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Court of Appeals
Division III
State of Washington

No. 32981-0

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON, Respondent,

v.

T.J.M., Appellant.

BRIEF OF RESPONDENT

Tamara A. Hanlon, WSBA #28345
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

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A. ISSUES RAISED BY ASSIGNMENT OF ERRORS

1. Was there sufficient evidence of all the elements of felony harassment?

2. Were T.J.M.'s threats "true threats" unprotected by the Constitutional right to free speech?

B. STATEMENT OF THE CASE

On December 19, 2014, the appellant, T.J.M., was convicted of three counts of felony harassment under RCW 9A.46.020. CP 27. The charges stemmed from the following facts:

T.J.M, a high school student at Naches Valley High School, was in counseling with Mr. Mark Heeringa. During a counseling session on October 7, 2014, T.J.M. was upset because three boys had teased him. RP 12-3. He told Mr. Heeringa that he thought about taking a gun to school and shooting them. RP 13, 34. He also said he wanted to kill them and for them to know the pain that he felt. RP 34. He described a specific plan of what it would look like for him to follow through with his threats to shoot the three boys and them himself. RP 18. First, he would get a gun from his grandfather's gun safe and shoot one boy at the boy's house before school. RP 19. He would then go to the school and shoot the other two boys and end by shooting himself. RP 19. He told his counsellor that if he couldn't get access to firearms, he would use bombs against the boys. RP 19.

Mr. Heeringa noticed a change in T.J.M.'s mood and demeanor as he made these statements. RP 33. Specifically, Mr. Heeringa testified that T.J.M. was angry, gesturing, short in his speech, and raising his voice at the time. RP 12-3. Mr. Heeringa asked T.J.M., "[d]oesn't this seem a bit – doesn't this seem wrong?" RP 20. T.J.M. replied, "who can say?" RP 20. Mr. Heeringa took the threats seriously and contacted law enforcement.

At trial, Mr. Heeringa testified that T.J.M. had previously talked about killing others, including T.J.M.'s grandfather, and that this was not the first time T.J.M. had threatened to kill someone. RP 23-5, 39. T.J.M. had also previously talked about committing suicide and had described various ways he would kill himself. RP 25-32.

Deputy Boyer of the Yakima County Sheriff's Office met with T.J.M. and asked him to explain what he said and what he would do. RP 54. Deputy Boyer described his conversation with T.J.M. as follows:

> He told me that he had talked to his counselor and told his counselor that he had thought about and was thinking about killing other students at the Naches school. And so I asked him how he would go about doing that. He indicated to me that he would either find the key to the gun cabinet or he would use an ax and break the door open to the gun cabinet. It's not a gun cabinet, but it's a closet where the guns are kept locked

> up. He would then take the 9 millimeter pistol of his grandpa's, and he would go to his friend's house who lives in the near area and kill him first. He would then ride the bus into this –Naches to school like normal. He would then wait at school until the other students were at lunch or everyone was in the cafeteria because that's when the – there would be the gathering of the individuals he wanted to shoot, at which point he said that he would shoot them and then he would shoot himself.

RP 54. Deputy Boyer testified that T.J.M. said all of this methodically, without emotion, and was very matter-of-fact. RP 56. T.J.M. explained to the deputy that he would use a 9 millimeter pistol because he could conceal it. RP 55. T.J.M. also confessed to making 15 or 16 small bombs. RP 72.

Deputy Boyer spoke to the school principal of Naches Valley High School, Mr. Richard Rouleau. RP 179. Principal Rouleau confirmed a report that T.J.M. was being harassed or bullied at school. RP 176. This was about 3 weeks into the school year. RP 176. T.J.M. had also recently been suspended from school and was distraught and upset over the suspension. RP 178.

Victim E.D. testified at trial. He said that he when he learned of the "hit list," he was really scared at first. RP 87, 91. He testified that he was scared that his life could have been taken. RP 87. He felt relieved

after T.J.M was in custody. RP 90. At the time of trial, he testified that he was still a little scared but relieved T.J.M. was detained. RP 90.

Another victim, W.B., testified that after learning he was on the "hit list," he was scared and really shaking. RP 105-6. He told his dad he was threatened and that he was scared. RP 106. At trial, he testified that he was still a little scared. RP 106. He also testified that he knew T.J.M. had talked about harming himself before and had even made a noose at one point. RP 108.

The third victim, G.C., testified that he got a text from his friend, W.B., telling him about the "hit list." RP 120. G.C. said that he was scared and freaked out at first. RP 120. G.C. was home sick at the time. RP 121. G.C. thought that if he had been at school, the plan might have been carried through. RP 121. He said that made him scared and frightened. RP 121.

T.J.M. did not testify or call any witnesses. He was convicted of three counts of felony harassment and sentenced to a local sanctions disposition consisting of 72 days of confinement, 18 months of community supervision, and 60 community service hours. CP 28. He was also ordered to complete a mental health evaluation and treatment. CP 31. In addition, the court ordered that there be no guns, weapons, ammunition, or incendiary devices of any kind in his house. CP 29. The court also

specifically ordered that these items be removed prior to T.J.M. returning to the house. CP 29. He now appeals his conviction.

C. ARGUMENT

1. There was sufficient evidence of all the elements of felony harassment.

In reviewing a challenge to the sufficiency of the evidence, courts review the evidence in the light most favorable to the State to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wash. 2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The verdict will be upheld unless no reasonable jury could have found each element proved beyond a reasonable doubt. State v. Gentry, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 599, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). The evidence is interpreted most strongly against the defendant. Id. Evidentiary inferences favoring the defendant are not considered in a sufficiency of the evidence analysis. State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

Circumstantial evidence may be used to prove any element of a crime. State v. Garcia, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The elements of felony harassment are as follows:

> To convict the defendant of the crime of [felony] harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about (date), the defendant knowingly threatened to kill (name of person) immediately or in the future;
> (2) That the words or conduct of the defendant placed (name of person) in reasonable fear that the threat to kill would be carried out;
> (3) That the defendant acted without lawful authority; and
> (4) That the threat was made or received in the State of Washington.

WPIC 36.07.02. T.J.M. argues that the State has not proven that the victims were subjectively afraid or that T.J.M., by his words or conduct, placed them in fear. (Brief at 15-21).

a. The victims subjectively felt fear.

To convict a defendant of felony harassment based on a threat to kill, the State must prove that the person threatened was placed in reasonable fear that the threat would be carried out. RCW

9A.46.020(1)(a)(i); State v. Mills, 154 Wn.2d 1, 10-11, 109 P.3d 415 (2005). The person threatened must subjectively feel fear and that fear must be reasonable. State v. E.J.Y., 113 Wn. App. 940, 952-3, 55 P.3d 673 (2002). Assuming the evidence establishes a victim's subjective fear, the next issue is whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found beyond a reasonable doubt, using an objective standard, that the victim's fear were reasonable. Id.

T.J.M. argues that the victims did not subjectively fear that the threat would be carried out. (Brief at 15-19). However, there is substantial evidence in the record to support this element. Victim E.D. specifically testified, "I was scared that my life could have been taken." RP 87. Victim W.B. also testified that he was so scared he was physically shaking at the time. RP 105-6. Further, he was still scared months later at trial, even though T.J.M. was in custody. RP 106. And finally, victim G.C. testified that he was "freaked out" and scared that the plan might have been carried through by T.J.M. RP 120-121. Based on this record, when viewed in the light most favorable to the State, the evidence amply supports the inference that the three victims subjectively felt fear. Furthermore, a rational trier of fact could have found that their fears were reasonable.

b. The defendant's words caused the victims' fears.

T.J.M. argues that the State failed to prove that T.J.M.'s words or conduct caused the victims to be afraid. (Brief at 19). Specifically, he argues that the victims were only told that there was a "hit list" and that this is insufficient to prove that T.J.M.'s words caused their fear. Id. He argues that "none of the three alleged victims testified that they heard Treys' statements, either directly or indirectly." Id. T.J.M. provides no caselaw in support of his argument that the victims must be told, directly or indirectly, of T.J.M.'s statements. This court can assume that there is none because none has been provided.

Under RCW 9A.46.020(1)(b), the legislature has expressly defined words or conduct to include such means as e-mail as well as "any other form of communication or conduct." RCW 9A.04.110(28) defines "[t]hreat" as "to communicate, directly or indirectly the intent" to kill. This definition does not require direct, verbal communication of a threat. Instead, it encompasses any form of communication, whether direct or indirect, including threats communicated by a third party. See State v. Vidales Morales, 174 Wn. App. 370, 488, 298 P.3d 791 (2013) ("The person to whom the threat is communicated may or may not be the victim of the threat.")

The person threatened need not hear of the threat from the defendant so long as the threatened person **learns of the threat** and, as a result, feared the threat would be carried out. State v. Kiehl, 128 Wn. App. 88, 93, 113 P.3d 528 (2005) (emphasis added). The threatened person simply has to find out that the threat was made, one way or another. State v. J.M., 101 Wn. App. 716, 726, 6 P.3d 607 (2000). And they may learn of the threat at a different time and place than where the threat was communicated. See id. at 727.

Here, it is not disputed that all three victims learned of the threat made by T.J.M. After speaking with the principal, Deputy Boyer said that he would be calling the victims' parents. RP 76, 181. He told all three mothers of the victims that a young man had been taken into custody for apparently planning to kill students at Naches High and that their sons were named as potential targets. RP 76, 78, 80. The mothers of E.D. and W.B. relayed this information to their sons. RP 87, 102. G.C. learned of the "hit list" from his friend, W.B., who texted him. RP 120.

T.J.M. takes issue with the precise nature of what was conveyed to the victims. He states that a "summary statement that there was a 'hit list'" was given, rather than the actual statements. (Brief at 20). However, the words conveyed to the victims were 1) entirely consistent with what T.J.M. actually said and, 2) actually *minimized* what T.J.M. had

specifically relayed to Mr. Heeringa and Deputy Boyer. Clearly, the victims would have been much more afraid had they heard all the specific details that T.J.M. described to Mr. Heeringa. The fact that every detail of how they would die was not relayed does not negate the fact that it was T.J.M.'s words that caused them reasonable fear.

2. T.J.M.'s threats were "true threats" unprotected by the Constitutional right to free speech.

T.J.M. claims that his threats were protected by the Constitution under his right to free speech. The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." U.S. CONST. amend. I. This generally prohibits government interference with speech or expressive conduct. State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797 (1998). But certain types of speech, such as "true threats," are not protected. Id. 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 individual]." Id. (citations omitted). This is an objective standard. State v. Johnston, 156 Wn.2d 355, 360, 127 P.3d 707 (2006).

A true threat is a serious threat, not one said in jest, idle talk, or political argument. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215

(2004) (citing United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1983)). Stated another way, communications that "bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole" are not true threats. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). Whether a statement is a true threat or a joke is determined in light of the entire context. Kilburn, 151 Wn.2d at 46, 48. Further, "[t]he speaker of a 'true threat' need not actually intend to carry it out. It is enough that a reasonable speaker would foresee that the threat would be considered serious." Schaler, 169 Wn.2d at 283 (citation omitted).

Whether language constitutes a true threat is an issue of fact for the trier of fact in the first instance. State v. Johnston, 156 Wn.2d 355, 365, 127 P.3d 707 (2006). As explained in Kilburn, however, a rule of independent appellate review applies in First Amendment speech cases. An appellate court must make an independent examination of the whole record, so as to assure itself that the judgment does not constitute a forbidden intrusion on the field of free expression. Kilburn, 151 Wn.2d at 50. The appellate court is required to independently review only crucial facts -- those so intermingled with the legal question as to make it necessary, in order to pass on the constitutional question, to analyze the facts. Id. at 50-51. Thus, whether a statement constitutes a true threat is a matter subject to independent review. Johnston, 156 Wn.2d at 365.

In this case, T.J.M. relies heavily on Kilburn for his argument that his threat was not a true threat. (Brief at 22-5). However, the facts of Kilburn are in stark contrast to the facts at hand here. In Kilburn, the scene was that of kids chatting, giggling, and laughing at the end of a school day. 151 Wn.2d at 52. Kilburn and another student, K.J., were talking about books they were reading. Id. Kilburn's book had military men and guns on it. Id. At that point Kilburn turned to K.J. and, half-smiling, said he was going to bring a gun the next day and shoot everyone, beginning with her. Id. Then he began giggling and told K.J. maybe not her first. K.J. testified that Kilburn started to laugh or giggle as if he was not serious and acted "kind of like he was joking." Id. K.J. had known Kilburn for two years and they had never had a fight or disagreement. Id. The court made the following conclusion:

> We conclude that the evidence is insufficient for a reasonable person in Kilburn's place to foresee that K.J. would interpret his statement as a serious threat to cause bodily injury or death, given his past relationship with K.J., his having joked with her and his other friend in the class before, the discussion that had been taking place about the books they were reading, and his laughing or giggling when he made his comments.

Id. at 53.

In contrast, T.J.M. wasn't laughing or giggling when he detailed his plan to kill the 3 boys. He was upset, angry, and annoyed. RP 12-3. He had a raised voice. RP 12. He was upset that all 3 victims had been teasing him. RP 12. He was short in speech and gesturing. RP 13. Mr. Herringa said that his mood and demeanor had changed. RP 33. T.J.M.'s plan was also much more detailed and lengthy than Kilburn's. See RP 18-9. Mr. Heeringa testified that T.J.M. had a specific plan of how he would shoot the 3 boys. RP 18. When speaking to Deputy Boyer, T.J.M. also relayed a very specific plan. RP 54-5. And he relayed it matter-of-factly and without any show of emotion. RP 58.

Unlike Kilburn, here there were prior problems between the boys and T.J.M. In addition, there was no indication that he was joking about his plan. When asked if it seemed wrong, he told Mr. Heeringa, "Who can say?" T.J.M. also had talked about killing himself and others previously. RP 23-25, 28, 39. In addition, T.J.M. confessed to building 15 or 16 bombs, RP 72, and said that if he couldn't get access to firearms, that he would use the bombs against the 3 boys. RP 19.

In State v. Schaler, 169 Wn.2d 274, 278, 236 P.3d 858 (2010), the defendant called Crisis Services and claimed to have killed his neighbors. He was crying and hysterical. Id. He said that he awoke from a dream and thought he had killed his neighbor and said that killing his neighbors

had been occupying his daytime thoughts too. Id. at 278-9. He also threatened to kill himself. Id. at 279. A deputy responded to Schaler's house. Schaler said that he dreamed that he slit her throat. Id.

Schaler was taken to see mental health staff the hospital. Id. While there, Schaler made threats that someone was going to get hurt and talked about getting guns the next time and that it would be a blood bath. Id. Schaler said that he wanted to kill his neighbors with his bare hands, by strangulation, and he he hoped he didn't really kill her. Id. at 280. Schaler appeared angry at the time. Id. The director treated the threat as a viable threat and warned the neighbors. Id. at 280-1.

Our supreme court found that there was ample evidence from which a reasonable jury could determine that the defendant's threats were true threats. Id. at 291. The court explained its reasoning as follows:

> There was ample evidence from which a reasonable jury could determine that Schaler's threats were "true threats." As discussed above, the evidence at trial was open to interpretation as to whether Schaler's threats were "true threats" or a cry for help—but both conclusions were possible. Schaler admitted to Heller-Wilson that he had been planning to kill his neighbors for months and that he wanted to do so. His demeanor did not suggest to Heller-Wilson that his words were idle talk or a joke. Heller-Wilson questioned Schaler to determine if he was serious and came to believe that he was. Moreover, the threats at

> issue built upon Schaler's history of unpleasant interactions with his neighbors, including the fruit tree dispute (in which he wielded a chain saw) that resulted in his neighbors' obtaining restraining orders. From the evidence, the jury could have concluded that a reasonable speaker in Schaler's position would have foreseen that his threats would be interpreted as a serious expression of his intention to take the life of another individual.

169 Wn.2d at 291.

As applied to this case, the demeanor of the person making the threatening comments is important. Like Schaler, T.J.M.'s demeanor was also serious and not indicative of someone making idle talk or joking. In addition, T.J.M. had prior unpleasant interactions with the boys who were teasing and bullying him. As such, in light of the entire context, a reasonable speaker would foresee that T.J.M.'s comments would be considered serious.

T.J.M. argues that the United States Supreme Court's decision in Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), requires a subjective test when evaluating a true threat. (Brief at 26). Washington, however, uses an objective true threat test. In State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004), our state supreme court stated that "[w]e have adopted an objective test of what constitutes a 'true threat'" based upon how a reasonable person would foresee the statement

would be interpreted. In State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006), our supreme court affirmed this rule, explaining that Washington has adopted an objective standard for determining what constitutes a true threat.

Most recently, in State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010), our state supreme court again defined true threat using an objective, not a subjective, test. The court stated:

> 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."

Id. at 286. As noted by the Schaler court, Black is distinguishable because the statute at issue there required the speaker to intimidate the listener, which necessitates a greater mens rea than simply putting the listener in fear. 169 Wn.2d at n.4. Here, because the State was not required to prove that T.J.M. meant to intimidate the listeners, Black does not support T.J.M.'s argument.

In sum, using the test our supreme court has repeatedly upheld, a reasonable person in T.J.M.'s place would foresee that his statements would be interpreted as threats. As such, T.J.M.'s threats were not protected speech under the Constitution.

D. CONCLUSION

The Court of Appeals decision should be affirmed. There was sufficient evidence to prove all the elements of felony harassment beyond a reasonable doubt. Furthermore, the threats were "true threats" under Washington's objective reasonable person standard.

Respectfully submitted this 5th day of August, 2015,

TAMARA A. HANLON, WSBA # 28345
Senior Deputy Prosecuting Attorney
Yakima County, Washington