

NO. 42496-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

STEPHEN BLAIR CLARK,

Appellant.

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

The Honorable Russell W. Hartman, Judge

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BRIEF OF APPELLANT

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CATHERINE E. GLINSKI  
Attorney for Appellant

CATHERINE E. GLINSKI  
Attorney at Law  
P.O. Box 761  
Manchester, WA 98353  
(360) 876-2736

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A. ASSIGNMENT OF ERROR

The court's refusal to instruct the jury on the definition of true threat failed to ensure that appellant's First Amendment rights were protected.

Issue pertaining to assignment of error

The intimidating a witness statute makes it a crime to threaten a witness in an attempt to induce that witness not to report information relevant to a criminal investigation. Because this statute criminalizes speech, appellant requested an instruction requiring the jury to find a "true threat" in order to convict, but the court refused to give the instruction. Where the court's instructions permitted the jury to convict appellant based on constitutionally protected speech, is reversal required?

B. STATEMENT OF THE CASE

1. Procedural History

On January 21, 2011, the Kitsap County Prosecuting Attorney charged appellant Stephen Clark with one count of tampering with a witness. CP 1-6. The charge was later amended to intimidating a witness, and a count of bail jumping was added. CP 6-9; RCW 9A.72.110; RCW 9A.76.170. The case proceeded to jury trial before the Honorable Russell W. Hartman, and the jury returned guilty verdicts. CP 70. The court

imposed a standard range sentence, and Clark filed this timely appeal. CP 131-32, 141.

2. Substantive Facts

On the evening of January 5, 2011, Jeffrey Rimack heard a car engine revving as it passed his house. He looked outside and saw the car run through a stop sign, break through a neighbor's fence, and crash into the front door. 3RP<sup>1</sup> 16. He went outside to investigate and was joined by a group of six to eight neighbors, including Veronica Reczek, who was on the phone with 911. 3RP 16-17, 24, 40-41.

The front end of the car was crumpled, and the driver's door would not open, so both the passenger and the driver came out of the passenger side of the car. 3RP 17. The driver ran off immediately. 3RP 24, 46, 81. The passenger, later identified as Stephen Clark, had his hand to his head and appeared bewildered. 3RP 20, 23. He was stumbling, wandering around, and mumbling to himself. He smelled of alcohol and was obviously intoxicated. 3RP 17-18, 20, 46.

Clark began talking to the neighbors who had gathered, asking them to help him move the car so they would not get in trouble. 3RP 20, 42. He seemed frustrated when they refused to help. 3RP 26. When he

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<sup>1</sup> The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—7/12/11; 2RP—7/13/11; 3RP—7/18/11; 4RP 7/19/11; 5RP—8/5/11.

learned that Reczek had called 911, he asked her not to call the cops, saying something like “snitches are bitches, snitches get stitches” or “snitches get stitches, bitch.” 3RP 18, 43. Clark made this comment one time, in a raised voice. 3RP 27. He did not raise a fist, and he did not appear angry; he just seemed upset about the whole situation. 3RP 25, 48. After making the comment, Clark stood about five feet away from the group of neighbors and called his wife. 3RP 26, 47.

Rimack was not concerned by Clark’s comment because he is much larger than Clark, Clark was obviously intoxicated, and the neighbors had Clark outnumbered. 3RP 19-20. He did not feel threatened, but he felt the statement implied a threat. 3RP 27. Reczek took Clark’s comment to mean that he did not want her on the phone with police and she would be hurt if she continued to talk to law enforcement. 3RP 43, 50. Clark’s comment made Reczek a little nervous, but she was not too worried because Rimack was there. 3RP 43.

Clark testified at trial that he had been drinking with a friend on the night in question. He had too much to drink and was intoxicated, and he fell asleep in the car as his friend was driving home. 3RP 78-79. The next thing he was aware of was his head bouncing off the dashboard of the car. 3RP 79. When he got out of the car, he saw that it was in a house.

He was surprised and bewildered. 3RP 80. His memory after that is spotty. 3RP 80.

Because the driver of the car had run off, Clark was afraid people would think he had been driving. 3RP 81. He remembered that he wanted to avoid trouble with the police. He also remembered that people were gathered around, but he did not remember what he said to them or asking for help moving the car. 3RP 82. Clark had no recollection of making the “snitches” comment, although he had no reason to doubt the witnesses who testified about it. 3RP 82-83. He assumed he must have heard the phrase in a movie or on television, but he had never said it before that night. 3RP 82. Clark testified that he was not trying to hurt or scare anyone; he just said something stupid when he was drunk, and he was embarrassed about the whole situation. 3RP 83.

C. ARGUMENT

THE COURT’S FAILURE TO ENSURE THAT CLARK WOULD BE CONVICTED ONLY IF THE JURY FOUND HE MADE A TRUE THREAT REQUIRES REVERSAL.

Clark was charged with intimidating a witness, which required the State to prove he threatened a current or prospective witness in an attempt to induce that person not to report information relevant to a criminal investigation or not to give complete or truthful information. CP 7-9; RCW 9A.72.110. Because the jury instructions did not ensure that Clark

would be convicted only if the jury found he made a “true threat,” Clark’s conviction of intimidating a witness must be reversed.

The First Amendment prohibits government interference with speech or expressive conduct. U.S. Const., amend I; Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503-04, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). State v. Brown, 137 Wn. App. 587, 591, 154 P.3d 302 (2007). Some types of speech are excluded from First Amendment protection, however, and a statute that criminalizes pure speech must be limited to unprotected speech. Watts v. United States, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); State v. Schaler, 169 Wn.2d 274, 282, 236 P.3d 858 (2010). While a threat is a form of pure speech, “true threats” are one type of unprotected speech. State v. Tellez, 141 Wn. App. 479, 482, 170 P.3d 75 (2007). 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.” Schaler, 169 Wn.2d at 282-83 (quoting State v. Kilburn, 151 Wn.2d 36, 42-43, 84 P.3d 1215 (2004)).

Importantly, only threats that are true threats may be criminalized. “The First Amendment prohibits the State from criminalizing communications that bear the wording of threats but which are in fact

merely jokes, idle talk, or hyperbole.” Schaler, 169 Wn.2d at 283. Thus, a statute which proscribes threats passes constitutional muster only if it is limited in application to cases involving true threats. Schaler, 169 Wn.2d at 287; see also Watts, 394 U.S. at 707-08 (statute criminalizing threats against President of the United States must be interpreted with commands of First Amendment in mind, requiring government to prove true threat).

Whether a true threat has been made is determined under an objective standard focused on the speaker, in light of the entire context of the statement. The relevant question is whether a reasonable person in the defendant’s position would foresee that the listener would interpret the statement as a threat. Kilburn, 151 Wn.2d at 44-46. This is a question for the trier of fact. State v. Johnston, 156 Wn.2d 355, 365, 127 P.3d 707 (2006). Thus, in order to protect the defendant’s First Amendment rights, the court’s jury instructions must set forth the true threat standard. Instructions which allow the jury to convict on anything less than a true threat amount to constitutional error. Schaler, 169 Wn.2d at 287 (in felony harassment case, instructions that did not comply with true threat requirement allowed jury to convict based on protected speech).

In this case, the defense proposed an instruction which included the definition of true threat:

As used in these instructions, threat means to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time. Threat also means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.

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 44.

The trial court denied the requested instruction, determining that a true threat analysis is not required for a conviction of intimidating a witness. 3RP 106. It omitted the true threat definition from the instruction. CP 58<sup>2</sup>.

Both instructional errors based on legal rulings and constitutional questions are reviewed de novo. Schaler, 169 Wn.2d at 282. In addition, the appellate court conducts an independent review of the record in First Amendment cases to ensure that the judgment does not constitute an infringement on the right of free expression. Schaler, 169 Wn.2d at 282 (citing Kilburn, 151 Wn.2d at 49–50).

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<sup>2</sup> Instruction No. 9 provides as follows:

As used in these instructions, threat means to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time. Threat also means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.

CP 58.

In ruling that a true threat instruction was not necessary, the trial court relied on Division Three's decision in State v. King, 135 Wn. App. 662, 145 P.3d 1224 (2006), review denied, 161 Wn.2d 1017 (2007). King was wrongly decided, and this Court should refuse to follow it.

In King, the court reasoned that the language of the intimidating a witness statute limits the speech and context to which it applies, making a true threat instruction unnecessary. The King Court felt that because the statute requires the State to prove that the defendant communicated an intent to harm a witness, there was no danger of convicting a defendant based on protected speech. King, 135 Wn. App. at 669-72.

What the King Court failed to consider, however, was that even statements regarding an intent to harm a witness can be made in jest or amount to mere idle talk or hyperbole. Unless a reasonable person in the speaker's position would foresee that the statement would be taken seriously, the statement is protected speech and cannot result in a criminal conviction. See Schaler, 169 Wn.2d at 283 ("Importantly, only threats that are 'true' may be proscribed. The First Amendment prohibits the State from criminalizing communications that bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole."); see also Johnston, 156 Wn.2d at 364 (bomb threat statute must be limited by jury

instructions so as to apply only to true threats); Brown, 137 Wn. App. at 591-92 (true threat analysis applied in intimidating a judge case).

Here, the jury was not instructed regarding the objective standard required by the First Amendment. As a result, none of the instructions required the jury to examine the context, circumstances, or perceived seriousness of Clark's statement. Nothing in the instructions conveyed the requirement that Clark's statement constituted a true threat. The jury was permitted to convict even if it thought Clark's statement was a "joke[], idle talk, or hyperbole." See Schaler, 169 Wn.2d at 283. Because the instructions did not comply with the true threat requirement of the First Amendment, they allowed the jury to convict Clark based on protected speech.

This constitutional error requires reversal unless the State shows the error was harmless beyond a reasonable doubt. A constitutional error is harmless only when it is clear the error did not contribute to the verdict. Schaler, 169 Wn.2d at 288. Where the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds, the error is not harmless, and reversal is required. Id.; see also Johnston, 156 Wn.2d at 364-65 (error not harmless because jury could have convicted on basis that defendant merely said the words of a threat).

Here, it is not possible to determine whether the jury found Clark's statement to constitute a true threat. While there was evidence that Clark's statement implied Reczek would get hurt if she continued talking to the police, the jury could have found from the context that his words were not a true threat. Clark was clearly intoxicated, injured, bewildered, and stumbling about when he made the statement. 3RP 18, 23, 46. He raised his voice but did not seem angry and made no threatening gestures, and he did not come closer than two to three feet from Reczek. 3RP 25, 27, 48. He made the comment only once and then stepped aside and called his wife. 3RP 47, 49. Moreover, he made the comment while surrounded by six to eight people, one of whom was 6'5" tall and 270 pounds. 3RP 24, 27. Given these circumstances, the jury could have found that a reasonable person in Clark's position would not foresee that his comment about snitches would be taken seriously.

While the jury could have concluded that Clark's comment was a true threat, it could also have concluded that the comment was merely idle talk or a bad joke by a clearly intoxicated man. On this record, the court's refusal to give the proposed instruction defining true threat was not harmless, and Clark's conviction must be reversed. See Schaler, 169 Wn.2d at 289-90.

D. CONCLUSION

By refusing the proposed true threat instruction, the court failed to ensure that Clark was not convicted based on constitutionally protected speech. Clark's conviction of intimidating a witness must therefore be reversed.

DATED this 30<sup>th</sup> day of January, 2012.

Respectfully submitted,



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CATHERINE E. GLINSKI  
WSBA No. 20260  
Attorney for Appellant

Certification of Service

Today I delivered a copy of the Brief of Appellant in *State v. Stephen Blair*

*Clark*, Cause No. 42496-7-II, directed to:

Via US Mail to:  
Stephen Blair Clark, DOC# 878168  
Washington State Penitentiary  
1313 N 13<sup>th</sup> Ave  
Walla Walla, WA 99362

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Port Orchard, WA  
January 30, 2012

# GLINSKI LAW OFFICE

**January 30, 2012 - 10:33 AM**

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