

65526-4

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NO. 65526-4-I

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

REC'D
DEC 22 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ANDRE D. WELLS,

Appellant.

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

The Honorable Regina S. Cahan, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206)623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
THE STATES FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT WELLS UTTERED A "TRUE THREAT"	3
D. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Engel</u> , 166 Wn.2d 572, 210 P.3d 1007 (2009).....	4
<u>State v. Green</u> , 94 Wn.2d 216, , 616 P.2d 628 (1980).....	4
<u>State v. J.M.</u> , 144 Wn.2d 472, 28 P.3d 720 (2001).....	5
<u>State v. Kilburn</u> , 151 Wn.2d 36, 84 P.3d 1215 (2004).....	5
<u>State v. King</u> , 135 Wn. App. 662, 145 P.3d 1224 (2006), <u>review denied</u> , 161 Wn.2d 1017 (2007).....	5
<u>State v. Nam</u> , 136 Wn. App. 698, 707, 150 P.3d 617 (2007).....	7
<u>State v. Williams</u> , 144 Wn.2d 197, 26 P.3d 890 (2001).....	5
 <u>FEDERAL CASES</u>	
<u>Jackson v. Virginia</u> , 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).....	4
 <u>RULES, STATUTES AND OTHER</u>	
RCW 9.61.230(1)(c)	4
RCW 9.61.230(2)(a)	4

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER (Cont'd)</u>	
RCW 9A.36.120(2)(a)	1
WPIC 2.24.....	5

A. ASSIGNMENT OF ERROR

The state failed to prove beyond a reasonable doubt that the appellant, Andre D. Wells uttered a "true threat" for purposes of the telephone harassment charge.

Issue Pertaining to Assignment of Error

Did Wells' angry telephone message left for his former girlfriend constitute a "true threat" when he had made similar calls many times, called later that day and said he loved her, had never been to her residence, and had "run into" her several times during the same period without incident?

B. STATEMENT OF THE CASE

Andre D. Wells and Lisa Easter dated for about 6 months. RP 77-78. Wells was convicted in April 2008 for committing felony harassment of Easter. RP 79-80, 158-60. As a result of the conviction, the trial court issued an order precluding Wells from contacting Easter for five years. RP 79-80, 160-62.¹

Wells called Easter on the telephone several times in fall 2009 and left messages. RP 80-81. Easter saved the messages and reported them to

¹ The existence of this conviction elevated the telephone harassment charge to a felony. RCW 9A.36.120(2)(a).

Wells' community corrections officer (CCO) on October 19, 2009. RP 83-84, 107-12, 134-35, 144. The CCO contacted police and a detective recorded the messages off of Easter's phone. RP 136, 157-58. The CCO arrested Wells at his workplace later that day. RP 137, 142.

During the period when she received the messages, Easter "ran into" Wells more than once. RP 111. She testified Wells knew where she lived, which was in Seattle's Belltown, but acknowledged he had never been to her residence. She explained, "He knows a lot of people. He knows where I'm at at all times." RP 112-13.

The state charged Wells with felony telephone harassment for a message left on October 3 and two counts of misdemeanor violation of the no-contact order for messages left on August 30 and September 7. CP 9-11.

During the resulting jury trial, the state introduced a copy of the order and played a recording of the messages. RP 86-97. Wells left two messages on October 3. In the first, he said, "Bitch, if you ever mother fucking talk to me like that again, I'll come all the way down to that mother fucking God damn and kick that mother fucking door in. Call me." RP 94. The state based its harassment charge on this message. RP 179. According to Easter, Wells was responding to a telephone conversation

they had earlier, during which she told him she wanted nothing more to do with him and not to call her anymore. RP 104.

In the second October 3 call, Wells said, "Give me call (inaudible). I love you (inaudible). Hurry up." RP 95. Easter said Wells left such contradictory messages "numerous, numerous times." RP 105.²

Jurors found Wells guilty as charged. CP 36-38. The trial court imposed a standard range sentence for telephone harassment and concurrent 24-month probation terms for the no-contact order violations. The court ran the standard range and misdemeanor sentences consecutively. RP 215-16.

C. ARGUMENT

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT WELLS UTTERED A "TRUE THREAT."

It is the context or surrounding circumstances that makes a threat "true" or serious. Given the circumstances here, a reasonable speaker in Wells' position would not have foreseen that Easter would take the October 3 "door kick" statement seriously. Wells' statement was thus not a

² Wells left a third message October 3 that the transcriber of the recorded trial did not pick up. RP 95-96. The message, "(Unintelligible) keep playin' a game[,]" is accurately transcribed in Exhibit 2, Transcript of Voicemails from Andre D. Wells. Wells has designated that exhibit as well as Exhibit 1, the disk of recorded messages prepared by the Seattle Police Department detective and played for the

true threat and therefore cannot sustain the telephone harassment conviction.

Due process requires the State prove every element of an offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Where a defendant challenges the sufficiency of the evidence, the question is whether, when viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

A person is guilty of telephone harassment if, "with intent to harass, intimidate, torment or embarrass any other person [he makes] a telephone call to such other person . . . [t]hreatening to inflict injury on the person or property of the person called" RCW 9.61.230(1)(c). The offense becomes a class C felony if the caller "has previously been convicted of any crime of harassment . . . with the same victim . . . named in a no-contact or no-harassment order in this or any other state" RCW 9.61.230(2)(a).

jury. RP 85-86, 157-58.

Because this provision criminalizes pure speech, it must be read as clearly prohibiting only “true threats.” State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (quoting State v. Williams, 144 Wn.2d 197, 208, 26 P.3d 890 (2001)); State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001). A “true threat” is a statement made in a context or under circumstances in which a reasonable person would foresee that the statement would be interpreted by a person to whom it is directed as a serious expression of an intent to inflict bodily harm or death. Kilburn, 151 Wn.2d at 43; State v. King, 135 Wn. App. 662, 669, 145 P.3d 1224 (2006), review denied, 161 Wn.2d 1017 (2007). The test is objective and focuses on the speaker. The State must prove the threat is serious, not said in jest or idle talk. Kilburn, 151 Wn.2d at 43.

Reflecting this requirement, the trial court instructed Wells' jury as follows:

Threat means to communicate, directly or indirectly, the intent to cause physical damage to the property of a person other than the actor.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP 28 (instruction 9); WPIC 2.24.

It is therefore the context or surrounding circumstances that makes a threat “true” or serious. The context or circumstances surrounding Wells' angry October 3 message rebuts an assertion it constituted a true threat. Easter had heard Wells say things similar to the "door kick" statement many times. And later the same day, Wells left a message that he loved Easter. He also left other non-threatening messages during the same time period.³ For example, Wells left two messages the previous day, both of which consisted of short commands to call him. RP 93-94.

Furthermore, Easter was not even sure Wells knew where she lived. She admitted Wells had never been to her residence and explained only that he knew a lot of people and knew where she was "at all times." Wells had also run into Easter during the period of the messages and apparently had not alarmed her enough to be reported to his CCO.

These facts indicate Wells' "door kick" statement was just more bluster. A reasonable person in Wells' position would therefore not have foreseen that the statement would be a serious expression of intention to come to Easter's residence and kick the door in. Because the state failed to prove Wells made a true threat, this Court should reverse the

³ Jurors were permitted to follow along with a transcript of the calls, admitted as Exhibit 2 for illustrative purposes only. RP 87. Wells has designated Exhibit 2.

telephone harassment conviction and remand for dismissal with prejudice.

State v. Nam, 136 Wn. App. 698, 707, 150 P.3d 617 (2007).

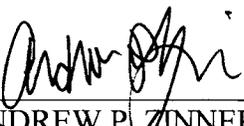
D. CONCLUSION

The state failed to prove Wells made a true threat on October 3. This Court should reverse Wells' conviction for telephone harassment and remand for dismissal with prejudice.

DATED this 22 day of December, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER
WSBA No. 18631
Office ID No. 91051

Attorneys for Appellant

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v.)	COA NO. 65526-4-I
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ANDRE WELLS,)	
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Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 22ND DAY OF DECEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANDRE WELLS
DOC NO. 940311
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF DECEMBER, 2010.

x Patrick Mayovsky

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12/22/10