

29580-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

STEPHANIE A. STRONG, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I.

APPELLANT'S 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.

II.

ISSUES PRESENTED

- A. ARE THERE ANY FIRST AMENDMENT ISSUES WHEN THE VICTIM DOES NOT MAKE ANY THREATS?
- B. WAS THERE SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD FIND THE DEFENDANT GUILTY AS CHARGED?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

The defendant's citations to Washington law include *City of Bellevue v. Lorang*, 140 Wn.2d 19, 30 n. 6, 992 P.2d 496 (2000), which is a case about telephone harassment, not extortion. The defendant also relies on *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006) which is a case about a bomb threat on an airplane. The defendant cites to *State v. Kilburn*, 151 Wn.2d 36, 84 P.3d 1215 (2004) which is a case involving harassment. The last Washington case cited was *State v. Williams*, 144 Wn.2d 197, 26 P.3d 890 (2001) which involved a direct physical and verbal threat demanding an employee's final paycheck. The case was decided on vagueness and "non-specific instructions" bases.

The defendant seems to be trying to steer an otherwise fairly simple case into the quagmire of First Amendment discussion. In order to justify the attempts at misdirecting this case, the defendant simply ignores the fact that there are no First Amendment issues involved in this case and proceeds as if there were.

On the stand, the defendant denied making the \$5000 demand to the victim. RP 420. By all accounts, the voice that made the demands was male. The defendant testified she was sure it was not her boyfriend's [Mobley] voice but she would not state who she thought the voice was

because of a prior bad experience in prison. RP 412. Thus, it can be fairly said that the defendant did not make statements to the victim that might invoke any constitutional issues. It was proved that the blackmailing calls came from the defendant's cell phone but it is unknown exactly who made the extortion calls. RP 418.

The defendant does not specify which statements she made that she now claims were violated by the State. This lack of specificity makes it impossible to formulate a response. Since there was no evidence that the defendant made the blackmailing calls to the victim, the defendant's First Amendment arguments cannot apply to something that does not exist. If the defendant is arguing that her conversations over the preceding months with the victim are protected speech, this line of argument is likewise irrelevant. The State certainly never argued that conversations between the defendant and the victim over getting rides, meeting for eating, etc. were not protected speech. The defendant's arguments are simply wide of the mark.

Equally far afield is the defendant's attempt to argue from a "true threat" position. Among other things argued by the defendant in connection with this approach is that the defendant did not threaten any bodily harm to the victim. Brf. of App. 7. As can be seen in the "to convict" instruction below, there is no element of bodily harm necessarily

involved in extortion. Again, the defendant appears to be purposely trying to drive the analysis in a nonsensical direction.

The only relevant criminal speech came when a caller demanded \$5000 from the victim.

Instruction # 8 reads in part:

(1) That on or about the 28th of June, 2010, the defendant knowingly obtained or attempted to obtain property or services of another by a wrongful threat;

(2) That such threat communicated, directly or indirectly, an intent

(a) to reveal any information sought to be concealed by the person threatened or

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

CP 67.

In addition to ignoring the *lack* of First Amendment issues, the defendant also ignores that the jury was instructed on accomplice liability.

Jury instruction #12 states in part:

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid means all assistance whether given by words, acts, encouragement, support or presence.

CP 71.

The accomplice liability issue is never mentioned by the defendant. This is odd in that the State's closing clearly stated that it was pursuing an accomplice theory. RP 456. There was overwhelming evidence that the defendant was an accomplice to this crime. The blackmailing phone calls came from her cell phone, the blackmailer knew details that could only have come from the defendant and additional other circumstantial evidence. The police watched as the defendant and her boyfriend got off a bus, walked towards Dick's Hamburgers and the pair split at "Frankie Doodles," with the defendant staying behind and watching her boyfriend make the pickup of the extorted money.

The defendant denied knowing anything about the crime, but the surrounding facts made those claims incredible and the jury heard the defendant's very extensive list of crimes of dishonesty.

The defendant discusses none of these issues but instead argues theories that are not connected to this case.

The Washington State Supreme Court discussed constitutional issues pertaining to extortion in *State v. Pauling*¹, 149 Wn.2d 381, 69 P.3d 331 (2003). Although *Pauling* dealt with a former version of the extortion statute, the case is instructive in the basic areas of First Amendment rights and extortion. The Court of Appeals in *Pauling* found the former extortion statute's language overbroad since the former statute did not require that a threat be "wrongful." The "wrongful" language is in the current version of the extortion statute.

Several items in *Pauling* are noteworthy. The presumption that statutes are constitutional is so powerful that the Court will only invalidate a statute if the Court is unable to define a limiting instruction that sufficiently controls the sweep of an otherwise overbroad statute. *Pauling, supra* at 389. The *Pauling* Court was able to sufficiently limit the scope of the extortion statute by inserting "lack of nexus" language into their threat discussion. *Id.* at 391. The *Pauling* Court cited to *U.S. v. Jackson*, 180 F.3d 55 C.A.2 (1999). The court in *Jackson* stated:

Where there is no plausible claim of right and the only leverage to force the payment of money resides in the threat, where actual disclosure would be counterproductive, and where compliance with the threatener's demands provides no assurance against additional demands based on

¹ The defendant briefly discusses *Pauling* but does not put the case in her table of authorities.

renewed threats of disclosure, we regard a threat to reputation as inherently wrongful.

U.S. v. Jackson, 180 F.3d 55, 71, C.A.2 (1999).

Using the logic of *Jackson*, the *Pauling* Court used “lack of nexus” to define one form of “wrongful.” *Pauling, supra* at 391. By the holdings in both *Jackson* and *Pauling*, an extortion threat in which the defendant has no nexus to the item being extorted, is inherently wrongful.

In this case the defendant had no possible claim of right to the victim’s \$5000. She and her accomplice[s] simply undertook a classic extortion of the victim.

A. THERE WAS AMPLE EVIDENCE TO SUPPORT THE DEFENDANT’S CONVICTION.

The defendant doggedly insists that the State did not prove that the defendant’s speech was unprotected. The problem is that the defendant does not state which speech the State did not prove was “unprotected.” If the defendant had informed both this court and the State as to which speech the defendant was contesting, a cogent answer might have been possible. It is not the State’s job in a response brief to formulate the defendant’s arguments.

In any event, there was more than ample evidence from which the jury could have reached a verdict. "There is sufficient proof of an element

of a crime to support a jury's verdict when, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that element beyond a reasonable doubt." *State v. Bright*, 129 Wn.2d 257, 266 n.30, 916 P.2d 922 (1996). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

As noted previously, the extortion phone calls came from the defendant's cell phone, the caller knew things that could only have come from conversations between the defendant and the victim. The defendant went to the money "pick up" location and watched as her boyfriend went and picked up the proper bag from the instructed location. There is zero doubt that an extortion took place. While the defendant denied being a

part of the extortion, the circumstantial evidence told a different story.

There was no error.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 12th day of September, 2011.

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A handwritten signature in black ink, appearing to read "Andrew J. Metts", is written over a horizontal line.

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DIVISION III

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 Respondent,) NO. 29580-0-III
 v.)
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STEPHANIE A. STRONG,)
)
 Appellant,)

I certify under penalty of perjury under the laws of the State of Washington, that on September 13, 2011, I mailed a copy of the Respondent's Brief in this matter, addressed to:

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9/13/2011
(Date)

Spokane, WA
(Place)

Kathleen A. Owens
(Signature)