

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 4

ARGUMENT..... 6

**The trial court’s instructions relieved the state of its burden to
prove a “true threat.” 6**

CONCLUSION 9

TABLE OF AUTHORITIES

FEDERAL CASES

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 6

Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35
(1999)..... 7

WASHINGTON CASES

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 7

State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003)..... 6

State v. Gonzales Flores, 164 Wn.2d 1, 186 P.3d 1038 (2008)..... 7

State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006)..... 7, 8, 9

State v. Lorenz, 152 Wn.2d 22, 93 P.3d 133 (2004)..... 6

State v. Randhawa, 133 Wn.2d 67, 941 P.2d 661 (1997) 6

State v. Seek, 109 Wn. App. 876, 37 P.3d 339 (2002)..... 7, 8

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) 6

State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001)..... 6

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV 6

Wash. Const. Article I, Section 3..... 6

WASHINGTON STATUTES

RCW 9.61.160 7

ASSIGNMENTS OF ERROR

1. The court's instructions allowed conviction without proof of all essential elements.
2. The court's instructions relieved the state of its burden to prove a "true threat."
3. The trial court failed to instruct the jury on the proper legal standard for distinguishing "true threats" from "idle talk."
4. The court's instructions did not require the jury to examine the context and circumstances under which the statements were made.
5. The court's instructions did not require the jury to evaluate Mr. Miller's statements using a reasonable person standard.
6. The court's instructions allowed the jury to convict Mr. Miller even if his statements were protected speech.
7. The trial court erred by giving Instruction No. 4, which reads as follows:

A person commits the crime of threatening to bomb or injure property when he threatens to bomb or otherwise injure any place of public assembly, or any government property, or any other building or structure, or a common carrier.

Supp. CP, Court's Instructions to the Jury, No. 4.

8. The trial court erred by giving Instruction No. 5, which reads as follows:

To convict the defendant Astro Miller of threatening to bomb or injure property, each of the follow elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about February 9, 2008, Mr. Astro Miler, threatened to bomb or otherwise injure a place of any public assembly, any governmental property, or any other building, common carrier, or structure; and
- (2) That the act occurred in the State of Washington.

If you find from the evidence that elements 1 and 2 have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighting all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.
Supp. CP, Court's Instructions to the Jury, No. 5.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

To convict a person of “Threats to Bomb or Injure Property,” the state must prove beyond a reasonable doubt that the accused person made a “true threat.” The court’s instructions omitted this requirement. Did the court’s instructions relieve the state of its burden to prove all essential elements of the offense? Assignments of Error Nos. 1-6.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Astro Miller called 911, using two payphones by the Aberdeen transit mall. He made the following statements to the operator, spread out among several calls:

Yeah, three seconds this fuckin' bus station is gonna blow up...
... You'd better send them now because I'm goin' to fuckin' blow this up right now.
Exhibit 2, pp. 1, 2, Supp. CP.

The operator described his voice as "gravelly," and said it "[s]ounded almost as if had [sic] been drinking." Exhibit 2 p. 1, Supp. CP. The operator told an officer the call was sufficient for a false reporting charge. Exhibit 2 (Attachment p. 1), Supp. CP; *see also* RP (3/24/08) 5.

The officer observed Mr. Miller dialing and speaking into the phone, approached him, and asked him if he had any explosives. Mr. Miller responded, "That's for me to know." RP (4/8/08) 41.

The officer noticed that Mr. Miller smelled strongly of alcohol. RP (4/8/08) 43. It was cold and raining hard, and Mr. Miller wore an old army jacket over many layers of clothing. RP (4/8/08) 42-43. After arresting him, the officer asked Mr. Miller if he'd made the call just to get a place to stay. RP (4/8/08) 46.

Mr. Miller was charged with Threats to Bomb or Injure Property. CP 1. At his jury trial, the court defined the charge as follows:

A person commits the crime of threatening to bomb or injure property when he threatens to bomb or otherwise injure any place of public assembly, or any government property, or any other building or structure, or a common carrier.
Supp. CP, Court's Instructions to the Jury, No. 4.

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

To convict the defendant Astro Miller of threatening to bomb or injure property, each of the follow elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about February 9, 2008, Mr. Astro Miler, threatened to bomb or otherwise injure a place of any public assembly, any governmental property, or any other building, common carrier, or structure; and
- (2) That the act occurred in the State of Washington.

If you find from the evidence that elements 1 and 2 have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighting all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.
Supp. CP, Court's Instructions to the Jury, No. 5.

None of the court's instructions mentioned the phrase "true threat."

Nor did the court tell the jury that the state was required to prove beyond a reasonable doubt that Mr. Miller's statements were made in a context or under such circumstances wherein a reasonable person would foresee that the statements would be interpreted as a serious expression of an intention to inflict damage. Court's Instructions, Supp. CP.

Mr. Miller was convicted and sentenced to more than a year in prison. CP 6. He timely appealed. CP 11.

ARGUMENT

THE TRIAL COURT’S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE A “TRUE THREAT.”

Due process bars conviction of a crime absent proof beyond a reasonable doubt of every essential element. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); Wash. Const. Article I, Section 3; *State v. Williams*, 144 Wn.2d 197, 26 P.3d 890 (2001). Jury instructions that relieve the state of its burden to prove every element violate due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997).

This rule applies with special force where “to convict” instructions are involved. A “to convict” instruction must, by itself, contain all the elements of the charged crime. *State v. Lorenz*, 152 Wn.2d 22 at 31, 93 P.3d 133 (2004). In a criminal case, the court’s “to convict” instruction serves as the yardstick by which the jury measures the evidence to determine an accused’s guilt or innocence. *Lorenz*, at 31. The jury has the right to regard the “to convict” instruction as a complete statement of the law. *Lorenz*.

The adequacy of a “to convict” instruction is reviewed *de novo*. *State v. DeRyke*, 149 Wn.2d 906 at 910, 73 P.3d 1000 (2003). If a

deficient “to convict” instruction relieves the state of its burden to establish every element, the appellant is entitled to automatic reversal, regardless of whether the error is prejudicial or harmless. *State v. Seek*, 109 Wn. App. 876 at 883, 37 P.3d 339 (2002).¹

RCW 9.61.160 criminalizes threats to bomb or injure property. Under the statute, it is “unlawful for any person to threaten to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy...”

To avoid First Amendment problems, the Supreme Court has construed RCW 9.61.160 to require proof of a “true threat.” *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006). A “true threat” is a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict damage. *Johnston*, at 360-361. The

¹ The only exception to this rule is where the element is uncontested. *State v. Brown*, 147 Wn.2d 330 at 340, 58 P.3d 889 (2002), citing *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). If the element is conceded, the reviewing court must still apply the stringent constitutional harmless error test. *Brown*, at 339-340. Under that test, error is presumed to be prejudicial; to overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *State v. Gonzales Flores*, 164 Wn.2d 1 at ___, 186 P.3d 1038 (2008); *Brown*, at 341.

standard is an objective one, focused on the speaker, and requiring the factfinder to distinguish between serious threats and those made in jest, during idle talk, or as political argument. *Johnston*, at 361. The trial court is required to instruct the jury on the state's burden to prove a "true threat," and to define the phrase "true threat" using the objective test outlined above. *Johnston, supra*.

In this case, the "to convict" instruction did not require the state to prove a "true threat." Instruction No. 5, Supp. CP. The deficiency was not corrected by any of the court's other instructions. Court's Instructions, Supp. CP. Nor did the court instruct the jury on the definition of "true threat," using the objective test outlined in *Johnston, supra*. As a result, the jury was not asked to examine the context, circumstances, or perceived seriousness of Mr. Miller's statements; nor were they told to apply a "reasonable person" standard to determine whether these factors merited classifying his statements as a "true threat."

Because the omission relieved the state of its burden to establish an essential element, automatic reversal is required. *Seek, supra*. Mr. Miller's conviction must be reversed and the case remanded to the superior court for a new trial. *Johnston, supra*.

CONCLUSION

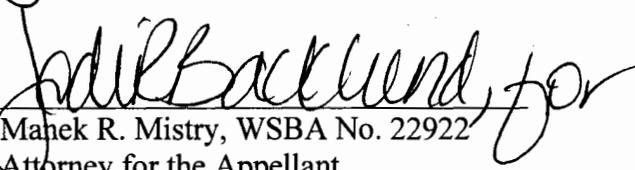
Mr. Miller's conviction must be reversed and the case remanded for a new trial. Upon retrial, the court must include the "true threat" element in the "to convict" instruction, and must define "true threat" using the objective test outlined in *Johnston, supra*.

Respectfully submitted on September 26, 2008.

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BY [Signature]
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Astro Miller, DOC #747444
Washington Corrections Center
P. O. Box 900
Shelton, WA 98584

and to:

Grays Harbor Prosecuting Attorney
102 West Broadway, #102
Montesano, WA 98563

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 26, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 26, 2008.

[Signature]
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