

NO. 32719-1-III

FILED
September 8, 2015
Court of Appeals
Division III
State of Washington

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON,

Respondent,

v.

NOLAND ASHLEY DOMINGUEZ,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. *Does Washington’s decision to follow the majority rule for intent of the speaker in defining true threat make the harassment statute unconstitutionally vague?***
- B. *Assuming the minority interpretation of Virginia v. Black is accepted contrary to Washington case law, does the true threat definition encompass a substantial amount of protected speech?***
- C. *Did the trial court abuse its discretion to allow evidence regarding a previous threat from the defendant against the victim that referenced a previous assault when the trial court gave an unobjected to limiting instruction and it was relevant to prove the element of fear of the victim?***
- D. *Did the State present sufficient evidence to conclude the victim’s fear was objectively reasonable?***
- E. *Does cumulative error demand a new trial?***

II. STATEMENT OF THE CASE

In 2006, Gerardo “Junior” Medel (Mr. Medel) had his eye gouged out by Manny Benavidez. Report of Proceedings (RP) 215. In 2013, Mr. Medel lived next door to appellant Noland Dominguez (Mr. Dominguez). RP 215-217. On June 5, 2013 Dominguez got mad at Medel, presumably for calling the police about his driving. *Id.* On that day, Mr. Dominguez was hanging out the passenger window of his Jeep as he drove by Mr. Medel’s house, calling Mr. Medel a snitch and threatening to “blast” him. RP 217. Once on his own property, Mr. Dominguez got out of his Jeep

and moved aggressively towards Mr. Medel, yelling threats of violence, including threats to kill Mr. Medel. RP 218. Mr. Dominguez had to be restrained by his family members to keep him from coming into Mr. Medel's yard. *Id.*, RP 241, 276, 303. Mr. Medel was afraid Mr. Dominguez would kill him or his family. RP 219.

This was not the first time Mr. Dominguez had threatened Mr. Medel. About six months earlier, in December 2012, Mr. Dominguez had told Mr. Medel he was going to shove a screwdriver into his remaining right eye and blind him like Manny Benavidez did. RP 220. Mr. Dominguez admitted to Moses Lake Police Sgt. Brian Jones that he had made this threat. RP 269. Dominguez also said he would have broken a flower pot over Mr. Medel's head, but that he changed his mind when Mr. Medel pulled out brass knuckles. RP 270. Mr. Dominguez made numerous threats against Mr. Medel and his family. Mr. Medel took the threats seriously. *Id.*

III. ARGUMENT

A. The harassment statute is not unconstitutionally vague.

1. The minority view of *Virginia v. Black* is not controlling in Washington.

Mr. Dominguez makes a facial attack on the harassment statute by adopting the minority interpretation of *Virginia v. Black*, 538 U.S. 343,

359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). However, the Washington Supreme Court has already accepted the majority rule, rejecting Mr. Dominguez’s argument that *Black* defined “true threat” as a statement the speaker intended the hearer to take seriously, (subjective test), rather than an intentional utterance a reasonable person would take seriously, (objective test). *State v. Schaler*, 169 Wn.2d 274, 236 P.3d 858 (2010); *State v. Johnston*, 156 Wn.2d 355, 360, 127 P.3d 707 (2006) (“We have adopted an objective standard for determining what constitutes a true threat.”)

It is true that the Washington Supreme Court’s interpretation of *Black* is not universally accepted across the various state and federal jurisdictions of the United States. *United States v. Elonis*, 730 F.3d 321, 330-31 (3rd Cir. 2013) (concurring with the holdings in *Johnston* and *Schaler*, but noting a circuit split among federal courts).¹ However, until

¹ State opinions supporting the objective test: *Citizen Publ’g Co. v. Miller*, 115 P.3d 107, 114 (Ariz. 2005); *Jones v. State*, 64 S.W.3d 728, 736 (Ark. 2002); *People v. Lowery*, 257 P.3d 72, 74 (Cal. 2011); *People v. Baer*, 973 P.2d 1225, 1231 (Colo. 1999); *State v. Moulton*, 78 A.3d 55 (Conn. 2013); *Carrell v. United States*, 80 A.3d 163, 170 (D.C. 2013); *State v. Valdivia*, 24 P.3d 661, 671-672 (Haw. 2001); *State v. Soboroff*, 798 N.W.2d 1, 2 (Iowa 2011); *State ex rel. RT*, 781 So. 2d 1239, 1245-1246 (La. 2001); *Hearn v. State*, 3 So. 3d 722, 739 (Miss. 2008); *State v. Lance*, 721 P.2d 1258, 1266-1267 (Mont. 1986); *State v. Curtis*, 748 N.W.2d 709, 712 (N.D. 2008); *State v. Moyle*, 705 P.2d 740, 750-751 (Or. 1985) (en banc); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 858 (Pa. 2002); *Austad v. Bd. of Pardons and Paroles*, 719 N.W.2d 760, 766 (S.D.

such time as either the Washington or the United States Supreme Court overrules those cases, *Johnston* and *Schaler* are binding on the Court of Appeals. The United States Supreme Court accepted review in *Elonis v. United States*, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015), but decided the case on federal statutory interpretation grounds, and expressly declined to address the First Amendment issue as to the appropriate intent requirement for true threats. *Elonis*, 135 S. Ct. at 2012 (“Given our disposition, it is not necessary to consider any First Amendment issues.”). Thus, in Washington the objective, reasonable person standard of *Johnston* and *Schaler* stands as good law.

Many courts applying an objective standard have adopted (or reaffirmed) the rule post-*Black*. Some have construed *Black* narrowly as having overturned the *Virginia* statute for overbreadth because the statute classified public cross burning as prima facie evidence of intent to intimidate when it was sometimes protected speech. See, e.g., *United States v. Martinez*, 736 F.3d 981, 986-987 (11th Cir. 2013) (“*Black* was primarily a case about the overbreadth of a specific statute—not whether

2006); *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707, 710 (2006); *State v. Perkins*, 626 N.W.2d 762, 770 (Wis. 2001).

State opinions supporting the subjective test: *O'Brien v. Borowski*, 961 N.E.2d 547, 557 (Mass. 2012); *State v. Grayhurst*, 852 A.2d 491, 515 (R.I. 2004); *State v. Miles*, 15 A.3d 596, 599 (Vt. 2011); *State v. Pomianek*, 58 A.3d 1205, 1217 (N.J. App. Div. 2013).

all threats are determined by a subjective or objective analysis in the abstract.”); *United States v. Jeffries*, 692 F.3d 473, 479-480 (6th Cir. 2012); *United States v. Mabie*, 663 F.3d 322, 332 (8th Cir. 2011); *United States v. White*, 670 F.3d 498, 511 (4th Cir. 2012).

Many appellate courts, including the Third Circuit in *Elonis*, read *Black* as limited to statutes like the one at issue there, statutes that expressly require subjective intent to threaten. Some have held that *Black*’s statement that “true threats” “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence[]” *Elonis*, 730 F.3d at 329, means only that the defendant intentionally uttered the statement, not that he intentionally meant to threaten with it. *White*, 670 F.3d at 509 (“We read the Court’s use of the word ‘means’ in ‘means to communicate’ to suggest ‘intends to communicate.’”); *accord*, *Jeffries*, 692 F.3d at 480. Still other courts have recognized *Black*’s relevance but declined to address what, if any, changes the decision worked on the “true threats” doctrine. *United States v. Clemens*, 738 F.3d 1, 12 (1st Cir. 2013); *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013).

Mr. Dominguez couches his arguments in terms of vagueness. He argues that because the harassment statute can be interpreted to encompass the objective standard while *Black* requires the subjective standard, the

statute is overbroad and encompasses substantial amounts of protected speech. Mr. Dominguez misinterprets *Black*. *Black* does not require the subjective standard. While a small minority of jurisdictions support Mr. Dominguez's argument, the majority of appellate courts, including the courts in Washington, do not. His over-encompassment argument fails for lack of foundation.

2. Assuming, arguendo, the subjective test for true threat is accepted, the statute is not overbroad.

Mr. Dominguez's argument is not, as he claims, directed at the harassment statute itself. Instead it is directed at the definition of "true threat." For a statute to be overly broad, it must reach a *substantial* amount of protected speech. *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001) (emphasis added). Application of the overbreadth doctrine is "strong medicine" and should be employed sparingly and only as a last resort. *O'Day v. King County*, 109 Wn.2d 796, 804, 749 P.2d 142 (1988); *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). Assuming the definition of true threat should incorporate the subjective test, the difference would be between intentional speech that a reasonable person would perceive as a threat, and intentional speech the speaker intended as a threat. This is a distinction that would make a difference in only a very small minority of cases, and would not affect a substantial amount of speech.

Perhaps recognizing that in this case, as in the vast majority of cases, the line between the subjective and objective test is a distinction without a difference, Mr. Dominguez does not argue the jury instruction definition of true threat is incorrect, as it would be if the subjective test were adopted. It is clear on this record that Dominguez intended his threats be taken seriously. Mr. Medel reasonably took those threats seriously and any error in the definition of true threat would be harmless. To get around this, Mr. Dominguez mounts a facial attack on the statute. But even assuming Mr. Dominguez's definition of true threat is legally correct, this case demonstrates that the difference between the objective and subjective test for true threat does not reach a substantial amount of speech, and in the vast majority of cases would not make a difference.

A minor change in definition of a term in a statute does not render the statute overbroad or vague. Definitions of legal terms are routinely refined in cases without rendering the statutes that refer to them unconstitutionally vague. *See, e.g., Grant County Prosecuting Atty. v. Jasman*, __ Wn.2d __, __ P.3d __ (2015) (defining "Public Officer"); *Wash. State Hosp. Ass'n v. Dep't of Health*, __ Wn.2d, __ P.3d __ (2015) (defining "sale, purchase or lease"); *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005) (defining "in a reckless manner"); *State v. Nelson*, 131 Wn. App. 175 (2005) (defining "sexual offense").

B. The trial court did not abuse its discretion in allowing the testimony about a past altercation between Mr. Medel and Manny Benavidez, when one of the threats uttered by Mr. Dominguez referenced that assault.

1. There was no ER 404(b) error.

A court reviews “the trial court's interpretation of ER 404(b) de novo as a matter of law. If the trial court interprets ER 404(b) correctly, [the reviewing court reviews] the trial court's ruling to admit or exclude evidence of misconduct for an abuse of discretion. A trial court abuses its discretion where it fails to abide by the rule's requirements.” *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009).

It has long been established that prior threats made by the defendant toward the victim are admissible in harassment cases because they establish both objective and subjective reasonable fear on the part of the victim. *State v. Binkin*, 79 Wn. App. 284, 292-93, 902 P.2d 673 (1995), overruled on other grounds, *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Mr. Dominguez referred to an earlier violent assault against Mr. Medel, one that resulted in the literal gouging out of Mr. Medel's eye. The jury was entitled to an explanation of the significance of that threat to Mr. Medel. The reference to Mr. Mendel's earlier trauma is relevant to the reasonableness of Mr. Medel's fear, as were Mr. Dominguez's escalating threats. The Court properly balanced these issues

and appropriately allowed the prior threat and the explanations thereof into evidence.

2. The trial court provided a limiting instruction, which was not objected to by Mr. Dominguez.

The trial court provided a limiting instruction even though one was not requested by Mr. Dominguez. CP 125, RP 314. Mr. Dominguez did not object to the instruction when the court drew it to counsel's attention. RP 314. The trial court is not required to issue a limiting instruction sua sponte. This issue has been completely resolved by *State v. Russell*, 171 Wn.2d 118, 249 P.3d 604 (2011), which held: "[n]othing in ER 105 creates an affirmative duty on the part of the trial court to sua sponte give a limiting instruction in the context of ER 404(b) evidence." *Id.* at 123. Mr. Dominguez makes no effort to distinguish *Russell*. The fact that the court did issue a limiting instruction in this case was to Mr. Dominguez's benefit. He does not challenge the language of the limiting instruction, and in any case, waived any error by failing to object at trial. *See State v. Gresham*, 173 Wn.2d 405, 432-33, 269 P.3d 207 (2012) (ER 404(b) error is non constitutional, therefore not subject to the RAP 2.5 exception).

C. Evidence was sufficient for the jury to conclude it was objectively reasonable to take Mr. Dominguez's threats seriously.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the

State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In making the challenge, the defendant admits to the truth of the State's evidence and all reasonably drawn inferences. *Id.* The reviewing court will defer to the fact finder on issues of conflicting testimony, credibility of the witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

The prior threat, admitted to by Mr. Dominguez, indicated that he was intending to assault Mr. Medel in December of 2012, and indeed, according to Mr. Dominguez, he did not only because Mr. Medel produced a weapon. Later, in June of 2013, Mr. Dominguez threatened Mr. Medel again. This was no mere words. Mr. Dominguez was yelling out the window of his Jeep as he drove past Mr. Medel's house and into his own driveway. As soon as he parked, he got out of the car and attempted to cross the bushes at the property line. He stopped only because his family members restrained him. Had he not been restrained, there is a good chance Mr. Dominguez would have ploughed through the bushes and attacked Mr. Medel.

Mr. Dominguez argues that because he never crossed the property line there was no way a reasonable person could take his threat seriously. This argument is questionable. Mr. Dominguez's tone, his language, and

the graphic violence of his repeated threats show his intent to act if not prevented. In addition, he ignores that he had to be forcibly restrained from crossing the property line. He does not recognize that the fear that the harassment statute attempts to prevent would be engendered by the totality of his words, his tone, and his attempt to cross the property line. He also ignores his prior attempt to assault Mr. Medel with a flower pot, adding to the reasonableness of Mr. Medel's fear. Any reasonable person standing in Mr. Medel's shoes would have taken the threat seriously.

D. Cumulative Error.

Because there was no error, there is no error to accumulate, and thus cumulative error does not provide relief to Mr. Dominguez.

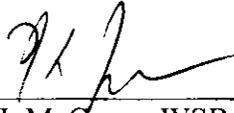
IV. CONCLUSION

The minority interpretation of *Black* is not the law in Washington. If it is to become the law the State or Federal Supreme Court will have to say so. The court did not err in allowing the jury to hear evidence about past altercations. There was sufficient evidence for a reasonable person to take Mr. Dominguez's threats seriously. There is no error, so cumulative

error does not help Mr. Dominguez. The trial court should be affirmed in all respects.

Dated this 8th day of September 2015.

GARTH DANO
Prosecuting Attorney

By: 

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

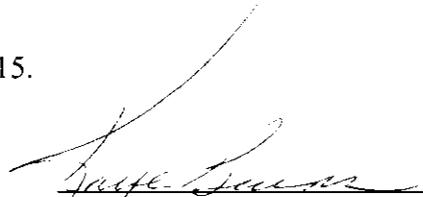
STATE OF WASHINGTON,)	
)	
Respondent,)	No. 32719-1-III
)	
vs.)	
)	
NOLAND ASHLEY DOMINGUEZ,)	DECLARATION OF SERVICE
)	
Appellant.)	
_____)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to counsel for Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

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Dated: September 8, 2015.



Kaye Burns