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NO. 71309-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

D'ANDRE CORBIN,

Appellant.

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

The Honorable Mariane C. Spearman, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove D'Andre Corbin made true threats to kill his wife, a necessary element of the crime of felony cyberstalking.

2. The trial court unlawfully imposed sentences that exceeded the statutory maximum for the crimes of attempted first degree assault and felony cyberstalking when it imposed the statutory maximum terms for each offense and added a 36-month term of community custody.

Issues Pertaining to Assignments of Error

1. As they had done in the past, Corbin and his wife, Denise, exchanged angry and insulting text messages. Each party mentioned the word "kill" several times, Corbin three times threatened to kill Denise, and Denise sent caustic and derogatory messages in response that plainly showed she did not fear Corbin would carry out his threats. Denise also did not call 911 in response to the text messages. Considering the context of the exchange, did the State fail to prove Corbin's threats were true threats beyond a reasonable doubt?

2. Did the trial court unlawfully impose a sentence that exceeded the statutory maximum for the crime of attempted first degree assault where it imposed the statutory maximum term for each offense and added a 36-month term of community custody?

B. STATEMENT OF THE CASE

On December 14, 2012, D'Andre Corbin and his wife, Denise, argued via text messages. RP 4-7, 130-45; Ex. 14. The couple had been married 10 years at the time and had two children together. RP 99. Denise explained their marriage was not perfect and that they needed money. RP 107-08.

During the argument, they called each other names and told each other to kill themselves. Corbin said three times he would kill Denise. Denise did not take the statements seriously because both of them had made the same threats during previous arguments. RP 135-51. A coworker who observed Denise as she and Corbin texted each other said Denise did not seem alarmed by the texts. RP 226-230.

During the argument, an agitated Corbin came to Denise's workplace at a Seattle hotel. RP 155, 209. Because their arguments sometimes got loud, Denise ran into a back office and called 911 to have Corbin removed. RP 155-62. Corbin approached another hotel clerk and demanded she get Denise. RP 213-14. The clerk went to the back office, and Corbin followed and pushed her out of the way. RP 214-16. He found Denise and approached her. RP 166-67. Denise ran through the hotel lobby and out the doors. Corbin did the same. RP 167-70. Several

people intervened and one of them carried Denise to a gas station after she fell and hurt her knee. RP 171-72.

Corbin started walking away, but Denise followed and threw a cup at him. RP 171-73. Corbin turned, approached Denise, and knocked her to the ground with a punch in the face. RP 190-92. A witness said he saw Corbin atop Denise striking her repeatedly as she lay on her back. RP 247-51. Another witness said Corbin punched Denise in the face five to seven times. RP 271-82.

A Seattle police officer drove to the scene and captured this portion of the fight on his dash-cam video. RP 324-30. Several other officers arrived and Corbin was arrested. RP 325-27.

The State charged Corbin with attempted first degree assault and two counts of felony cyberstalking. CP 123-25.<sup>1</sup> Defense counsel argued Corbin's threats to kill were not true threats because Denise's blistering texts in response were hardly expressions of fear. RP 567-73.

A jury found Corbin guilty of attempted first degree assault and the two felony cyberstalking counts. CP 224, 226, 228, 230-32. The trial

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<sup>1</sup> The State's theory of attempted first degree assault was that Corbin attempted but failed to actually inflict great bodily harm as required by RCW 9A.36.011(1)(c).

court imposed concurrent standard range sentences totaling 120 months. CP 322-30. The court also imposed a 36-month community custody term.

C. ARGUMENT

1. THE STATE FAILED TO PROVE CORBIN'S THREATS TO KILL HIS WIFE WERE TRUE THREATS.

Denise did not take Corbin's threats to kill seriously and responded in kind. The couple often made such threats during their arguments, which frequently got loud. Considering the context in which the threats were made, Corbin would not reasonably foresee his threats would be a serious expression of intent to carry out the threats to kill. The threats, therefore, were not true threats. The State thus failed to prove Corbin guilty of felony cyberstalking and his convictions should be reversed and remanded for dismissal with prejudice.

Due process requires the State to prove each element of a charged crime beyond a reasonable doubt. U.S. Const. amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Deer, 175 Wn.2d 725, 731, 287 P.3d 539 (2012), cert. denied, 133 S. Ct. 991, 184 L. Ed. 2d 770 (U.S. 2013). When reviewing a challenge to the sufficiency of evidence, courts view the evidence in the light most favorable to the state. State v. Williams, 144 Wn.2d 197, 212, 26 P.3d 890 (2001).

The trial court set forth the elements of felony cyberstalking as follows: (1) that Corbin made an electronic communication to Denise Corbin; (2) that at the time Corbin initiated the electronic message he intended to harass, intimidate, torment, or embarrass Denise Corbin; (3) that Corbin threatened to inflict injury on the person on the Denise Corbin; (4) that the threat consisted of a threat to kill Denise Corbin; and (5) that the communication was made or received in Washington. CP 254 (instruction 16).

Crimes that have a threat to commit bodily harm as an element require the State to prove the threat was a "true threat" so as not to violate the First Amendment's free speech clause. State v. Kilburn, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004). 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 to inflict bodily harm or to take a life. Kilburn, 151 Wn.2d at 43.<sup>2</sup> This Court conducts an independent review of the record to determine whether the defendant made a "true threat." State v. Strong, 167 Wn. App. 206, 211, 272 P.3d 281, review denied, 174 Wn.2d 1018 (2012).

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<sup>2</sup> The trial court's instruction 17 defined "true threat". CP 254. The instruction is attached as an appendix.

"Innocent blather and jokes about harming people are protected by the First Amendment." State v. King, 135 Wn. App. 662, 669, 145 P.3d 1224 (2006), review denied, 161 Wn.2d 1017 (2007). Applying these standards to the facts here demonstrates the State failed to prove Corbin's rambling discourse included true threats to kill.

Denise testified Corbin threatened to kill her but that "I didn't take him seriously, I mean, only for the simple fact we've had text arguments before[.]" RP 136. She explained both she and Corbin had threatened to kill each other before but "nothing of that ever transpired. And it's just something we said in the heat of a moment, when we were angry." Id. Finally, Denise said Corbin threatened to kill her to "get under my skin, to make me mad, and I know that." RP 137. She did not believe Corbin would carry out his threats and she was not frightened. RP 137.

This is evident from some of Denise's texts and conduct. Among other responses to Corbin's texts are messages calling Corbin a "stupid walk away loser," a "weirdo stalker," and a "jail bound loser." She also texted, "This [Corbin's texts] "helps for custody our divorce everything thank you crazy." Ex. 14. Importantly, Denise did not call 911 in response to the threats. Instead, she called in hopes the police would make

Corbin leave to avoid a continued argument at her workplace. RP 155-65.<sup>3</sup>

Corbin, like Denise, was aware of their history of threatening each other and calling each other derogatory names. This is important because whether a threat is "true" is looked at through the eyes of a reasonable speaker. Kilburn, 151 Wn.2d at 46. An independent review of the facts shows a reasonable person in Corbin's position would not foresee the statement to be interpreted as a serious expression of intention to carry out the threat. Cf. State v. Hecht, \_\_ Wn. App. \_\_ 319 P.3d 836, 844 (2014) (evidence was sufficient to prove Hecht uttered a true threat because complainant was afraid; Hecht, therefore, could foresee complainant would consider threat to be a true threat).

Kilburn is instructive. Kilburn and K.J. started talking about books they were reading. Kilburn then, with a partial smile, said he was going to bring a gun to school the following day and shoot everyone. Kilburn began giggling and, according to K.J., acted like he was joking. She testified Kilburn always treated her nicely. She also testified, however, that she later wondered whether he was joking or serious. She was

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<sup>3</sup> Denise testified she told the 911 operator the situation was not a "typical emergency." RP 162. She said Corbin "wants to continue to argue, but I need him removed from the property." Id.

"freaked out" because speaking about a gun at school was strictly forbidden. Because the students knew they were not to mention guns, K.J. said Kilburn must have been serious. 151 Wn.2d at 52-53.

Despite K.J.'s uncertainty, the Supreme Court held Kilburn's statement was not a true threat. The court relied on K.J.'s and Kilburn's past history and relationship, his treatment of her in the past, the regularity of Kilburn joking with her and others, and his giggling or laughter as he made the comments, and acting like he may have been joking to find it would be "difficult to conclude that [Kilburn] would reasonably foresee his comments being taken seriously." Kilburn, 151 Wn.2d at 53.

Similarly, the Corbins had been married 10 years and their marriage was difficult. Denise said the couple sometimes exchanged 300 texts in a day. She said Corbin often sent sarcastic messages that she responded to in kind. RP 409-10. Denise admitted she and Corbin "argued via text messaging, and this is one of the bad times we argued via text messaging. But I think I did say a lot of things to get under his skin because I was angry at him." RP 412. She also said Corbin had texted her in the past stating he was going to assault her. RP 420. She agreed the text message exchange was fairly typical. Id.

In harassment cases, evidence of the victim's subjective fear is a necessary but not sufficient component of the prosecution's proof. State v. Alvarez, 74 Wn. App. 250, 260–61, 872 P.2d 1123 (1994), aff'd., 128 Wn.2d 1 (1995). Here the State failed to show Denise subjectively feared that Corbin would kill her. The State thus failed to prove Corbin's threats to kill constituted true threats. This Court should reverse his convictions and remand for the lesser degree conviction of misdemeanor cyberstalking because the trial court gave the jury the lesser degree instructions. CP 258-59 (instructions 20-21); State v. Heidari, 174 Wn.2d 288, 294, 274 P.3d 366 (2012).

2. THE SENTENCES EXCEED THE STATUTORY MAXIMUM TERMS FOR THE CRIMES.

First degree assault is a class A felony. RCW 9A.36.011. An attempt to commit a class A felony is treated as a class B felony. RCW 9A.28.020(3)(b). The statutory maximum term for a class B felony is 120 months. RCW 9A.20.021(1)(b). Felony cyberstalking is a class C felony, punishable by a maximum term of 60 months. RCW 9.61.260(3)(b); RCW 9A.20.021(1)(c).

The trial court imposed the statutory maximum for each crime. CP 325. The court also imposed 36 months of community custody for the attempt to commit first degree assault. The sentences thus exceed the

statutory maximum. This court must therefore remand for resentencing to remove the community custody term and all accompanying conditions. RCW 9.94A.701(9); State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

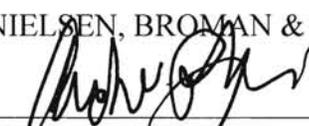
D. CONCLUSION

The State failed to prove Corbin committed felony cyberstalking. Furthermore, the court exceeded its statutory sentencing authority by imposing sentences that exceeded the statutory maximums. This Court should remand for dismissal of the felony cyberstalking convictions with prejudice and remand for the lesser degree offense of misdemeanor cyberstalking and for correction of the sentences.

DATED this 17 day of June, 2014.

Respectfully submitted,

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\_\_\_\_\_  
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JUN 17 2014  
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## APPENDIX

No. 17

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person; or to cause physical damage to the property of a person other than the actor; or to do any act that is intended to harm substantially the person threatened or another with respect to that person's health, safety, business, financial condition, or personal relationships.

To be a threat, a statement or act must occur in the 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.

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
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v.	)	COA NO. 71309-4-I
	)	
D'ANDRE CORBIN,	)	
	)	
Appellant.	)	

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**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 4<sup>TH</sup> DAY OF JUNE 2014, 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 AND/OR VIA EMAIL.

[X] D'ANDRE CORBIN  
DOC NO. 804264  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
FORKS, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 4<sup>TH</sup> DAY OF JUNE 2014.

X *Patrick Mayovsky*