior towards the two people is explained by the fact that they are of different races. Thus, the State makes the logically fallacious argument that correlation is cause, an argument that has long been rejected:

“Correlation does not imply causation” is a phrase used in science and statistics to emphasize that correlation between two variables does not automatically imply that one causes the other (though it does not remove the fact that correlation can still be a hint, whether powerful or otherwise).

The opposite belief, *correlation proves causation*, is a logical fallacy by which two events that occur together are claimed to have a cause-and-effect relationship. The fallacy is also known as *cum hoc ergo propter hoc* (Latin for “with this, therefore because of this”) and *false cause*. By contrast, the fallacy *post hoc ergo propter hoc* requires that one event occur before the other and so may be considered a type of *cum hoc*.

http://en.wikipedia.org/wiki/Correlation_does_not_imply_causation

(footnotes omitted).

The State simply ignores the obvious third variable and that is the identity of the person who issued the parking ticket. Brian Smith did not issue the parking ticket, and he told Read that. Saba Zwedu did issue the parking ticket, and Read knew that before he began speaking to her because Brian Smith had pointed him in her direction, (and because Zwedu was wearing a Diamond Parking uniform and a badge). Thus, the cause of Read's behavior

towards Zwedu was the fact that she issued his parking ticket, *not* the fact that she was African-American.

The critical question is, would Read have engaged in the same behavior if Zwedu had been white. In answer to this question, it is significant that *Zwedu herself thought that Read threatened her because she issued the ticket and not because she was Ethiopian*, and she so testified in court:

Q. [B]ut you thought he wanted to kill you ***because you had given him a parking ticket?***

A. ***Yes.***

Q. Not because you were Ethiopian?

A. No.

RP II, 95 (bold italics added).

Similarly, in *Kilburn* the one fact which the Court found most significant was the fact that K.J. herself, the alleged victim, did not think that Kilburn was making a serious threat at the time he made his remarks. She testified

That she did not feel scared when Kilborn spoke, just surprised. . . . She testified that she later wondered whether he was joking or serious. RP at 71, 73 (she testified “he was acting kind of like he was joking, but I didn’t know if he was joking or not”).

Kilburn, 151 Wn.2d at 52-53. The Supreme Court justices ultimately concluded that if K.J. wasn’t sure that Kilburn’s statement was a true threat or just a joke, the justices could not be sure either.

In the present case, the victim, Saba Zwedu, did not express uncertainty like K.J. did. On the contrary, Zwedu testified that she did *not* believe that Read threatened her because she was Ethiopian; she said she believed he threatened her “because [she] had given him a parking ticket.” RP II, 95. It makes little sense for the judges of this Court to conclude that they know better than Zwedu what was going on inside Read’s mind. She was there, she saw and heard him, and she concluded it was the parking ticket that motivated him to threaten her.

Moreover, her conclusion is well supported by the other evidence in the case. Everyone who testified agreed that from the moment Read found the ticket on his truck, he wanted to confront the person who issued him that ticket. His wife testified:

He said, “I want to talk to the person who gave us this ticket,” because they had given us a ticket just a few minutes before we came out, from the time on the ticket. And, “They should be able to tell us why they gave us the ticket,” because we sure didn’t understand it. A pet peeve of ours is companies who try to rip people off or try to scam them. That is what we felt had happened, that they were just hoping we would want it to go away and pay it.

So, he said he wanted to talk to the person and ask them why they gave us this ticket. . . .

RP III, 150.

Brian Smith testified:

He wanted to talk to somebody, specifically the person who

wrote the ticket . . .

RP III, 123.

Zwedu testified that the first thing Read did was ask her if she wrote the ticket, and only after he got an affirmative answer did he get out of his truck:

That day I was doing my route. He came. The only reason how I knew and how he came is because I heard his tires. I looked up and he had his window rolled. And he said, "Did you give me this 'F'ing' ticket?"

* * *

I said, "Yes." If you have any questions, you need to call the number that is on the ticket."

And he said, "You N, you gave me this fucking ticket."

And he came out of the car and that is when I started getting scared . . .

RP II, 67. "He just kept saying, 'You gave me this fucking ticket.'" RP II, 69.

And finally Read himself said that his goal was to confront the person who wrote the ticket and demand an explanation for it:

I wanted to find out what the deal was. I wanted to find out what the interpretation of improper parking was. I wanted somebody to look me in the eye and tell me what the improper parking was . . .

RP III, 184.

In speaking to both individuals, the first words out of Read's mouth were identical: "Did you give me this fucking ticket?" RP II, 67 (to Zwedu); RP

III, 185 (to Smith); FF No. 6 (Smith); FF No. 8 (Zwedu). In sum, the conclusion is nearly inescapable that had Zwedu been a white woman Read would have behaved in exactly the same manner because what was driving him was his anger at having been issued what he felt was a bogus parking ticket.

The prosecutor's only other piece of evidence to support its contention that Read threatened Zwedu "because of" her race is the fact that he called her a nigger. This argument resonated with the trial judge, who seemed to conclude that *whenever* a person calls another person a nigger all of their conduct towards that person is necessarily caused by their perception of that person's race:

A defendant commits the crime of malicious harassment if he or she maliciously and intentionally commits the act because of his or her perception of a victim's race. The threats or threat, if there was one, were made because of Mr. Read's perception of the victim's race. ***The use of the N word is proof of that to me.*** I can't think of a more despicable term.

RP III, 246 (bold italics added).

Once again, the trial judge's comment is simply illogical. Of course, if the trial judge simply meant that "the act" of calling her a nigger was committed "because of" his perception of her race, that makes perfect sense. But if the trial judge meant, as he seemed to, that Read's use of the word "nigger" *necessarily* shows that he committed the act of threatening Zwedu

“because of” his perception of her race, this is clearly an illogical conclusion. It simply ignores the possibility that Read wanted to insult and demean her “because of” her race, but that at the same time he wanted to threaten her “because of” her having issued him the parking ticket.

The fallacy in the trial judge’s reasoning is that it is not enough that Read selected the offensive word he spoke because of the victim’s race. To commit the crime Read must have selected Zwedu as a person to intimidate “because of” her race. Here Zwedu was not selected “because of” her race. There was no “selecting” done by Mr. Read. Zwedu was the person who gave him the parking ticket and Mr. Read played no role in selecting her for the job of giving out parking violation tickets.

Commonwealth v. Ferino, 433 Pa. Super. 306, 640 A.2d 934 (1994), *aff’d by an equally divided court*, 540 Pa. 51, 655 A.2d 506 (1995), clearly illustrates the logical fallacy behind the trial judge’s reasoning. In that case the defendant was convicted of a similar offense which is called “ethnic intimidation” in that State. There the defendant fired a gun in the direction of an African-American man while shouting “I’m going to kill you, you fucking nigger.” Like Washington’s malicious harassment statute which uses the words “because of . . . that person’s race,” the Pennsylvania statute in *Ferino* uses the phrase “motivated by hatred toward the race” of the victim.

The *Ferino* court reversed and dismissed the defendant’s ethnic

intimidation conviction finding that the evidence was insufficient as a matter of law to prove the race hatred element of the crime. Although it was uncontested that the defendant spoke the words “you fucking nigger” and threatened to kill the victim in the same breath, the court held that these words were not sufficient to show that the defendant’s motive for assaulting the victim was the victim’s race:

This was *insufficient to evidence an intention* malicious in nature and *having as its origin racial prejudice which evoked or was the underlying cause for* the prohibited behavior.

Ferino, 640 A.2d at 938 (bold italics added).⁸

Just as the use of the N-word was not sufficient to show that the victim’s race was “the underlying cause” of the defendant’s assaultive behavior in *Ferino*, appellant Read respectfully submits that use of the same word is not sufficient to show that the victim’s race was “the underlying cause for the prohibited behavior” of making a threat of bodily harm.

This case is similar to *Commonwealth v. Sinnott*, 976 A.2d 1184 (Pa. Super. 2009), where again a Pennsylvania appellate court threw out a conviction for ethnic intimidation on the grounds that the evidence was not

⁸ The *Ferino* Court reversed and dismissed the defendant’s conviction even though it was applying the usual highly deferential appellate review standard and asked only whether, drawing all reasonable inferences in favor of the prosecution, a finder of fact could reasonably have determined that all the elements of the crime had been proved. *Id.* at 313. Appellant Read submits that the Pennsylvania appellate court used the wrong standard of appellate review, erred in failing to engage in *de novo* review, and yet nevertheless reached the correct result in that case.

sufficient to prove that the defendant's threats and assaultive conduct were motivated by the victim's race or ethnicity. In *Sinnott* the defendant "insulted the victim Rojas "for her supposed ethnicity saying, 'Fuck you, Mexicans. Go back across the border,' and made repeated references to the Alamo." *Id.* at 1186. Rojas told the defendant she was not Mexican but Puerto Rican, but the defendant "continued to rail against her and her family, asserting that they were Panamanian." *Id.* Sinnott threatened to kill Rojas' father when he returned. *Id.*

Despite his continued use of derogatory ethnic terms, the appellate court reversed the conviction and ordered the charge of ethnic intimidation dismissed because the evidence showed that what motivated Sinnott was not racial hatred but an employment dispute:

In this instance, Evelyn Rojas's testimony recounts Sinnott's repeated assertion at the time of the altercation that he was angry with Benny Rojas over their employment relationship and was first motivated by his anger in that regard to throw the tools Benny had given him back onto the Rojas property. [Citation omitted]. Of course, Sinnott's anger at Benny Rojas in no way justified his repeated use of the ethnically charged derogatory terms that pepper this record; nevertheless, it does suggest that Sinnott's commission of the predicate offense, i.e., Terroristic Threats, upon which his Ethnic Intimidation conviction depends, was driven principally by factors other than the Rojas's ethnicity. Accordingly, ***we cannot conclude that the record establishes the "malicious intention toward the race, color, religion or national origin of another individual or group of individuals" necessary to conviction of Ethnic Intimidation. The evidence, therefore, is legally insufficient to sustain this conviction.***

Sinnott, 976 A.2d at 1190-1191 (bold italics added).⁹

Here, as in *Sinnott*, the record clearly shows that Read's conduct was "driven principally by factors other than [Zwedu's] ethnicity," and therefore his conviction, like *Sinnott's* should be reversed.

4. THE FIRST AMENDMENT REQUIRES A FINDING THAT THE DEFENDANT'S PERCEPTION OF HIS VICTIM'S RACE WAS THE "BUT FOR CAUSE" AND THE "PROXIMATE CAUSE" OF HIS CRIMINAL CONDUCT. SINCE NO SUCH FINDING WAS MADE, READ'S CONVICTION MUST BE REVERSED. THE DICTA IN *STATE v. POLLARD* THAT THE PROSECUTION NEED NOT PROVE THAT THE VICTIM'S RACE WAS A SUBSTANTIAL MOTIVATING FACTOR SHOULD BE DISAVOWED.

a. The Trial Judge Did Not Find That Read's Perception of Zwedu's Race was Either a But for Cause, or a Proximate Cause, of his Criminal Conduct.

In this case the trial court did *not* find that the defendant's perception of Zwedu's race was the "but for" cause of his threatening conduct. Nor did he find that the defendant's perception of Zwedu's race was the proximate cause of his threatening conduct. Finding of Fact No. 13 says only this:

Although Mr. Read's reason for anger was because he was cited for a ticket, his reason for anger switched to his perception of Ms. Zwedu's race, color, ancestry, or national origin as soon as he saw Ms. Zwedu. He threatened her because of her race, color, ancestry, or national origin.

⁹ It is not entirely clear whether the *Sinnott* Court was engaging in *de novo* review or the more "traditional" type of review of the sufficiency of the evidence in a criminal case.

FF No. 13, CP 188. Similarly, FF No. 12 states in part:

Once Mr. Read saw Ms. Zwedu's physical appearance, he exited his truck to start a confrontation. The motivation for him getting out of the truck and starting a confrontation was based on his perception of Ms. Zwedu's race and national origin.

FF No. 12, CP 188.

The trial judge failed to quantify *how much* of Read's motivation for threatening her was attributable to his perception of her race, and how much was attributable to her being the person who issued him the parking ticket. Instead, he confined himself to the determination that "Mr. Read acted because of his perception of the victim's race, *at least in part.*" RP-III, 246 (bold italics added).

- b. **In *Pollard*, In the Course of Rejecting a Vagueness Challenge to "Clarify" the Statute, This Court Declined to Read Into The Statute a Requirement That The Defendant's Perception of His Victim's Race Must Be Shown to Have Been a "Substantial Factor" Which Caused Him To Select His Victim. This Court Held that the Words "Because of" Were Sufficiently Intelligible to the Average Person to Give Notice of What Conduct Was Prohibited.**

Given this Court's statement in *Pollard* that a trial court need *not* decide how much of a causative factor the defendant's perception of the victim's race was, it is clearly understandable why the trial judge made no finding on this point. In *Pollard* the defendant argued that the malicious harassment statute was unconstitutionally vague:

Pollard contends RCW 9A.36.080 is unconstitutionally vague because it is unclear what part of the defendant's motivation in assaulting his victim that person's membership in a particular group must be. He urges us to construe the statutory language "because of" the person's race to require a showing that the victim's race was at least a substantial factor in the defendant's motive for the assault. As with his sufficiency of the evidence argument, he contends that without this requirement a person making a biased statement while committing a misdemeanor assault may be subject to a felony prosecution for malicious harassment depending on the individual sensibilities of the police, investigator, or prosecutor. He further argues that if we hold that the victim's status must be a substantial factor in the defendant's motive in committing the assault, his conviction cannot stand because racial bias played only a small role in his assault on Durham.

Pollard, 80 Wn. App. at 68.

In response, "based on the [Washington] Supreme Court's recent consideration of this issue in *Talley*," this Court held:

We reject Pollard's argument that the statute is unconstitutionally vague without a substantial factor requirement. In that case [*Talley*], the court rejected a vagueness challenge to a different portion of the statute. The court looked to the plain, ordinary meaning of the words and at the language around it. It noted that the words "because of" in ordinary usage mean "by reason of" or "on account of". [Citation]. The court concluded that the statute provided "adequate notice and sufficient standards to prevent arbitrary enforcement because the average citizen can understand the proscription at hand." [Citation]. We agree that, in the context of Pollard's argument here, the words "because of" are sufficiently intelligible to the average citizen to give fair notice of what the law prohibits and that the statute does not need to be clarified as he urges.

Pollard, 80 Wn. App. at 68-69.

c. **The *Pollard* Court's Purported Distinction Between Substantive Crime Statutes and Sentencing Enhancement Statutes Is Clearly Erroneous. RCW 9A.36.080 Is a Substantive Crime Statute. It Makes No Mention whatsoever of any Sentencing Enhancement for Any Other Crime.**

The *Pollard* Court purported to distinguish *People v. Baker*, 35 Cal.App.4th 1413, 25 Cal.Rptr.2d 372 (1993), review dismissed and case remanded, 45 Cal.Rptr.2d 206, 902 P.2d 224 (1995). The *Baker* Court held that even though the degree to which hatred for the selection of the victim was not explicitly stated in the statute, nevertheless

it makes no sense to interpret “because of” to mean the statute applies only where race, color, or ethnicity is a de minimis factor in the selection process. In light of the legislative rationale behind hate crime statutes, such an interpretation would be absurd. Thus, the statute must be construed to apply when the hatred involved comprises a *substantial factor* in the selection process.

Baker, 25 Cal.Rptr.2d at 378 (italics in original; citations omitted), quoted in *Pollard*, at 69.

This Court held that *Baker* was distinguishable because “the statutory scheme at issue here was a sentence enhancement provision, not a statute creating a separate substantive offense.” *Id.* at 70. But with all due respect, this statement is simply wrong. RCW 9A.36.080 *does* create a separate substantive offense, and it does *not* provide a sentencing

enhancement for another offense. It is possible that the *Pollard* Court had in mind RCW 9A.46.020, which in subsection (2)(a) specifically states that the crime of harassment is a gross misdemeanor unless the defendant has been previously convicted of harassment or the defendant made a threat to kill his victim. RCW 9A.46.020(2)(b). Under those circumstances, RCW 9A.46.020 constitutes a Class C felony. Thus, arguably it might be said that RCW 9A.46.020(2)(b) is a sentence enhancement statute. But RCW 9A.36.080 is not.

RCW 9A.36.080 makes no reference to the enhancement of any sentence for any other underlying crime. It simply states, “Malicious harassment is a class C felony.” There are no situations under which malicious harassment is anything other than a Class C felony. Subsection (1) of RCW 9A.36.080 creates the substantive offense of malicious harassment. The only reference in RCW 9A.36.080 to other crimes is in subsection (5) which states, “Every person who commits another crime during the commission of a crime under this section may be punished and prosecuted for the other crime separately.” Thus, RCW 9A.36.080 cannot, under any stretch of the imagination, be construed as a sentencing enhancement statute.¹⁰

¹⁰ Even if it were a sentencing enhancement statute, that would not serve to distinguish it from *Baker* since the First Amendment is violated when persons are punished for pure speech regardless of whether the punishment is imposed for commission of a substantive

d. **The Statement in *Pollard* That Racial Motivation Need Not Be Shown to be a “Substantial Factor” in Causing the Offense Is Pure Dicta Since the Court Went on to Hold That There Was “Ample Evidence” That the Victim’s Race Was “More Than a Substantial Factor.”**

Finally, the *Pollard* Court held in the alternative that “even if we agreed with *Pollard* that bias must be a substantial factor in a defendant’s motivation for the assault, we would nonetheless uphold his conviction because there is sufficient evidence to meet this standard.” *Pollard*, at 70. Thus, the statement in *Pollard* which rejects the contention that the prosecution must prove that racial bias was a “substantial factor” is mere dicta, since it is entirely unnecessary for determination of the case. In the end, the *Pollard* Court found that there was “ample evidence that [the victim’s] race was *more than a substantial factor* in *Pollard*’s commission of the assault.” *Id.* at 71 (italics added).

e. **Appellant Read is Not Making a Vagueness Challenge. He Contends That Without a Requirement that the Victim’s Race Was the “But for” Cause and the “Proximate Cause” of the Offense, the Statute Violates the First Amendment Because it is Content Discriminatory and Because It Punishes Pure Speech.**

crime, or for commission of an act identified as a sentencing enhancement for a substantive crime. *See, e.g., State v. Stalder*, 630 So.2d 1072, 1074 (Fla. 1994), where the Florida Supreme Court, in order to avoid a First Amendment violation, construed a statute which “require[d] *penalty enhancement* where the commission of any felony or misdemeanor” was “based on” the race of the victim, as requiring proof that racial bias caused the defendant to commit the crime. *See also Dawson v. Delaware*, 503 U.S. 159, 162-168 (1992)(defendant’s First Amendment rights violated where jury in penalty phase of capital case was allowed to consider defendant’s membership in white supremacist prison gang as a basis for imposing death sentence).

Appellant Read is not making a vagueness challenge to any part of RCW 9A.36.080, and thus whatever validity *Pollard* may have with respect to such a claim, *Pollard* does not govern the claim that is being made here.

In *State v. Stalder*, 630 So.2d 1072 (Fla. 1994), the Florida Supreme Court explained why the First Amendment prohibition against content discrimination required it to save the statute by reading into it a causal connection element. The statute in question enhanced the criminal penalties for the commission of any felony or misdemeanor crime which “evidence[d] prejudice based on the race . . . of the victim.” 775.085, Florida Statutes (1989). As written, the statute did not expressly require the prosecution to show that there was a causal connection between a defendant’s racially derogatory speech and the defendant’s criminal conduct. Unlike RCW 9A.36.080, the words “because of” did not appear in the Florida statute.

The Florida Supreme Court observed that the U.S. Supreme Court had recently held that “bias-inspired speech” was unconstitutionally abridged by a municipal ordinance in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). That ordinance made it a crime to display symbols or graffiti which one had reasonable grounds to know “arouses anger, alarm or resentment in others

on the basis of race . . .” The ordinance had been construed by the Minnesota Supreme Court as being limited to “fighting words,” a category of speech outside the protection of the First Amendment. Nevertheless the U.S. Supreme Court held that because it singled out certain types of “fighting words” such as racially derogatory terms, the ordinance was content discriminatory because it imposed special prohibitions on speakers who expressed their views on disfavored topics. Thus, the ordinance was found unconstitutional because it violated the First Amendment prohibition against government censorship of disfavored viewpoints.

Bearing in mind the holding of *R.A.V.*, the *Stalder* Court noted the danger that its penalty enhancement statute could be applied in a content discriminatory way. The Court noted that the statute embraced two different categories of offenses: (1) “because of” offenses, and (2) mere “temporal coincidence” offenses.

First are those offenses committed because of prejudice. For instance, A beats B because B is a member of a particular racial group. This class of offense is virtually identical to the bias-motivated crimes proscribed by the valid Wisconsin statute in *Mitchell*. The targeted activity – the selection of a victim – is an integral part of the underlying crime. As such, the conduct is not protected speech at all, but rather falls outside the First Amendment and may be banned.

Second are those offenses committed for some reason other than prejudice but nevertheless show bias in their commission. For example, A beats B because of jealousy,

but in the course of the battery calls B a racially derogatory term. *The targeted conduct here – the expression of bias – is related to the underlying crime in only the most tangential way. The expression and crime share the same temporal framework, nothing more. This tenuous nexus, which amounts to mere temporal coincidence, is irrelevant for constitutional purposes. The proscribed conduct consists of pure expression indistinguishable from the bias-inspired expression targeted by the St. Paul ordinance in R.A.V. and cannot be selectively banned.*

Stalder, 630 So.2d at 1076 (bold italics added). The Florida Court concluded that under *R.A.V.* the First Amendment prohibited penalty enhancement in the second class of cases. Therefore, in order to save the statute, the Florida Court gave it a narrow construction and limited its application to the “because of” or “bias-motivated” class of cases, holding that “[s]o read, the statute is constitutional.” *Id.* at 1077

In the present case, appellant Read contends that his case falls in the second category. He argued that his threatening conduct and his bias-inspired speech merely happened at the same time, but that the conduct was not “because of” the racial prejudice evidenced by the speech. The trial judge rejected this contention and found that “Mr. Read acted because of his perception of the victim’s race, *at least in part.*” RP III, 246 (bold italics added). But he did not quantify the degree to which perception of the victim’s race motivated Read’s actions. He did not hold that racial prejudice was either a substantial factor, or the predominant factor, which

caused Read to threaten his victim. Nor did he hold that racial prejudice was the “but for” or “proximate” cause of Read’s conduct.

- f. **Several Courts Have Held That “Because of” Hate Crimes Statutes Require Proof that the Defendant’s Bias Was a “Substantial Factor” Which Caused the Defendant To Commit His Crime. The Lead Case Holds That the Prosecution Must Prove That the Defendant’s Bias was the “Cause In Fact” of His Criminal Conduct.**

After *Mitchell* a number of courts began grappling with the question of how large a role racial prejudice must play in the causation of the criminal conduct in order not to run afoul of the First Amendment. The lead cases are *People v. M.S.*, 10 Cal.4th 698, 896 P.2d 1365, 42 Cal.Rptr.2d 355 (1995) and its companion case of *Superior Court v. Aishman*, 10 Cal.4th 735, 896 P.2d 1387, 42 Cal.Rptr.2d 377 (1995). In *M.S.*, the California Supreme Court held that the statutory terms “because of” contained in California’s hate crimes statutes, Penal Code Sections 422.6 and 422.7, required proof that race, religion, national origin, or sexual orientation¹¹ hatred was a “substantial factor” which caused the defendant to commit his crime.

In *M.S.* the California Attorney General defending the statute argued that it should be construed as merely requiring proof that class hatred “contributed to the underlying criminal conduct.” *M.S.*, 10 Cal.4th at 716.

¹¹ The criminal conduct in *M.S.* was directed at the victims because of their sexual orientation.

The defendants, on the other hand, argued that the State was required to prove that the victim would not have been selected “but for” his or her protected characteristic. *Id.* Ultimately, the California Supreme Court held that the prosecution had to prove that the protected characteristic was a “substantial factor” on the defendant’s selection of the victim.

While it is clear that the California Supreme Court chose to adopt a “substantial factor” test, it is not altogether clear what those words mean or how they are to be applied. The *M.S.* majority opinion noted that (a) the statutory text did not require that bias must be the sole reason behind the defendant’s criminal act; and (b) the statutes were silent on the question of “to what degree it must have motivated the defendant.” *Id.* at 716. The majority phrased its holding in these terms:

On the one hand, the Legislature has not sought to punish offenses committed by a person who entertains in some degree racial, religious, or other bias, but whose bias has not motivated the offense; in that situation it cannot be said the offense was committed *because of* the bias.^[12] On the other hand, nothing in the text of the statute suggests that the Legislature intended to limit punishment to offenses committed exclusively or even mainly because of the prohibited bias. A number of causes may operate concurrently to produce a given result, none necessarily predominating over the others. By employing the phrase “because of” in sections 422.6 and 422.7, ***the Legislature has simply dictated the bias motivation must be a cause in fact of the offense***, whether or not other causes exist. [Citations omitted]. ***When multiple concurrent motives***

¹² This is the equivalent of the Florida Supreme Court’s temporal coincidence category in *Stalder*.

exist, the prohibited bias must be a substantial factor in bringing about the crime. (*People v. Caldwell* (1984) 36 Cal.3d 210, 220, 203 Cal. Rptr. 433, 681 P.2d 274 [“[N]o cause will receive juridical recognition if the part it played was so infinitesimal or so theoretical that it cannot properly be regarded as a *substantial factor* in bringing about the particular result”]; cf. CALJIC No. 3.41 (1992 rev.)) These principles accord with traditional rules of causation in criminal cases [Citations omitted].

M.S., 10 Cal.4th at 719-720 (bold italics added).¹³

g. The Concurring Justice In the *M.S.* Case Offered Definitions of “Cause in Fact” and “Substantial Factor” and Equated These Terms to The Tort Law Concepts of “But for” Causation and “Proximate Cause”.

While the majority opinion used the terms “cause in fact” and “substantial factor,” it did not define what those terms meant. Consequently, Justice Kennard felt compelled to write a concurring opinion, in which he offered his interpretation of what the majority meant when it used these terms. His opinion deserves to be read in full, but in a nutshell he made the following observations:

- (1) Determining a person’s motive for certain actions is a difficult task, and frequently not even the actor will know why he acted as he did. The prosecution cannot compel a defendant to testify, and thus must resort to consideration of the defendant’s out-of-court

¹³ These rules are restated succinctly in the companion case of *People v. Aishman*, 10 Cal.4th at 741: “[W]e have interpreted identical statutory language (“because of”) contained in other hate crimes statutes (sections 422.6 and 422.7) to mean the bias motivation must have been a cause in fact of the offense, and when multiple concurrent causes exist, the bias motivation must have been a substantial factor in bringing about the offense.”

statements to demonstrate the proscribed motive. But the use of a defendant's past statements and associations to prove motive, if not carefully controlled, may have a chilling effect on First Amendment freedoms. *M.S.*, 10 Cal.4th at 730 (Kennard, J., concurring).

- (2) "Very often, motives prohibited by the statute will have combined with other more common motives completely unrelated to the victim's statutorily enumerated characteristics. Again, First Amendment concerns are present. The more attenuated the relationship between the bias motive and the behavior, the greater the risk that the statutory punishment (or increase in punishment) is effectively being imposed for the defendant's bigoted thoughts or beliefs or expressions rather than for the behavior." *Id.*

Justice Kennard then addressed the majority opinion's formulation of the test that a jury should use when deciding whether the prosecution had met its burden of proving the requisite degree of proscribable bias-related motive. He noted the majority had held that (1) bias need not be the predominant or exclusive motive; (2) bias must have been the "cause on fact" of the defendant's conduct; and (3) the bias motive must have been a substantial factor producing the defendant's behavior. *Id.* at 731. Justice Kennard further noted that the majority had used "the language of causation developed primarily in tort law," and that the terms "cause in fact" and "substantial factor" had "established meanings in tort law." *Id.*

In tort law, a person's conduct is a "cause in fact" of another's injury if the injury would not have occurred in the absence of that conduct. This is generally referred to as the "but for" test of causation.

M.S., 10 Cal4th at 731 (Kennard, J. concurring).

While the “but for” test works well in most situations, Justice Kennard noted that in tort law this test should not be used in situations where two causes concur to bring about an event, and either one of them alone could have been sufficient to bring about the result. In this situation, tort law employs a modified definition of “cause in fact.” Justice Kennard proposed the following definition of cause in fact for multiple motive cases and voiced his belief that the majority had adopted this approach:

When . . . the evidence reveals both bias and nonbias motives, the bias motives will be a “cause in fact” of the conduct if either (1) the conduct would not have occurred in the absence of the bias motives or (2) the bias and nonbias motives are independent of each other and the bias motives would have been sufficient to produce the conduct even in the absence of all non-bias motives. Under our decision today, as I understand it, this is what the prosecution must prove to establish that the bias motivation was a “cause in fact” of conduct charged under Penal Code section 422.6 or 422.7.

M.S., 10 Cal.4th at 732 (Kennard, J., concurring).

In *addition* to proving “cause in fact,” Justice Kennard noted that generally in tort law a second level of causation – termed “proximate cause” -- must also be proved. *Id.* at 733. Furthermore, the term “substantial factor” is often used as a synonym for proximate cause. *Id.* at 733 n.3.

Justice Kennard noted that the majority had not defined the term “substantial factor.” While he agreed it was difficult to define, he

ultimately suggested the following operational definition:

Perhaps the most that can be said is that when the defendant has entertained both discriminatory and nondiscriminatory motives, and either alone would have been sufficient to produce the behavior, the defendant should not be found to have acted “because of” the victim’s statutorily enumerated characteristic if nonbias motives so predominated over the bias motives that imposing a punishment designed particularly for bias-motivated conduct would be inherently unfair and would come perilously close to punishing improper thoughts or beliefs.

M.S., 10 Cal.4th at 733-34 (Kennard, J., concurring).

h. Other State Courts Have Been Much Vaguer About What They Mean, But Have Also Held That the Prosecution Must Prove That Bias Motives Were a “Substantial Factor” In Bringing About the Defendant’s Conduct.

Several other state courts have held that in the context of hate crime statutes, the prosecution must prove that the defendant’s bias motive was a “substantial factor” which caused the defendant to engage in his criminal conduct. *See, e.g., In re the Welfare of S.M.J.*, 556 N.W.2d 4 (Minn.Ct.App. 1996);¹⁴ *City of Wichita v. Edwards*, 23 Kan.App.2d 962, 968, 939 P.2d 942 (1997).¹⁵

¹⁴ “Minnesota is not unique in using ‘because of’ in its formulation of bias assault; other courts have interpreted the same words in similar statutes to require the state to prove a causal connection between the infliction of injury and the assailant’s perception of the group to which the victim belongs. [Citations]. *By requiring a causal link, the statutes exclude offenses committed by a person* who entertains racial or other bias but *whose bias is not in substantial part what motivated the offense.*” 556 N.W.2d at 6-7, citing *M.S.*, 42 Cal.Rptr.2d at 367-68 (bold italics added).

¹⁵ The Court rejected a vagueness challenge to Wichita’s ethnic intimidation ordinance, and cited with approval to *In re M.S.* where the California Supreme Court had rejected a similar vagueness argument on the grounds that the state statutes required a causal link

In the present case, the trial judge did not make any finding that Read's racial prejudice was either the "cause in fact" or the "but for cause" of his threatening behavior. Nor did he make any finding that his racial bias was a "substantial factor" or the "proximate cause" of his criminal behavior. Instead, he confined himself to finding that the defendant "acted because of his perception of the victim's race, *at least in part.*" RP III, 246 (bold italics added). This language is identical to statutory language which the New Jersey Supreme Court found unconstitutionally vague in *State v. Mortimer*, 135 N.J. 517, 641 A.2d 257 (1994).

N.J.S.A. 2C:33-4(d) provided that a person committed the crime of fourth degree harassment "if in committing an offense under this section, he acted, *at least in part*, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity." (Bold italics added). The New Jersey Supreme Court held this portion of the statute was vague and struck it from the statute. The Court held that the phrase means "in some degree," and that consequently the statute applied whenever a person

between bias and the commission of the crime and further required that the prohibited bias had to be a substantial factor in the commission of the crime. The Kansas Court also cited to *State v. Mortimer*, 135 N.J. 517, 532, 641 A.2d 257 (1994) a New Jersey case where a penalty enhancement statute *was* held unconstitutionally vague precisely because that statute did *not* require that bias be a substantial causative factor.

acted with some amount of racial hatred; “but exactly what amount the statute requires is not clear.” *Mortimer*, 641 A.2d at 265.

The subsection does not enumerate whether an infinitesimal amount of ill will, hatred, or bias is enough, or whether the actor must act with a substantial amount of one of those sentiments.

Mortimer, 641 A.2d at 265. Similarly, in the present case the trial judge convicted Read without indicating whether the degree to which his racial bias caused his behavior was more than infinitesimal. Merely stating that it was a factor “at least in part” is constitutionally insufficient because it creates a vagueness problem if the statute is allowed to be interpreted in that fashion. In addition, if racial bias was not the “but for” and “proximate” cause of the defendant’s conduct then construed in this manner, the statute permits the defendant to be convicted and punished simply on the basis of his thoughts and his expression of those thoughts.

At least one court has adopted the rule that racial bias must have been the “primary motivating factor” behind the defendant’s criminal conduct. In *Martinez v. State*, 980 S.W.2d 662 (Tex.Ct.App. 1998), the court addressed the degree of causal connection between racial bias and criminal conduct which the prosecution was obligated to prove:

By requiring the State to prove a causal link, *the statutes prevent prosecution of offenses committed by a person* who entertains bias or prejudice but *whose bias or prejudice was not a primary motivating factor*.

Id. at 667 (bold italics added).

i. **The Supreme Court's Decision in *Brandenburg v. Ohio* Compels the Conclusion That the Prosecution Must Prove That Race Bias Was The Primary Cause (More than 50%) Which Motivated Read to Engage in Criminal Conduct.**

In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court held that a State could not impose criminal liability for racist speech which had some tendency to cause others to commit criminal acts, but which was not likely to cause imminent unlawful conduct. The speech in that case was extremely racist in nature. Defendant Brandenburg was a Klu Klux Klan leader. *Id.* He held a rally on a farm during which crosses were burned and derogatory remarks were made about African Americans and Jews. *Id.* at 446. During a speech he made while dressed in full Klan regalia Brandenburg said this:

This is an organizers' meeting. We have had quite a few members here today which are-we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. ***We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.***

Brandenburg, 395 U.S. at 446 (bold italics added). In another speech

Brandenburg said, “Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.” *Id.* at 447. For these remarks Brandenburg was convicted of syndicalism, for having advocated “the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform.” *Id.* at 449 n.3.

The Supreme Court reversed Brandenburg’s convictions because the Ohio statute did not require proof, and the prosecution had not presented proof, that Brandenburg’s words were likely to actually *cause* anyone to commit an illegal act in the near future:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action ***and is likely to incite or produce such action.***

Brandenburg, 395 U.S. at 447 (bold italics added).

Under *Brandenburg* it is well established that to impose criminal liability for speech based on the actions of others, the prosecution must show that the defendant’s speech was likely to cause others to commit criminal acts. Similarly, a defendant cannot be criminally punished for his own speech which expressed his own thoughts, no matter how racist they may be, if such thoughts did not “produce” (which is to say “cause”) any resulting criminal act.

j. **The Supreme Court's Decision in *Claiborne Hardware* Compels The Conclusion That The Prosecution Must Prove That Read's Racially Biased Beliefs Were the Proximate Cause of His Threatening Criminal Conduct.**

Similarly, the Supreme Court's decision in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982) also compels the conclusion that as a prerequisite to imposing criminal liability, the First Amendment requires a proximate cause relationship between Read's threatening criminal conduct and his racially bigoted speech. In *Claiborne* a merchants association sued over 100 members of the NAACP for urging people to boycott stores that did not employ African Americans. Some of the individual defendants were accused of making threatening statements and of encouraging people to resort to unlawful violence. The merchant association was eventually awarded a huge damages award for which over 100 people were found jointly and severally liable. On appeal the Supreme Court set aside the damages award on the ground that there was no proof that the conduct of these individuals was the proximate cause of the economic damages suffered by the plaintiffs.

While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. ***Only those losses proximately caused by unlawful conduct may be recovered.***

Claiborne, 458 U.S. at 918 (bold italics added).

If *civil* liability cannot be imposed for injuries that were not proximately caused by a person's speech, then clearly *criminal* liability cannot be imposed for injuries which were not proximately caused by the defendant's speech or thoughts.

k. Under Either the *Martinez* Test or the *M.S.* Test, The Trial Judge Failed to Make a Constitutionally Necessary Finding and Thus The Findings of Fact Do Not Support The Conviction.

Appellant Read believes that to be constitutional, RCW 9A.36.080 must be interpreted as requiring proof that the defendant's racial bias was the primary motivating factor which caused him to threaten the victim. If racial bias was not the primary motivating factor, then it cannot be said that the crime was committed "because of" such bias. Moreover, because this is a criminal case, such causation must be proved beyond a reasonable doubt. It would be absurdly anomalous to hold that the defendant can be held criminally liable for the criminal acts of others only if his speech is shown to have been reasonably likely to incite *them* to criminal action, but at the same time to hold that *he* can be criminally liable for his own racist thoughts and verbal statements expressing them, even though they did *not* cause him to engage in any criminal conduct.

Even assuming that it is not necessary to prove that race bias was the *primary* cause of Read's threatening conduct, at the very least the First

Amendment requires proof that his racist beliefs were a “*significant factor*” in his decision to engage in such conduct.

Under either test, the findings of fact which have been entered in this case do not meet the constitutional standard required by the First Amendment and therefore appellant Read’s conviction should be reversed, and the charge dismissed with prejudice. On appeal in a criminal case findings of fact are reviewed to see whether they support the conclusion of law that the defendant is guilty and thus support the judgment of conviction. *State v. Macon*, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). In this case, since there is no finding that the defendant’s racial bias was either the cause in fact or the proximate cause of his criminal conduct, the judgment of conviction cannot stand.¹⁶

5. THERE IS INSUFFICIENT EVIDENCE FOR THIS COURT TO FIND THAT THE DEFENDANT MADE A TRUE THREAT.

In *Kilburn* the Supreme Court found that there was insufficient evidence from which it could find that the defendant made a true threat. Similarly, in *State v. Brown*, 137 Wn. App. 587, 154 P.3d 302 (2007), Division Two reversed and dismissed a conviction for intimidating a judge because it found insufficient evidence to support the conclusion that the

¹⁶ Even if such a finding had been made, this Court would be obligated to review it de novo. Since the record does not contain sufficient evidence to justify such a finding this Court could not approve it.

defendant made a true threat.

In *Virginia v. Black*, 538 U.S. 343 (2003), the Court defined “true threats,” which are not protected by the First Amendment, in these words:

“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, *where a speaker directs a threat* to a person or group of persons *with the intent of placing the victim in fear of bodily harm or death*.

Virginia v. Black, 538 U.S. at 359-360 (bold italics added).

As one Ninth Circuit panel has recognized:

The clear import of [Black’s] definition is that only *intentional* threats are criminally punishable consistently with the First Amendment. A natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim.

United States v. Cassel, 408 F.3d 622, 631 (9th Cir. 2003) (italics in original).

In the present case, there is no evidence that Read *intended* to frighten Zwedu, and the trial judge failed to make any finding that Read *intended to frighten her*. He found that he did frighten her; he found that

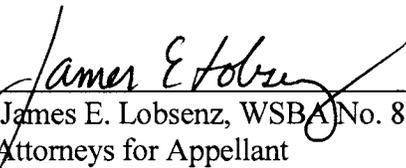
she interpreted his statement “I know where you work” as a future threat. FF No. 10. He found that after getting out of his truck he “began making her feel immediate physical harm and eventually threatened her by the totality of his words and conduct of future harm.” FF No. 12. But he did not find that he *intended* to frighten her.¹⁷ Without such a finding, Read’s statement is not a true threat and thus he cannot be punished for uttering it.

F. CONCLUSION

For the reasons stated above, appellant asks this Court to reverse his conviction and to remand with directions that the charge be dismissed with prejudice.

DATED this 6th day of July, 2010.

CARNEY BADLEY SPELLMAN, P.S.

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¹⁷ Read testified that when he confronted her about the parking ticket he did not have in mind that he was going to be threatening anybody. RP III, 209.