

FILED
JAN 29 2010
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

84152-7

Supreme Court No. _____

(Court of Appeals No. 61967-5-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF ROBERT DANFORTH

STATE OF WASHINGTON,

Respondent,

v.

ROBERT DANFORTH,

Petitioner.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN 25 PM 4:19

PETITION FOR REVIEW

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A. INTRODUCTION

Robert Danforth is the first and only person in Washington to have been committed indefinitely based on speech alone under the new “threat” prong of RCW 71.09.020(10).¹

Mr. Danforth is a 64-year-old, mildly retarded man who has not committed any crimes since 1987, and who lived in the community crime-free from 1996-2006. In October of 2006, he went to the King County Sheriff’s office and asked for help because he had a bad dream and was afraid he might reoffend. But King County did not help him. Instead, they put him in jail and petitioned for his commitment as a sexually violent predator, alleging that Mr. Danforth’s statements at the sheriff’s office constituted a recent overt act.

Mr. Danforth moved for summary judgment, but the trial court denied the motion and the Court of Appeals affirmed. Mr. Danforth respectfully requests that this Court grant review to address the critical First Amendment, Due Process, and statutory interpretation issues presented.

¹ As amended in 2001, the statute provides: “Recent overt act” means any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Robert Danforth, through his attorney, Lila J. Silverstein, asks this Court to review the published opinion of the Court of Appeals in In re Detention of Danforth, No. 61967-5-I (Slip Op. filed December 28, 2009). A copy of the opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. “Recent overt act” means “any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.” A threat is “an expression of an intention to inflict harm on another.” Robert Danforth, a former sex offender who had lived in the community crime-free for a decade, walked into the Regional Justice Center and asked for help because he had a dream involving teenaged boys and feared he would go to a video arcade and “rub up against boys” if the authorities did not help him. Instead of helping him, the State petitioned for his commitment as a sexually violent predator, alleging that his statements at RJC constituted a recent overt act. Were Mr. Danforth’s requests for help a recent overt act? RAP 13.4(b)(4).

2. A statute is overbroad under the First Amendment if it prohibits threats but does not limit the prohibition to “true threats,” which are

statements expressing an intention to inflict bodily harm or take the life of a specific individual or group of individuals. In 2001, the Legislature amended the definition of “recent overt act” in the SVP statute to include not only “acts” but also “threats”. The lower courts construed the amendment to apply to Mr. Danforth’s statements that he wanted help so he could avoid harming teenaged boys. Is the statute, as construed by the lower courts, unconstitutionally overbroad? RAP 13.4(b)(1), (3).

3. A statute is void for vagueness under the Due Process Clause and the First Amendment if it either (1) does not define its terms with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) does not provide ascertainable standards to protect against arbitrary enforcement. Is the “threat” prong of the “recent overt act” definition unconstitutionally vague because it does not provide sufficient notice that a request for help like Mr. Danforth’s will be considered a threat? RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

Robert Danforth survived a horrific childhood during which his parents beat him, locked him in the basement, and made him wear dresses and answer to the name “Roberta”. CP 69, 355, 380. He has been diagnosed with fetal alcohol syndrome and borderline mental retardation.

CP 335, 338, 356. Because of “odd behaviors and looks,” he has always suffered from harassment. CP 380.

As an adult, Mr. Danforth committed indecent liberties in 1972 and was convicted of second-degree rape in 1993 for events alleged to have occurred in 1987. CP 300-01, 345. Following the latter conviction, he was sentenced to 34 months’ confinement based on an offender score of one. CP 301-02.² The psychologist hired by the State to perform a presentence investigation recommended “a minimal period of incarceration and a long term plan for community advocacy with an active case manager and an ongoing therapeutic relationship with someone who can provide clear feedback.” CP 327. The psychologist had a long history with Mr. Danforth, and noted that “in the 14 years she had worked with him, she had never had any reason to believe that he was a threat to society and considered the reverse to be true.” CP 328, 357.

Following his release in 1996, Mr. Danforth lived in his own home in the community and committed no crimes. CP 71. But he was the victim of repeated harassment from neighbors who poisoned his dogs, threw eggs and toilet paper at his house and left burning feces on his doorstep. CP 374, 383.

² Mr. Danforth has always adamantly maintained his innocence with respect to the second-degree rape charge, and even the psychologist hired by the State to perform the presentence investigation “did not believe he could have committed the crime.” CP 326-27. He was nevertheless found guilty following a jury trial. CP 326.

In 2002, Mr. Danforth called the King County prosecutor's office and asked to be civilly committed. CP 317, 364. He told the prosecutor and the State's psychologist that he felt he was a danger, lacked control, and was afraid of victimizing someone else soon. CP 318, 365. He said he thought about committing a crime if papers were not filed to commit him. Mr. Danforth did not "even want to think about it, he need[ed] to be in a place where he [could] be safe, and [did] not want to take a chance on offending with someone." He "indicated there are places where he could do it and it would be unwise not to put him in a facility." Mr. Danforth stated "he has tried everything he can and was going to do something crazy." He "scream[ed] out for help to keep from doing anything." CP 318, 365.

Although the State hired psychologist Charles Lund to evaluate Mr. Danforth, it declined to seek Mr. Danforth's commitment under either RCW ch. 71.05 or RCW ch. 71.09. Dr. Lund noted, "It is clear that [Mr. Danforth] has engaged in marginally appropriate sexual encounters with adults during the period he has been at large in the community, but there is no direct evidence of inappropriate overtures toward minors or self-reported involvement of sexualized encounters with minors." CP 324. Dr. Lund concluded, "the act of requesting to be committed under RCW 71.09 in and of itself does not create a reasonable apprehension of harm of a

sexually violent nature,” and therefore does not constitute a recent overt act. CP 324, 370.

Dr. Lund noted that Mr. Danforth “functioned adequately in the community for a substantial period of time following his release from prison, and it would appear that he could function adequately again in the community with increased social and mental health supports, including provisions for short-term psychiatric hospitalization at times he is in crisis.” CP 370. Dr. Lund stated he “would definitely support any effort to utilize more traditional mental health interventions that might be available under RCW 71.05 and would strongly recommend the development of additional social and mental health supports to assist Mr. Danforth at any future times of crisis.” CP 324.

The prosecutor’s office did not help Mr. Danforth obtain short-term psychiatric hospitalization or voluntary inpatient treatment under RCW ch. 71.05, and instead told him he needed to perpetrate some offense in order to be committed. CP 318, 365. Despite this advice, Mr. Danforth refused to commit another offense. He continued to live in his home for another four years, and remained crime-free. CP 71.

In October of 2006 Mr. Danforth again sought refuge from his hostile community environment by asking the King County Sheriff’s Office to commit him. CP 310-11. That month, his house had been pelted

with raw eggs and someone had put a burning bag of feces on his front porch. CP 383. Mr. Danforth went to the Regional Justice Center on October 25 and asked to speak with a detective.

According to the detective, Mr. Danforth “feared that he was going to reoffend.” CP 391. The detective reported, “Danforth said he fears he would walk to a bus stop with boys and try to have sex.” CP 391. “He talked about a dream that he had last night and that it was a red light for him.” CP 393. In the dream Mr. Danforth was 13 years old and he had a sexual relationship with another 13-year-old boy. CP 393. Mr. Danforth told the detective that “he thought of going by a school today, but did not want to, since he did not trust himself.” CP 393.

The detective asked two mental health professionals from King County Crisis and Commitment Services to speak with Mr. Danforth. CP 311. Mr. Danforth told them that he needed to be committed because he desires children sexually. He said, “If I’m not locked up, I could re-offend.” CP 393. The mental health professionals noted, presumably referring to the 2002 communication, that “patient has called with this before but never walked in.” CP 412.

The detective asked Mr. Danforth what he would do if the mental health professionals said there was nothing they could do to help him. CP 391. Mr. Danforth responded that he would go to a video arcade and “rub

himself against the back” of a teenaged boy. CP 392. He said, “If he liked it I might pursue more.” CP 392. The mental health professionals reported that Mr. Danforth “said he nearly went to South Center to the arcade but came here for help instead.” CP 413.

But the mental health professionals declined to help Mr. Danforth. CP 394. In fact, they decided they would not even admit him for a 72-hour mental health evaluation. CP 391-92. They told the detective that Mr. Danforth does not have symptoms that would allow for civil commitment. CP 415. The detective thanked the mental health professionals and told them he would “take it from here.” CP 415.

The detective booked Mr. Danforth into jail. CP 311, 394. The next day, he interviewed Mr. Danforth again. CP 395-407. The detective asked Mr. Danforth why he had come to RJC the day before, and Mr. Danforth answered that he had done so because he had had thoughts of going to the arcade and rubbing up against boys. CP 397-98. Mr. Danforth said that community-based counseling does not work and that he wanted to be in a facility. CP 398.

The detective asked Mr. Danforth to reiterate what he would do if the mental health professionals could not help him. CP 399. Mr. Danforth responded, “I would uh, find someone and, standing up, uh, using one of the uh, video arcade games, groom the person by rubbing myself on

them.” CP 399. The detective asked Mr. Danforth what he would do if the boy liked it, and Mr. Danforth stated, “Well, I prob’ly would go the rest o’ the way, not even considering the consequences.” CP 401. He clarified that “the rest of the way” meant sexual intercourse. He concluded, “So therefore I wanted to come down and be committed so I don’t offend anymore.” CP 406. Mr. Danforth also told the detective that he had been receiving harassing telephone calls recently. CP 405.

The State filed a petition seeking Mr. Danforth’s commitment as a sexually violent predator, alleging that Mr. Danforth’s statements to the King County Sheriff’s detective and mental health professionals on October 25th and 26th constituted a recent overt act. CP 1-46. On October 31, 2006, Mr. Danforth was transferred to the Special Commitment Center (“SCC”) to await trial. CP 383. After Mr. Danforth had been there for a few months, Dr. Charles Lund, who interviewed him in 2002, interviewed him again. Mr. Danforth told Dr. Lund that he had “no desire related to boys under 21.” CP 354. He also stated, “I don’t have the desire to harm victims.” CP 354.

Mr. Danforth explained that he requested commitment because he just “needed a temporary place of refuge from harassment from the community.” CP 374. He made clear that his statements at the Sheriff’s Office were “a cry for help.” CP 373. He had no real intention of going

to an arcade and rubbing up against boys, but told the detective he would because he wanted to be placed somewhere where he would be free of persecution. CP 383. He said, "I wouldn't be here now if other people would have helped me." CP 374. He was upset that the mental health professionals he spoke with at the Sheriff's Office declined to help him enter a mental health facility. CP 383-84. He did not want to stay at SCC, where he was raped and taunted. CP 378.

Mr. Danforth's attorneys filed a motion for summary judgment, asking the court to rule as a matter of law that Mr. Danforth's statements at RJC did not constitute a recent overt act. CP 60-84. Citing due process and the First Amendment, Mr. Danforth argued that "words alone, absent any act, in light of his many years in the community without sexually acting out against children, cannot constitute a recent overt act under a constitutional application of the statute." CP 188.

The court denied the motion for summary judgment, and found that Mr. Danforth's statements on October 25 and 26, 2006 to the King County Sheriff and the mental health professionals "constitute a recent overt act as that term is defined in RCW 71.09.020." CP 293, 420-21.

On appeal, Mr. Danforth argued that as a matter of law, his statements could not constitute a recent overt act because they were not true threats. Mr. Danforth expressed an intent to avoid inflicting harm,

whereas a true threat is precisely the opposite: it is an expression of an intention to inflict harm. Thus, under both the plain meaning of the statute and the First Amendment, Mr. Danforth's statements were not threats.

Mr. Danforth further argued that if his statements could be considered threats under the statute, then the statute is void for vagueness under both the First Amendment and the Due Process Clause because it does not provide notice that requests for help like Mr. Danforth's can result in one's commitment as a sexually violent predator. Finally, to comport with due process, a civil-commitment statute must require proof of serious difficulty in controlling behavior. But Mr. Danforth did control his behavior. In fact, he did exactly what we should be encouraging former sex offenders to do: he sought help before losing control. Accordingly, his commitment violates both due process and sound policy.

The Court of Appeals nevertheless affirmed the commitment order. The court begged the question, concluding "a threat that constitutes a recent overt act is not protected by the First Amendment." Slip Op. at 1. In dismissing Mr. Danforth's arguments, the Court ignored the similarities between the recent overt act statute and the harassment statute addressed in State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004). Slip Op. at 9. The court did not address the due process tailoring argument, and dismissed the vagueness argument as "without merit." Slip Op. at 12.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should grant review because the question of whether a person may be committed indefinitely based on pure speech is a significant question of constitutional law and a matter of substantial public interest.

a. Due Process requires the State to prove a “recent overt act”

before an individual may be committed as a sexually violent predator.

Civil commitment is a “massive curtailment of liberty.” In re Harris, 98 Wn.2d 276, 279, 654 P.2d 109 (1982). A law that abridges a fundamental right such as liberty comports with due process only if it furthers a compelling government interest and is narrowly tailored to further that interest. U.S. Const. amend. XIV; In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). To satisfy the narrow-tailoring requirement, the State must prove that a respondent is both mentally ill and dangerous before committing him. In re Detention of Young, 122 Wn.2d 1, 37, 857 P.2d 989 (1993). The dangerousness must be current. Albrecht, 147 Wn.2d at 7.

Because predicting dangerousness is an inexact science, courts must be especially vigilant in protecting against improper commitment. Harris, 98 Wn.2d at 281. Otherwise SVP proceedings risk becoming “an Orwellian dangerousness court.” Young, 122 Wn.2d at 60 (C. Johnson, J., dissenting). This slippery slope must be prevented by “requiring

demonstration of a substantial risk of danger and by imposing procedural safeguards and a heavy burden of proof.” Harris, 98 Wn.2d at 281.

Where, as here, the respondent has been living in the community, the substantial risk of danger must be evidenced by a “recent overt act.” Id. at 284 (reading “recent overt act” requirement into RCW 71.05.020); Young, 122 Wn.2d at 41-42 (reading “recent overt act” requirement into RCW 71.09.030).

In Harris and Young, this Court defined what type of “recent overt act” the State must prove in order to subject an individual to civil commitment consistent with due process. The Court held the State must prove an “act” which “has caused harm or creates a reasonable apprehension of dangerousness.” Harris, 98 Wn.2d at 284-85; Young, 122 Wn.2d at 40. The Legislature subsequently amended the relevant statutes to conform to this definition, requiring the State to prove “any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm.” Laws of 1995, ch. 216, § 1.

In 2001, the Legislature again amended the statute, expanding the definition of “recent overt act” to include not only acts, but also “threats”:

“Recent overt act” means any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.

Laws of 2001, ch. 286, § 4; RCW 71.09.020(10) (emphasis added).

Other than Mr. Danforth, nobody in Washington has been committed based on mere statements under the “threat” prong of the statute, and no court has held that the expanded definition of “recent overt act” comports with due process. See In re Detention of Lewis, 163 Wn.2d 188, 203, 177 P.3d 708 (2008) (Sanders, J., concurring).

b. Mr. Danforth’s statements do not constitute a “threat” within the meaning of the statute, and if they do, the statute violates due process. The dictionary defines “threat” as an “expression of an intention to inflict loss or harm on another.” Webster’s Third New International Dictionary at 2382 (2002). Mr. Danforth’s statements were not threats under the plain meaning of the word, because he expressed an intent not to harm anyone. He told the detective and psychologists that he wanted their help in order to avoid harming others. Because Mr. Danforth’s stated intent was to prevent harm, not to cause harm, his statements do not constitute a threat within the plain meaning of the statute.

Even if the definition of the word “threat” were ambiguous, policy considerations would dictate that Mr. Danforth’s statements do not constitute a recent overt act. Our society should encourage former sex offenders to seek help if they fear they might commit new crimes.

Providing help in the form of voluntary inpatient treatment under RCW 71.05.050 or other options like group homes would be an appropriate response to a request for assistance. If a person knows that the State will petition for his commitment as a sexually violent predator if he asks for help, then there is an incentive not to come forward and instead risk reoffending. The Legislature could not have intended this result.

Furthermore, construing Mr. Danforth's statements to constitute a recent overt act would violate the narrow-tailoring requirement of due process. In order to pass strict scrutiny, a civil-commitment statute must require "proof of serious difficulty in controlling behavior." Kansas v. Crane, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002). Washington's recent overt act element – as it has been applied to other respondents – comports with this requirement. But the Legislature may not "broaden[] or attempt[] to dilute the recent overt act constitutional requirement." Lewis, 163 Wn.2d at 203 (Sanders, J., concurring). The statute would be unconstitutional if extended to Mr. Danforth's statements, because Mr. Danforth did control his behavior. Indeed, he did exactly what we should be encouraging former sex offenders to do: he sought help before losing control.

Even the State's attorney and psychologist did not perceive Mr. Danforth's statements as threats, but rather as a request for help. Dr.

Charles Lund described the exchange as follows: "I received a telephone call from [the prosecutor] on 10/25/06 regarding Mr. Danforth advising me that Danforth had been involved in an incident in which he contacted law enforcement and reported he was having urges to reoffend and was requesting some kind of intervention to assist him." CP 310, 371. Their later description of the statements as threats is therefore suspect.

Viewed in the context of Mr. Danforth's history, it is clear that his statements were cries for help rather than threats. See In re Detention of Broten, 130 Wn. App. 326, 335, 122 P.3d 942 (2005) (respondent's history during release is relevant to recent overt act determination); RCW 71.09.020(10) (whether threat creates reasonable apprehension of harm must be viewed from point of view of "objective person who knows of the history and mental condition of the person engaging in the act"). Mr. Danforth called the prosecutor's office with similar statements in 2002, saying he lacked control and was afraid of victimizing someone else soon. CP 318, 365. But when the authorities declined to commit him or otherwise help him, Mr. Danforth returned to the community and remained crime-free, as he had since 1996.

As far back as 1987, Mr. Danforth sought refuge in the criminal justice system when he had trouble caring for himself. That year, "Danforth came to speak to an officer and reported that he wanted to

confess to anything that the officer would write up so that he would be incarcerated.” CP 332, 359. Mr. Danforth has always been subjected to taunts due to his minor mental retardation, and he recently explained to Dr. Lund that he just “needed a temporary place of refuge from harassment from the community.” CP 374. Mr. Danforth’s requests for assistance do not constitute a threat of any kind, let alone a threat that would rise to the level of a recent overt act.

c. Unless limited to true threats, the statutory amendment extending the definition of “recent overt act” to encompass threats is unconstitutionally overbroad. The First Amendment prohibits laws abridging the freedom of speech. U.S. Const. amend. I. “A statute is presumptively inconsistent with the First Amendment if it imposes a ... burden on speakers because of the content of their speech.” Bellevue v. Lorang, 140 Wn.2d 19, 24, 992 P.2d 496 (2000). A statute is overbroad if its prohibitions extend beyond proper bounds and violate the First Amendment’s protection of free speech. Lorang, 140 Wn.2d at 26. Speech will be protected “unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.” State v. Williams, 144 Wn.2d 197, 206, 26 P.3d 890 (2001).

Although the legislature may sanction threats, “[w]hat is a threat must be distinguished from what is constitutionally protected speech.” Watts v. United States, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). A “true threat,” which the government may proscribe, 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 take the life of another individual.” Williams, 144 Wn.2d at 207-08. The State may not prohibit or sanction threats that do not meet this definition. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). Statutes proscribing threats must be construed as limited to true threats in order to avoid invalidation on overbreadth grounds under the First Amendment. State v. Johnston, 156 Wn.2d 355, 359, 127 P.3d 707 (2006). Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Id. at 44.

Mr. Danforth’s statements do not constitute a true threat. As discussed above, he did not express an intention to inflict bodily harm, but instead expressed an intention to avoid inflicting bodily harm.³ His conditional statement that he would go to an arcade and rub up against

³ The Court of Appeals erroneously contends that Mr. Danforth’s argument is based on his subjective intent to avoid inflicting harm. Slip Op. at 8. To the contrary, his argument has always been based on the fact that his expressed intent was to seek help and prevent harm. See Brief of Appellant; Reply Brief of Appellant.

teenaged boys if the counselors did not help him is protected speech, not a true threat. See Watts, 394 U.S. at 706, 708 (conditional statement “if they ever make me carry a rifle, the first man I want to get in my sights is L.B.J.” was not a true threat). Indeed, statements far more chilling than Mr. Danforth’s have been held protected speech rather than true threats. See, e.g., NAACP v. Claiborne Hardware, 458 U.S. 886, 902, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (“If we catch any of you going in any of them racist stores, we’re gonna break your damn neck”); Kilburn, 151 Wn.2d at 39 (“I’m going to bring a gun to school tomorrow and shoot everyone and start with you”).

Furthermore, Mr. Danforth later explained to Dr. Lund that he made up his dangerousness story in order to be removed from his neighborhood harassers. This explanation is consistent with his history of requesting incarceration in 1987 and commitment in 2002. As this Court explained in Kilburn, this type of history and context must be considered in evaluating whether a statement is a true threat. Kilburn, 151 Wn.2d at 52-53. In sum, the “threat” prong of the “recent overt act” definition is unconstitutionally overbroad unless limited to true threats. So limited, the statute does not apply to Mr. Danforth’s statements.

d. If the “threat” prong of the recent overt act statute can be applied to Mr. Danforth’s statements, the statute is unconstitutionally

vague. A statute is void for vagueness under the Due Process Clause if it either (1) does not define its terms with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) does not provide ascertainable standards to protect against arbitrary enforcement.

Lorang, 140 Wn.2d at 30. Courts are “especially cautious in the interpretation of vague statutes when First Amendment interests are implicated.” Id. at 31.

If the definition of “recent overt act” can be applied to Mr. Danforth’s request for help, then it is unconstitutionally vague. The word “threat” does not give notice that requests for help will constitute grounds for an SVP commitment petition. For this reason, too, this Court should grant review.

F. CONCLUSION

Mr. Danforth respectfully requests that this Court grant review.

DATED this 22nd day of January, 2010.

Respectfully submitted,



Lila J. Silverstein - WSBA 38394
Washington Appellate Project
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RECEIVED

In the Matter of the Detention of ROBERT DANFORTH.)	No. 61967-5-1	DEC 28 2009
STATE OF WASHINGTON,)	DIVISION ONE	Washington Appellate Project
Respondent,)	PUBLISHED OPINION	
v.)		
ROBERT DANFORTH,)	FILED: December 28, 2009	
Appellant.)		

GROSSE, J. — A sex offender’s statement to authorities that he will inflict sexually violent harm against minor boys if he is not committed is sufficient evidence of a recent overt act to support a sexually violent predator (SVP) petition when that statement is considered in the context of the sex offender’s history and mental condition. Robert Danforth contends that the trial court erred by denying his summary judgment motion because his statements to the authorities were not threats of harm but pleas for help to prevent him from inflicting harm and therefore amount to protected speech. But a threat that constitutes a recent overt act is not protected by the First Amendment because it produces harms distinct from its communicative impact and is based on the sex offender’s conduct. Here, there was sufficient evidence from which a jury could find that Danforth expressed an intent to inflict sexually violent harm and that his history and mental condition created a reasonable apprehension of such harm.

Thus, the trial court properly denied the summary judgment motion and we affirm.

FACTS

As a young child, Robert Danforth was subjected to both physical and emotional abuse by his parents. He was also diagnosed as suffering from borderline mental retardation and fetal alcohol effects caused by his mother's excessive drinking during her pregnancy. He had behavioral problems in school and was sent to a boarding school when he was 14 years old. He had his first sexual experiences at the boarding school and had sexual encounters with several of the boys at the school.

In 1970, at age 25, while employed as a maintenance worker in Cannon Beach, Oregon, Danforth had sexual contact with at least four boys between the ages of 7 and 13. When investigated by the police about these incidents, Danforth admitted that he was "sick" and needed help because he could not control himself sexually when he was around children. He was prosecuted for these offenses, but the case was apparently dismissed for a speedy trial violation.

In 1971, in Colfax, Washington, Danforth approached a group of boys at a ballpark and asked them if they wanted to have "sex play." He was prosecuted and pleaded guilty to charges of indecent liberties. The court ordered that he be sent for treatment at Western State Hospital, but after a short time there, he was found to be not amenable to treatment and sent to prison.

In August 1987, Danforth invited a 16-year-old boy and his friend to participate in group sexual activity with him. He was charged and convicted in King County with two counts of communication of a minor with immoral purposes, but the convictions were later reversed on appeal.

In 1993, Danforth was convicted of second degree rape in King County for forcibly raping a 12-year-old boy in the summer of 1987. The victim was participating in a play production and stepped outside in back of the theater during a rehearsal. Danforth hit him over the head with a rock, forcibly pulled down the boy's pants and anally raped him, leaving the boy crying behind the theatre. Danforth denied the allegations, refused treatment, and served prison time.

Danforth was released from prison in 1996 and did not commit any further sexual offenses while in the community. But he engaged in behavior that caused concern, including targeting and grooming young adult males, some of whom were developmentally disabled, and devising schemes that he hoped would lead to sexual contact with them. For example, he solicited churches and colleges seeking young men to be his driver, posing as someone who wanted to see tourist locations before he lost his sight to diabetes.

In 2002, Danforth called the King County Prosecuting Attorney's Office and requested to be civilly committed. He had apparently been subjected to repeated harassment by the neighbors during this time, including vandalism of his home. He told a prosecutor that he lacked control and was afraid of reoffending if he was not committed. The State's psychologist, Dr. Charles Lund,

evaluated Danforth, but determined that commitment was not appropriate because the “problem[] sexual behavior” involved adults, not children. As Dr. Lund concluded:

It is clear that [Danforth] has engaged in marginally appropriate sexual encounters with adults during the period he has been at large in the community, but there is no direct evidence of inappropriate overtures toward minors or self-reported involvement of sexualized encounters with minors.”

On October 25, 2006, Danforth again appealed to authorities to civilly commit him. This time, he presented himself at the King County Sheriff’s Office and asked to speak with a detective. He told the detective that he had come to “turn himself in” because he felt like reoffending. He then gave a lengthy statement in which he described having sexual fantasies involving boys between the ages of 13 and 14. He also stated that he believed he was going to reoffend against underage boys if he was not taken into custody. He said he was afraid to be near children and needed to be in a facility permanently.

The detective arranged for two King County mental health professionals to assess Danforth. He reiterated to the mental health professionals that he would reoffend if not taken into custody. When asked what action he would take if not taken into custody, Danforth responded that he would go to a bus stop where boys were and try to have sex with them. He also said he would go to the arcade at the Southcenter Mall and rub up against the back of a 13- to 15- year-old boy for his sexual gratification, and if he found a boy who liked it, he would pursue “more.” He was then arrested and gave a detailed recorded statement, which confirmed his previous statements that he would be “a serious danger to society

if [he were] turned loose.” He also clarified that his plan to “rub up against [a boy]” meant that he would rub his penis against “the back rectum of a boy.”

The State then filed a petition under chapter 71.09 RCW to civilly commit Danforth as a sexually violent predator (SVP). The petition was supported by a declaration from Dr. Lund, who opined that Danforth suffered from pedophilia and was more likely than not to reoffend in a sexually violent manner. As Dr. Lund explained:

The recent reports reviewed indicate that Mr. Danforth made explicit and specific statements of intent to commit sexual offenses against young boys. He has the ability to carry out the intervening actions to gain access to high risk situations where the offending would occur. The specificity of the threat is professionally speaking, quite alarming and there is imminently a high risk of sexual reoffending, given the threat. His history of committing sexual offenses, his current reports of subjective experiences related to ongoing sexual interest in young boys, masturbatory fantasies involving children, and his own self assessment of being at high risk would constitute a combination of historical and dynamic factors that are of extreme concern, in the absence of external constraints on opportunities to reoffend against a child.

Thus, from a professional perspective, I would consider the recent incident to be not just the basis for apprehension of harm of a sexually violent nature, but the basis for outright alarm, and hold this opinion to a reasonable degree of psychological certainty.

Dr. Lund affirmed this opinion in a July 2007 supplemental report:

It is my continuing professional opinion, to a reasonable degree of psychological certainty, that the statement of intent to have sexual contact with a child is extremely alarming from a professional perspective, well beyond the threshold of apprehension, and would constitute a recent overt act, according to the statutory definition of recent overt act.

While awaiting trial, Danforth was transferred to the Special Commitment Center, where he was interviewed by Dr. Lund. He told Dr. Lund that he now

had “no desire related to boys under 21,” and that he only requested commitment because he needed a place of refuge from harassment from the community.

Before trial, Danforth moved for summary judgment, arguing that the SVP petition should be dismissed because the State failed to establish that he committed a recent overt act. He contended that the statements the State alleged to be the recent overt act did not rise to the level of a constitutionally valid threat of danger to the community. The trial court denied the motion, ruling that there was sufficient evidence from which a jury could find that he committed a recent overt act. A few days into the trial proceedings, just before jury selection, Danforth stipulated to his civil commitment as an SVP, but reserved his right to appeal the trial court’s denial of his summary judgment. He now appeals.

ANALYSIS

Danforth contends that the trial court erred by denying his motion for summary judgment because the State failed to establish as a matter of law that he committed a recent overt act. He argues that telling authorities that he feared he might reoffend if not confined does not amount to a threat, much less a true threat, which he contends is required to withstand a First Amendment challenge to the statute.

We review summary judgment rulings de novo.¹ A party is entitled to summary judgment when there is no genuine issue of material fact and the

¹ Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

moving party is entitled to judgment as a matter of law.² All facts must be viewed in the light most favorable to the nonmoving party.³

To support a petition alleging that an offender is a sexually violent predator, the State must prove beyond a reasonable doubt that the offender “would be likely to engage in predatory acts of sexual violence if not confined in a secure facility.”⁴ When the offender is not incarcerated at the time the State files the SVP petition, due process requires that the State also “prove present dangerousness with evidence of a recent overt act.”⁵ A “[r]ecent overt act” includes threats and is defined as

any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.⁶

Danforth first contends that his statements that he feared he would reoffend if not committed do not constitute a threat under the plain meaning of RCW 79.09.020. Because the statute does not define the term “threat,” it is given its ordinary and common law meaning.⁷ Both parties cite the dictionary definition and appear to agree that the ordinary meaning of “threat” is an “expression of an intention to inflict loss or harm on another.”⁸

² CR 56(c); Huff v. Budbill, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000).

³ Hertog, ex rel. S.A.H. v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

⁴ RCW 71.09.060(1).

⁵ In re Det. of Lewis, 163 Wn.2d 188, 194, 177 P.3d 708 (2008); RCW 71.09.060(1).

⁶ RCW 71.09.020.

⁷ City of Redmond v. Burkhart, 99 Wn. App. 21, 24, 991 P.2d 717 (2000).

⁸ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2382 (2002).

Viewed in the light most favorable to the nonmoving party (the State), the evidence is sufficient to establish that Danforth expressed an intent to inflict harm. Danforth described a specific plan to molest minor boys and told authorities he would carry out the plan if not committed. Danforth contends that these statements established only an intent to prevent harm, not inflict it. But this does not change the fact that he did express his intent to inflict the harm. This expressed intent alone established the threat, regardless of whether he wished to prevent it from being carried out.⁹ The trial court therefore properly denied the summary judgment motion and concluded that there was sufficient evidence to submit to the jury on the issue of whether he committed a recent overt act.

Danforth next argues that unless the statute's definition of recent overt act is limited to true threats, it is unconstitutionally overbroad because it encompasses constitutionally protected speech. He contends that his statements do not amount to true threats because they were conditional statements that he would harm others unless he received help.

A statute that regulates pure speech implicates the First Amendment.¹⁰ A law is unconstitutionally overbroad if it sweeps within its prohibitions conduct protected by the First Amendment.¹¹ But certain categories of speech are not protected, including "true threats."¹² Our state Supreme Court has held that threats prosecuted under the felony harassment statute must be limited to true

⁹ Indeed, our courts have acknowledged that proof of intent to carry out a threat is not required to support a conviction for threats prosecuted under the felony harassment statute. State v. Kilburn, 151 Wn.2d 36, 38, 84 P.3d 1215 (2004).

¹⁰ State v. Johnston, 156 Wn.2d 355, 360, 127 P.3d 707 (2006).

¹¹ State v. Halstien, 122 Wn.2d 109, 121-22, 857 P.2d 270 (1993).

¹² Johnston, 156 Wn.2d at 360.

threats to avoid unconstitutional infringement of protected speech.¹³ In doing so, the court recognized that the statute implicated First Amendment protections because it regulated “pure speech” by criminalizing threats to inflict bodily harm.¹⁴

Danforth argues that like the felony harassment statute, chapter 71.09 RCW regulates speech by authorizing the State to petition for involuntary commitment based on a threat to cause harm of a sexually violent nature. Thus, he contends, the SVP statute must apply only to true threats to withstand an overbreadth challenge and avoid reaching protected speech. The State argues that because additional proof of conduct is required to establish a recent overt act, the statute does not regulate pure speech and the true threat analysis therefore does not apply. We agree with the State.

As the State points out, chapter 71.09 RCW does not penalize threats to reoffend in a sexually violent manner nor does it authorize civil commitment based on such threats alone. Rather, the statute’s focus is on the impact of the sex offender’s conduct on the community, i.e., present dangerousness, which is established by proof of a recent overt act.¹⁵ This requires more than showing a threat to reoffend; the State must also show that the offender’s mental condition and history create a reasonable apprehension of such harm from an objective viewpoint. Thus, because the threats must be evaluated in the context of the offender’s conduct, i.e., the offender’s history and mental condition, the statute

¹³ State v. Williams, 144 Wn.2d 197, 208, 26 P.3d 890 (2001); Kilburn, 151 Wn.2d at 43.

¹⁴ Kilburn, 151 Wn.2d at 41 (citing Williams, 144 Wn.2d at 206-07).

¹⁵ Lewis, 163 Wn.2d at 194; RCW 71.09.060(1).

does not regulate pure speech. Rather, it allows the State to establish current dangerousness with proof of a threat that would create a reasonable apprehension of harm based on the sex offender's conduct.

As established Supreme Court precedent recognizes: “[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.”¹⁶ Threats used to establish a recent overt act under chapter 71.09 RCW produce such special harms and are therefore not entitled to First Amendment protection. Indeed, as the State points out, by requiring that the threat create a reasonable apprehension of harm from the viewpoint of one who is aware of the sex offender's history and mental condition, the recent overt act statute actually incorporates the “true threat” concept.¹⁷

But even under a true threat analysis, there was sufficient evidence to submit to the jury. The undisputed evidence does not establish that Danforth's threats to molest young boys were made in jest, idle talk, or political argument.¹⁸ To the contrary, viewed in the light most favorable to the State, the evidence shows that they were made precisely to be taken seriously. He told the

¹⁶ Roberts v. United States Jaycees, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); see also N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 916, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) (“The First Amendment does not protect violence.”).

¹⁷ “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.’” State v. Tellez, 141 Wn. App. 479, 482, 170 P.3d 75 (2007) (internal quotation marks omitted) (quoting Kilburn, 151 Wn.2d at 43).

¹⁸ A threat said in jest, idle talk or political argument is not a “true threat.” See Johnston, 156 Wn.2d at 361 (citing Kilburn, 151 Wn.2d at 43).

authorities that he was alerting them because he could not control himself and if they did not confine him, he would carry out his plans to sexually harm minor boys. Dr. Lund also concluded that Danforth was at high risk to reoffend and based on his history, was sincere in making these threats. As he opined: "The specificity of the threat is professionally speaking, quite alarming and there is imminently a high risk of sexual reoffending, given the threat."¹⁹ The cases Danforth cites in which he claims "statements far more chilling" were found to be protected speech involved statements that were clearly political argument or the context was clear that they were made in jest.²⁰

Finally, Danforth contends that as applied to the facts here, the definition of "recent overt act" is unconstitutionally vague because it does not give sufficient notice that requests for help amount to a threat that will support an SVP petition. A statute is unconstitutionally vague under the Fourteenth Amendment if it is "framed in terms so vague that persons of common intelligence must necessarily

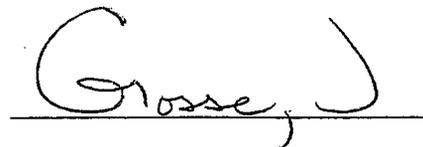
¹⁹ Danforth's reliance on evidence suggesting that he made up his story because he wanted to escape his neighbors' harassment simply raises a disputed issue of fact, precluding summary judgment.

²⁰ In Watts v. United States, 394 U.S. 705, 706-08, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), the court described the statement: "[I]f they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." as "political hyperbole" and agreed with the petitioner "that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.'" In N.A.A.C.P. v. Claiborne Hardware, 458 U.S. at 902, the statement: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck," was part of a political speech made during a Civil Rights protest to encourage a boycott of white-owned business. Finally, in Kilburn, the evidence showed that the statement, "I'm going to bring a gun to school tomorrow and shoot everyone and start with you," was meant in jest because alleged victim was not scared by the statement, the defendant often joked with her and treated her kindly, and the defendant was giggling as he made the comments. 151 Wn.2d at 39, 52-53.

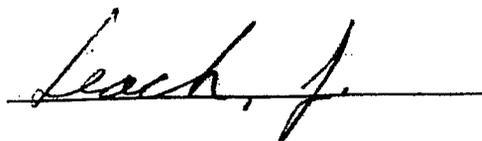
guess at its meaning and differ as to its application.”²¹ Determining whether a statute sufficiently defines an offense “does not demand impossible standards of specificity or absolute agreement.”²²

Here, Danforth fails to demonstrate that reasonable minds could differ on the use of the term “threat” in the recent overt act definition. Indeed, as discussed above, he and the State agree that its ordinary meaning is an expressed intent to inflict harm and his statements to the authorities that he would sexually reoffend against minor boys if not committed unquestionably fall within this definition. More significantly, Danforth was well aware that his threat of sexually violent harm would support an SVP petition for civil commitment: this is precisely why he made the threats and in doing so, he clearly acknowledged that such behavior would result in civil commitment. His vagueness argument is without merit.

We affirm.

A handwritten signature in cursive script, appearing to read "Grosse, J.", written above a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Leach, J.", written above a horizontal line.A handwritten signature in cursive script, appearing to read "Appelwick, J.", written above a horizontal line.

²¹ State v. White, 97 Wn.2d 92, 98-99, 640 P.2d 1061 (1982).

²² City of Spokane v. Douglass, 115 Wn.2d 171, 179, 795 P.2d 693 (1990) (citing Kolender v. Lawson, 461 U.S. 352, 361, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)).

DECLARATION OF FILING & MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 61967-5-I** (for transmittal to the Supreme Court) and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for **respondent: David Hackett - King County Prosecuting Attorney-SVP Unit,** **appellant** and/or **other party**, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.


MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 25, 2010