

FILED

JUL 25 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29580-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHANIE STRONG,

Appellant.

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney of Appellant

WASHINGTON APPELLATE PROJECT
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A. ASSIGNMENTS OF ERROR

1. Stephanie Strong's conviction for second degree extortion violates the First Amendment.

2. In the absence of sufficient evidence, Ms. Strong's conviction deprived her of due process.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Where a criminal statute reaches protected speech, the State must establish beyond a reasonable doubt that the speech at issue falls outside a protected category. Where the State did not prove beyond a reasonable doubt that Ms. Strong's speech was unprotected, did the State present sufficient evidence to support her conviction for second degree extortion?

C. STATEMENT OF THE CASE

Velven York was employed as a guard at the Spokane County Jail. RP 161-62. While employed as a guard, Mr. York began at least two inappropriate relationships with female inmates confined in the jail, one of whom was Ms. Strong. RP 191-92 Ms. Strong was subsequently transferred to a federal detention facility to serve her sentence. RP 164-65. While there, Mr. York sent her letters and maintained contact with her family. RP 165.

When Ms. Strong returned to Spokane to complete her sentence in a federal work-release facility, Mr. York renewed his contact with her. Mr. York would drive Ms. Strong to counseling appointments and buy her dinner during the trip. RP 168. Mr. York paid off more than \$2,000 in fines, so that Ms. Strong could get her driver's license reinstated. RP 170.

Mr. York received a telephone call on his cell phone in which the male caller said, "I know you're having girl troubles at work." RP 175. The caller then said "I want \$5,000," and hung up. RP 176.

Mr. York then called Ms. Strong and told her about the call. RP 176-77. The male caller called Mr. York a second time and explained that Mr. York should go to Dick's Hamburgers, purchase a hamburger, place the money in the hamburger bag and leave it by a designated trashcan. RP 179. Mr. York and Ms. Strong spoke by phone throughout the evening, and at one point Ms. Strong offered to pay the sum for Mr. York.

Mr. York contacted police the following day and disclosed the phone calls. RP 184. When he went to Dick's that afternoon, officers watched Mr. York purchase a burger and place the money in the bag near the designated garbage can and leave the parking

lot. RP188-90, RP 251-54. Officers watched as Douglas Mobley, Ms. Strong's boyfriend, walked to the trash can and picked up the bag. RP 253. Officers immediately arrested Mr. Mobley and found Ms. Strong behind a nearby building. RP 255

Ms. Strong was charged with second degree extortion. CP 154. A jury convicted her as charged. CP 73, 151.

Because his relationship with former inmates violated jail policies, Mr. York resigned in lieu of being fired from his job. RP 193.

D. ARGUMENT

BECAUSE THE STATE DID NOT PROVE MS. STRONG'S WORDS CONSTITUTED A "TRUE THREAT" OR OTHERWISE LACKED CONSTITUTIONAL PROTECTION, THERE IS INSUFFICIENT EVIDENCE TO SUPPORT HER CONVICTION.

1. Due process requires the State prove each element of an offense beyond a reasonable doubt. The State is required to prove each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Evidence is sufficient only if in the light most favorable to the prosecution, a rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Green, 94 Wn.2d at 221.

2. Where a statute criminalizes speech, First Amendment concerns require the State prove the speech falls in a category of speech not protected by the First Amendment. The First Amendment to the United States Constitution and Article 1, section § 5 of the Washington Constitution prohibit the government from proscribing speech or expressive conduct. R.A.V. v. St. Paul, 505 U.S. 337, 112 S.Ct. 2538, 120 L.Ed.2d 305, 317 (1992); Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). When analyzing a statute for overbreadth, the key determination is "whether the enactment reaches a substantial amount of constitutionally protected conduct." Huff, 111 Wn.2d at 925.

This standard is very high and speech will be protected unless shown likely to produce a clear and present danger of a serious substantive evil that rises above public inconvenience, annoyance, or unrest.

City of Bellevue v. Lorang, 140 Wn.2d 19, 26-27, 992 P.2d 496 (2000) (quoting City of Houston v. Hill, 482 451, 461, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987))

Threats are a form of pure speech. State v. Williams, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). Thus, any statute which seeks to criminalize threats “must be interpreted with the commands of the First Amendment clearly in mind.” Id. at 207 (citing Watts v. United States, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed. 664 (1969)). Where a sufficiency challenge turns on whether the speech at issue is protected by the First Amendment, the reviewing court must conduct an independent review of the record. State v. Kilburn, 151 Wn.2d 36, 52, 84 P.3d 1215 (2004).

3. Ms. Strong’s words were protected speech and thus cannot support a conviction of extortion. RCW 9A.56.110 provides "Extortion" means knowingly to obtain or attempt to obtain by threat property or services of the owner, and specifically includes sexual favors. A person commits extortion in the second degree “if he or she commits extortion by means of a wrongful threat as defined in RCW 9A.04.110(25) (d) through (j).” RCW 9A.04.110(27) provides in relevant part:

"Threat" means to communicate, directly or indirectly the intent:

- ...
- (f) To reveal any information sought to be concealed by the person threatened; or
- ...

(j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships

. . . .

A regulation of speech in a traditional public forum must be a valid, narrowly drawn, time, place, and manner restriction which is content-neutral. Huff, 111 Wn.2d at 926. By contrast, speech may be prohibited in a non-public forum if “the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.” Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); Huff, 111 Wn.2d at 927. The extortion statutes do not limit themselves to non-public forums, and thus may only limit speech to the extent it is a narrowly drawn time, place and manner restriction which is content neutral. The provisions of RCW 9A.04.110(25) relevant to this case are not content neutral but instead specifically focuses upon the content of the threat. Nor are the extortion statutes merely time, place or manner restrictions, as they contain no such limitation.

[T]here are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend because they “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that

any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). These categories of unprotected speech include libel, fighting words, incitement to riot, obscenity, child pornography, and “true threats.” Kilburn, 151 Wn.2d at 43.

A threat remains constitutionally protected unless the State proves it is a “true threat.” Kilburn, 151 Wn.2d at 43. 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 an intention to inflict bodily harm upon or to take the life of [another individual].

State v. Johnston, 156 Wn.2d 355, 360-61, 127 P.3d 707 (2006)

(Bracketed text in original, citations omitted).

Here, there is no evidence that Ms. Strong threatened any bodily harm to Mr. York. Nor is there any evidence that the “threat” sought to incite a breach of the peace or that it constituted fighting words. There is plainly no evidence that it involved obscenity or child pornography. Finally, the “threat” was not libelous, as Mr. York himself admitted the truth of the allegations. Thus, Ms.

Strong's "threat" did not fall into an unprotected category of speech and remained protected speech.

In State v. Pauling, the Court addressed a challenge that the extortion statute was unconstitutionally overbroad because it did not require that the threat be "wrongful." 149 Wn.2d 381, 69 P.3d 331(2003). The Court agreed such a limitation was necessary. Id. at 389.¹ Borrowing from the reasoning of United States v. Jackson, 180 F.3d 55 (2nd Cir. 1999), the court found a threat is "inherently wrongful, [where the] threat [] has no nexus to a claim of right." Pauling, 149 Wn.2d at 390-91.

Because it was not presented to the Court, Pauling did not address the question presented here, however, whether otherwise constitutionally protected speech may result in a criminal conviction simply because it seeks something to which the speaker does not have a claim of right.

Ms. Strong could have lawfully reported Mr. York's improper behavior to jail supervisors, a news reporter, or to anyone at all. Similarly, Mr. York could lawfully have offered to pay Ms. Strong any sum of money not to disclose the conduct - such as a politician

¹ Following the Court of Appeals' opinion in Pauling, but before the Supreme Court's, the Legislature amended RCW 9A.56.130 to require a "wrongful threat" to establish second degree extortion. Laws 2002 ch. 47.

making payments to the mother of a child born as a result of an extramarital affair. Civil suits are often resolved with a payment in turn for an agreement not to disclose details of the settlement. Civil suits, too, are often initiated with a demand letter seeking payment in return for an agreement not to sue. The potential plaintiff may have good faith belief that she will succeed with a suit, but she still does not have a claim of right to any of the potential defendant's property or services. If a threat is wrongful where the person does not have claim of right to the property sought, the demand letter in this hypothetical civil case constitutes extortion.

The constitutional problem which was not addressed by and remains after Pauling, is that the words themselves, the threat, may nonetheless be constitutionally protected speech. Threats so long as they are not libelous, do not create a real and present danger of a breach of the peace and do not constitute a true threat. Thus, regardless of whether one has a claim of right to the property sought, so long as the threat is constitutionally protected speech, the person cannot be criminally sanctioned.

The extortion statute does not limit itself to unprotected speech. Indeed, the supposed threats in the present case are protected speech - they were not libelous but true; they did not

threaten an immediate breach of the peace, and did not constitute a true threat of physical harm. That fact is not changed regardless of whether Ms. Strong had a claim of right in the property sought.

Ms. Strong's threat was to reveal a public-safety employee's violation of policy. The State's evidence does not establish those words created a "serious substantive evil that rises above public inconvenience, annoyance, or unrest." Lorang, 140 Wn.2d at 26-27.

That speech may be embarrassing to another is not a sufficient basis for criminally sanctioning it. John Edwards undoubtedly hoped news of his infidelity would not be revealed because it would embarrass him and certainly damaged his professional, and thus economic, aspirations. But the media could not be sanctioned for revealing the information nor for threatening to do so.

African Americans living in an isolated rural community in Mississippi may have justifiably feared harm when civil rights leader Charles Evers declared he would break the neck of any person found entering a boycotted business, regardless of Mr. Evers's intent to actually follow through. And that threat was plainly intended to cause financial harm to the business owners if they did

not alter their practices. However, the Supreme Court held such speech to be protected. N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 902, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). But under RCW 9A.56.110, Mr. Evers's comment would constitute extortion. If speech such as that in Claiborne is sanctionable, the statute is unconstitutionally overbroad.

That Mr. York found the revelation of his conduct embarrassing or that it led to his dismissal from his job does not change the constitutionally-protected nature of the speech. The fact is, Mr. York was dismissed because the allegations were true and demonstrated a clear violations of jail policies. Mr. York's desire to suppress that information does not override First Amendment protections.

Instead, to ensure they do not reach protected speech, the extortion statutes must require proof of a threat which is both wrongful and which falls into a category of unprotected speech. Thus, a threat to reveal false information damaging to a person's reputation -- libelous speech -- can constitutionally lead to a conviction for extortion. So too, prosecution for a threat to injure or physically harm a person is wholly permissible. In each instance

the speech is not constitutionally protected. But the statute cannot permit conviction for protected speech.

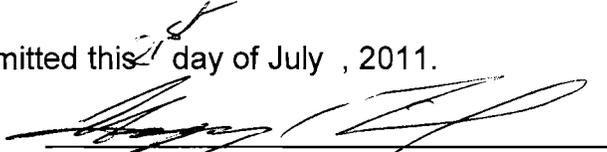
Because the State did not prove Ms. Strong's speech fell within a category of unprotected speech, her conviction must be reversed. Kilburn, 151 Wn.2d at 54.

4. The Court must dismiss Ms. Strong's conviction. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an added element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because the State failed to prove her speech was unprotected, the Court must reverse Ms. Strong's conviction.

E. CONCLUSION

For the reasons above, this Court must reverse and dismiss
Ms. Strong's conviction.

Respectfully submitted this 21st day of July , 2011.



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DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 29580-0-III
)	
STEPHANIE STRONG,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF JULY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF JULY, 2011.

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