

65064-5

65064-5

NO. 65064-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHARLES READ,

Appellant.

2010 SEP -31 PM 2:09
COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. FACTS OF THE CRIME	1
C. <u>ARGUMENT</u>	6
1. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT THE DEFENDANT HARASSED THE VICTIM BECAUSE OF HER RACE.....	6
2. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT THE DEFENDANT'S THREAT WAS A "TRUE THREAT"	12
D. <u>CONCLUSION</u>	18

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. J.M., 144 Wn.2d 472,
28 P.3d 720 (2001)..... 12, 13

State v. Johnson, 115 Wn. App. 890,
64 P.3d 88 (2003).....7, 10, 11

State v. Kilburn, 151 Wn.2d 36,
84 P.3d 1215 (2004).....8, 13, 14, 15, 16

State v. Pollard, 80 Wn. App. 60,
906 P.2d 976 (1995).....7, 9, 11

State v. Schaler, __ Wn.2d __,
__ P.3d __ (Slip Opinion No. 81864-9,
2010 WL 2948579, filed July 29, 2010) 14, 15, 16

State v. Talley, 122 Wn.2d 192,
206, 858 P.2d 217 (1993).....6, 7, 11

State v. Tellez, 141 Wn. App. 479,
170 P.3d 75 (2007)..... 12, 13

State v. Williams, 144 Wn.2d 197,
26 P.3d 890 (2001).....12

Constitutional Provisions

Federal:

U.S. Const. amend. I.....6, 7, 8, 12, 13, 14, 17

Statutes

Washington State:

RCW 9A.36.0806, 7

RCW 9A.46.0206

Other Authorities

WPIC 2.24.....13, 14

A. ISSUES PRESENTED.

1. Whether sufficient evidence supports the trial court's finding that the defendant harassed the victim because of her race.

2. Whether sufficient evidence supports the trial court's finding that the defendant's threat was a "true threat."

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Charles Read was charged by information with the crime of malicious harassment. CP 1. Read waived his right to a jury trial. RP 3.¹ A bench trial was held before the Honorable Michael Heavey, and the court found Read guilty as charged. RP 244-50; CP 186-89. Read received a first time offender waiver at sentencing and was ordered to complete 720 hours of community service by December 20, 2011. CP 179-85.

2. FACTS OF THE CRIME.

Twenty-eight-year-old Saba Zewdu emigrated with her family from Ethiopia at the age of six. RP 61, 100. She is African-

¹ The verbatim report of proceedings from the trial, dated January 26, 2010, January 27, 2010, and February 1, 2010, are sequentially paginated and will be referred to simply as "RP."

American. RP 196. She is a small woman, standing five feet, two inches tall and weighs approximately 120 pounds. RP 80. On May 7, 2009, she was working at the Elliott Bay Marina as a parking lot attendant for Diamond Parking lots. RP 62-63.

Sixty-three-year-old Chuck Read is the owner and president of Read Products, Inc., a manufacturing company. RP 142, 174. He is Caucasian. He is a large man, standing six feet tall and weighs approximately 240 pounds. RP 113. On May 7, 2009, Read and his wife had dinner at a restaurant at the Elliott Bay Marina. RP 145. They were frequent customers at the restaurant because it was close to their place of business. RP 145.

Read parked his large F-150 Super Crew four-door pickup truck in the Diamond Parking lot. RP 146, 176-79. Read's wife testified that Read was "very particular about nobody touching his truck" and takes pains to park it so that other people will not park next to him. RP 146-47. On May 7, Read parked his truck across two parking stalls, a fact testified to by both Zewdu and the parking valet who was working at the time. RP 83, 120. At 4:35 p.m., Zewdu placed a parking ticket for improper parking on Read's truck. RP 83.

At approximately 5:46 p.m., Read and his wife left the restaurant, returned to their truck and found the parking ticket. RP 181-83. Read was very angry that he had received a ticket, and felt that it was unwarranted. RP 151, 160-61, 182-84. Read drove his truck to the parking valet, Brian Smith, and said, "What is this? Who wrote this? I am not going to pay it. This is bullshit." RP 119-21. Read did not get out of his truck or call Smith, who is white, any derogatory names or threaten him. RP 120-22, 127. Smith advised Read that he should call the parking lot company. RP 123. Smith also pointed to Zewdu as the person who issued the ticket. RP 123. Zewdu was still in the parking lot, on foot and in uniform. RP 67, 85, 100.

Read quickly drove his truck toward Zewdu. RP 67. He rolled down his window and asked her, "Did you give me this fucking ticket?" RP 67. She said she did and instructed him that he should call the phone number on the ticket if he had any questions. RP 67. Read responded, "You nigger, you gave me this fucking ticket." RP 67. He then stepped out of his truck and started approaching Zewdu. RP 67. Read was very angry and his hands were clinched into fists. RP 68. He walked very close to Zewdu and kept repeating, "You gave me this fucking ticket." RP 69. He

called her a nigger at least three times. RP 68. She informed him that she was Ethiopian, and he responded "You fucking Ethiopian." RP 69. He asked her, "Do you know who I am?" RP 71. He then stated, "I know where you work," which Zewdu interpreted as a threat that he would return and do something to her. RP 74.

Zewdu became very frightened and told Read that she was going to call the police. RP 70, 72. He responded, "I don't give a fuck." RP 70. When she began to call the police on her cell phone, Read returned to his truck and drove away. RP 70.

Once Read left, Zewdu approached Brian Smith, the valet. RP 124. Smith testified that she was crying and shaking and "looked traumatized." RP 124. She told Smith that Read had threatened her and called her racial slurs. RP 124. Smith escorted her to the harbormaster's office, where John DeMaria was working. RP 125. John DeMaria testified that Zewdu entered the office crying and trembling and it took approximately 15 minutes for her to calm down. RP 135-38.

Zewdu was so frightened by the encounter with Read that she asked her supervisor to change her shift, and began working an earlier shift the next day. RP 78. She also purchased pepper

spray the next day. RP 77. She had trouble sleeping for awhile after the incident. RP 80.

Read admitted that he angrily used profanity and racial slurs against Zewdu, but denied threatening her. RP 187-90, 207. He testified that he got out of his truck to confront Zewdu because it was "necessary" and "proper," but had no further explanation for why he did not continue to address Zewdu from inside the truck as he did Brian Smith. RP 197-99.

In finding Read guilty of malicious harassment, the court found that the testimony of Zewdu was credible and the testimony of Read and his wife was not credible. RP 188. The court found that the totality of Read's words and conduct constituted a threat of future harm and that his motivation for getting out of his truck and threatening her was his perception of her race. RP 188. The court also found that Zewdu was placed in reasonable fear of harm. RP 189.

C. ARGUMENT.

1. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT THE DEFENDANT HARASSED THE VICTIM BECAUSE OF HER RACE.

The crime of malicious harassment is defined in RCW 9A.36.080. A person commits malicious harassment, as charged in this case, when he threatens a person because of his perception of the victim's race, color, ancestry, national origin or gender, or other characteristic² and places that person in reasonable fear of harm to person or property. RCW 9A.36.080(1)(c). The crime of malicious harassment is a class C felony. RCW 9A.36.080(7). In contrast, a person is guilty of harassment when he knowingly threatens to cause bodily injury or property damage to a person and places the person in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a)(i)(ii), (b). Harassment is a gross misdemeanor unless the offender has been previously convicted of harassment or threatens to kill the victim. RCW 9A.46.020(2).

In finding that the malicious harassment statute does not violate the First Amendment, the state supreme court found that the statute regulates conduct, not speech. State v. Talley, 122 Wn.2d

² The other prohibited characteristics are sexual orientation, or mental, physical or sensory handicap. RCW 9A.36.080(1)(c).

192, 204, 206, 858 P.2d 217 (1993). A statute that punishes offensive speech cannot survive a First Amendment challenge. Id. at 200. For this reason, a person cannot be punished more severely for uttering biased remarks during the commission of another crime. State v. Johnson, 115 Wn. App. 890, 896, 64 P.3d 88 (2003); State v. Pollard, 80 Wn. App. 60, 65, 906 P.2d 976 (1995). However, a person *can* be punished for choosing a victim on the basis of the victim's race, or another characteristic. Talley, 122 Wn.2d at 206. The malicious harassment statute is constitutional because it punishes victim selection. Id. The State must prove that the defendant selected the victim because of the victim's perceived membership in a specified group. Id. at 209. This constitutional requirement is evident on the face of the malicious harassment statute, which requires the State to prove that the defendant committed harassment "because of his or her perception of the victim's race" or other characteristic. RCW 9A.36.080 (1).

In determining whether evidence was sufficient to support a conviction where First Amendment concerns are raised, the standard of review is more stringent than the usual sufficiency standard. The appellate court undertakes an "independent review"

of the crucial facts that bear on First Amendment issues. State v. Kilburn, 151 Wn.2d 36, 52, 84 P.3d 1215 (2004). However, the appellate court must defer to credibility findings made by the trier of fact. Id. In the present case, the trial court made explicit findings that the victim was credible and the defendant and his wife were not credible. CP 188.

An independent review of the crucial facts, with deference to the trial court's credibility determinations, should lead this Court to conclude that there was sufficient evidence that Read harassed the victim because of her race. Although the defendant was already angry when he approached the valet, he did not threaten the valet or try to physically intimidate him. The initial encounter with the victim was presumably triggered by the defendant's anger over being given the ticket and began with only profanity. However, the evidence produced at trial reflects that the defendant became more irate when he discovered that the ticket had been issued by the victim, a small black woman. It was upon the realization of this fact that the defendant chose to escalate the situation from an unpleasant, profanity-laced conversation, into a racially-charged physical confrontation. He exited the truck, walked very close to the victim, hurled racial epithets at her and threatened to return to

her workplace at a future date. The evidence shows that the defendant chose to exit his truck and escalate the encounter only after he saw who the victim was. The evidence supports the trial court's stated conclusion that the defendant harassed the victim because of his perception of her race, not because she had issued him a parking ticket.³

There is no evidence that the defendant set out on the evening of May 7, 2009, to find an African immigrant to harass. However, as Washington courts have held, there is no requirement under the statute that the defendant's acts be pre-planned. A defendant commits malicious harassment if he chooses to harass a victim because of their race in the course of a random encounter. For example, in State v. Pollard, the defendant was walking down the street drunk. 80 Wn. App. at 62. Two young African-American boys saw him and started giggling. Id. The defendant crossed the street, started hurling racial insults at the boys, threatened to beat them up and pushed one of them. Id. After he was arrested, he continued to make bigoted remarks and threats. Id. at 63. On appeal the defendant argued that the State failed to prove that he

³ The trial court explicitly found in both its oral ruling and written findings that the defendant harassed the victim "because of" her race. RP 245; CP 189.

assaulted the victim because of his race, arguing that there was no evidence the defendant planned the encounter. Id. at 64-65. This Court properly rejected the claim that malicious harassment requires pre-planning, stating, "It is entirely conceivable a person could be walking down the street, have a random encounter or confrontation with a member of a group he or she does not like and decide then and there to assault that person because of the victim's membership in the target group." Id. at 66. This Court concluded that the evidence established that Pollard had not merely uttered a racial slur while committing assault, but had committed the crime because of the victim's race. Id. at 66-67.

Similarly, in State v. Johnson, a case that is directly analogous to the present case, the defendant was arrested by a female police officer, and issued numerous profanity-laced and sexually explicit threats against her. 115 Wn. App. at 893. On appeal, the defendant challenged the sufficiency of evidence that the threats were made because of the officer's gender rather than the fact he was under arrest. Id. at 898. The appellate court concluded that the misogynistic nature of the threats and the fact that the defendant hurled no insults at a male transit security officer who was also present were sufficient to support the trial court's

conclusion that the threats were made because of the victim's gender. Id. at 899.

As in Pollard and Johnson, there is no evidence that Read planned his encounter with Zewdu. But having encountered her and having observed her race, Read chose to escalate the encounter into a barrage of racial insults and a threat of harm, just as the defendants in Pollard and Johnson did. The facts presented in this case are sufficient to support the conclusion made by the trial court that Read threatened Zewdu because of her race.

Read argues, based on cases from other jurisdictions, that the trial court was required to make an explicit finding that the victim's race was a "significant factor" or a "substantial factor" in causing the defendant to commit the crime. However, the malicious harassment statute already requires the State to prove that the defendant selected the victim "because of" the victim's race or other characteristic. The trial court made that finding and it is supported by the evidence. Any requirement that race be a "substantial factor" is subsumed in this statutory requirement, which, as the Talley court explained, renders the malicious harassment statute constitutional. Read's argument that a separate "substantial factor" element must be grafted onto the statute

should be rejected. The statute is constitutional as written and needs no additional court-imposed elements.

2. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT THE DEFENDANT'S THREAT WAS A "TRUE THREAT."

Read argues that the evidence presented at trial was insufficient to establish that he made a "true threat" to Zewdu. This claim should be rejected. Examining the crucial facts, and accepting the trier of fact's credibility determinations, a rational trier of fact could conclude that a reasonable person in Read's position would foresee that his statement "I know where you work," would be interpreted as a serious expression of an intent to harm Zewdu. The evidence was sufficient to establish a "true threat," as required by the First Amendment.

Any statute that criminalizes a form of speech "must be interpreted with the commands of the First Amendment clearly in mind." State v. Tellez, 141 Wn. App. 479, 482, 170 P.3d 75 (2007) (quoting State v. Williams, 144 Wn.2d 197, 207, 26 P.3d 890 (2001)). "True threats" are not protected speech, and may be prohibited. State v. J.M., 144 Wn.2d 472, 477, 28 P.3d 720 (2001).

Statements that are not "true threats" are protected speech, and may not be prohibited. State v. Kilburn, 151 Wn.2d at 43.

In order for a statute that prohibits threats to comply with the First Amendment, the statute must be interpreted as proscribing only "true threats." Id. A "true threat" 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." Id. Thus, in defining statutes that prohibit threats, Washington courts have defined the term "threat" as used in those statutes as prohibiting "true threats" only. See J.M., 144 Wn.2d at 478 (noting that the harassment statute is defined as prohibiting only true threats). In Tellez, 141 Wn. App. at 483-84, this Court held that the concept of "true threat" serves to define and limit the constitutional scope of the threat element in the felony telephone harassment statute, and is not an element of the crime.

Notably, the instructions that were provided to the court by the State in this case included the constitutional definition of "true threat" set forth in WPIC 2.24. CP 80. Recently, this instruction was expressly approved by the state supreme court in State v.

Schaler, ___ Wn.2d ___, ___ P.3d ___ (Slip Opinion No. 81864-9, 2010 WL 2948579, filed July 29, 2010). In Schaler, the court held that failing to supply the definition of "true threat" to the jury was error. However, the court noted that the error was unlikely to arise in future cases because the proper definition had been incorporated into Washington Pattern Jury Instruction 2.24, the instruction that defines "threat." In footnote 5, the court expressly approved of this instruction, stating, "Cases employing the new instruction defining 'threat' will therefore incorporate the constitutional mens rea as to the result." Id., slip opinion at 12 n. 5. In the present case, the trial court was provided with the proper definition of threat, which encompassed the constitutional limitation to "true threats."

Because First Amendment rights are implicated, the appellate court must independently review the record, while nonetheless giving deference to the trier of fact's findings on credibility. Kilburn, 151 Wn.2d at 52. The standard for assessing whether a threat constitutes a "true threat," set forth above, is an objective standard that focuses on the speaker. Id. at 44, 48. However, the State is not required to prove that the speaker actually intended to cause harm. Id.

In Schaler, the defendant, who was receiving a mental evaluation at a hospital, made repeated threats to kill two neighbors. The court concluded there was sufficient evidence that Schaler's threats were "true threats." The court noted that Schaler's demeanor did not suggest that his words were idle talk or a joke. The court concluded that a reasonable trier of fact "could have concluded that a reasonable speaker in Schaler's position would have foreseen that his threats would be interpreted as a serious expression of his intention to harm the victims."

In State v. Kilburn, the juvenile respondent was chatting and laughing with a classmate when he said he was going to bring a gun to school and shoot everyone beginning with her. 151 Wn.2d at 39, 52. He then giggled and said "maybe not you first." Id. The classmate thought he might have been joking but was not sure and reported the threat. Id. The supreme court concluded that because of the joking nature of the exchange, a reasonable person in the defendant's position would not have foreseen that his comments would be interpreted as a serious expression of intent to harm. Id. at 53. The court found the evidence was insufficient to establish a "true threat." Id.

In the present case, like Schaler and unlike Kilburn, the trier of fact properly concluded that a reasonable speaker in Chuck Read's position would have foreseen that his threat, "I know where you work," would be interpreted as a serious expression of his intention to harm Zewdu's person or property. There was no dispute that Read was very angry, and that his threat was accompanied by much profanity and repeated racial slurs. There was no basis for a reasonable trier of fact to conclude that Read was joking with Zewdu. According to Zewdu's testimony, which the trial court found credible, Read came uncomfortably close to her and uttered the threat with clinched fists. There was no basis for a reasonable trier of fact to conclude that this was idle talk. Clearly, Read was angry and was trying to intimidate Zewdu. The only reasonable interpretation of the words, "I know where you work," is that Read intended to return to the parking lot at a future date. That is why Zewdu took the steps of changing her work shift and buying pepper spray in reaction to the threat. Given his angry tone, insulting words, and threatening body language the implication was that he would return to the parking lot to harm her in some way. The size differential between Read and Zewdu also contributed to the menacing nature of the statement. The crucial facts in this case

support the conclusion that a reasonable speaker in Read's position would have foreseen that his threat, "I know where you work," accompanied by his very angry tone, profanity, racial slurs and his aggressive stance, would be interpreted as a serious expression of his intention to harm the victim. He was angry and wished to retaliate by putting the victim in fear. The evidence was sufficient to establish a "true threat."

Read argues that the State must prove that he intended to frighten the victim. First, there is ample evidence based on the above facts that Read *did* intend to frighten the victim when he said "I know where you work." That statement, uttered under these circumstances, communicated an intent to return to the victim's workplace to harm her. Moreover, the state supreme court has explicitly held that the definition of true threat is assessed by an objective standard, not a subjective standard. The State need not prove that Read foresaw that the statement would be interpreted as a serious threat under the "true threats" standard. The State needs to prove only that a reasonable person in Read's position would have foreseen that the statement would be interpreted as a serious threat. The State met that burden of proof. Sufficient evidence was presented that Read's threat was a "true threat."

D. CONCLUSION.

Sufficient evidence supports Read's conviction for malicious harassment. His conviction should be affirmed.

DATED this 2nd day of September, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 James Lobsenz, the attorney for the appellant, at Carney Badley Spellman, P.S., 701 Fifth Avenue, Suite 3600, Seattle, WA 98104-7010, containing a copy of the Brief of Respondent, in STATE V. READ, Cause No. 65064-5-I, 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.

U Brame

Name

Done in Seattle, Washington

9/3/10

Date