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THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN BENTURA OZUNA,

Appellant.

BRIEF OF RESPONDENT

(Supplemental)

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A. INTRODUCTION

Ozuna was charged by Information and subsequently convicted of one count of Intimidating a Witness pursuant to RCW 9A.72.110(2) in the Superior Court for Yakima County.

The Court of Appeals Division III in an unpublished opinion upheld the conviction. Appellant petitioned this court for review presenting to this court only one of the allegations raised in the Court of Appeals; whether the threats that was made in the letters that were seized were in fact “communicated” and therefore met the definition of “threat.”

B. ISSUE PRESENTED BY PETITION

1) Were the threats made by Appellant “communicated?”

ANSWER TO ISSUES PRESENTED BY PETITION

1) The totality if the facts presented support the jury’s finding of guilt. The decision of the Court of Appeals should not be disturbed.

C. STATEMENT OF THE CASE

The facts have been adequately set forth in the briefing of the parties as well as the decision of the Court of Appeals.

D. ARGUMENT

State v. Williamson, 120 Wn.App. 903, 908, 86 P.3d 1221 (2004) amended on recon., 131 Wn.App. 1, 2004 WL 614504, 2004 Wn.App. LEXIS 3712 (2004);

A person violates the witness intimidation statute even if the threat is not communicated to the victim. State v. Anderson, 111 Wn.App. 317,44 P.3d 857 (2002). And a person is guilty of intimidating a judge even if the threat is not communicated. State v. Hansen, 122 Wn.2d 712, 862 P.2d 117 (1993). The statutory language here compels the same result.

A person tampers with a witness if he *attempts* to alter the witness's testimony. "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). Williamson completed his attempt to alter MK's testimony when he asked DR to talk with MK about changing her testimony. (Emphasis in original.)

In State v Rempel the court was considering the witness tampering statute which used the same definition as the intimidation statute. The court ruled when determining if statements constitute witness tampering, the State is entitled to rely on the inferential meaning of words and the context in which they were used. State v. Rempel, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990).

"Threat" means: "(a) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or (b) Threats as defined in RCW 9A.04.110." RCW 9A.76.180(3). In turn, RCW 9A.04.110(28) also defines "threat" in terms of "to communicate." Thus, under both subsections (a) and (b) of section 180, threat means "to communicate." As Ozuna has indicated the legislature

has not defined the word "communicate." Where the legislature does not specifically define a statutory term, the court will read the word according to its plain and ordinary meaning. First Covenant Church v. City of Seattle, 120 Wn.2d 203, 220, 840 P.2d 174 (1992).

RCW 9A.04.110. Definitions

- (28) "Threat" means to communicate, directly or indirectly the intent:
- (a) To cause bodily injury in the future to the person threatened or to any other person; or
 - (b) To cause physical damage to the property of a person other than the actor; or
 - (c) To subject the person threatened or any other person to physical confinement or restraint; or
 - (d) To accuse any person of a crime or cause criminal charges to be instituted against any person; or
 - (e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or
 - (f) To reveal any information sought to be concealed by the person threatened; or
 - (g) To testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
 - (h) To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding; or
 - (i) To bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or
 - (j) To do any other act which is intended to harm substantially the person threatened or another with respect to his or her health, safety, business, financial condition, or personal relationships;

Several Washington cases have held under these statutes that communication encompasses both verbal and nonverbal communication. In Burke, this court held that a defendant's fighting stance "like a boxer" met the definition of a "threat" under this statute. State v. Burke, 132

Wn.App. 415, 421, 132 P.3d 1095 (2006). In Toscano, this court agreed with Burke and held that the crime of intimidating a public servant encompasses nonverbal threats. State v. Toseano, 166 Wn.App. 546, 554, 271 P.3d 912, review denied, 174 Wn.2d 1013 (2012). The court in Toseano reversed the conviction because the acts of failing to yield and blocking an intersection for the purpose of interrupting a police chase were "not clear nonverbal communication" like in Burke. Id.

In analogous circumstances, courts have held that the display of a deadly weapon alone can be sufficient to communicate a threat. The Court of Appeals determined that the nonverbal act of setting a gun down next to a rape victim was sufficiently threatening to constitute "threatened ... use of a deadly weapon" for first degree rape. State v. Lubers, 81 Wn.App. 614, 620-21, 915 P.2d 1157 (1996). The definition of "threatens" as used in the rape statute is the same definition used in the crime of intimidating a public servant. State v. Bright, 129 Wn.2d 257, 270, 916 P.2d 922 (1996) (defining "threatens" for purposes of rape by reference to RCW 9A.04.110). In Bright the court concluded that the act of wearing a holstered weapon while committing a rape constituted a "threat" under RCW 9A.04.110. Bright, 129 Wn.2d at 270.

The definition set forth by Ozuna in his opening brief in the Court of Appeals refers to the “definition of “communication” . . . found in the Black’s Law Dictionary (9th ed.):

1. the expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another’s perception. 2. the information so ex-pressed or exchanged.

This definition does include the requirement that a document or in this instance a letter be “mailed” in order for the “communication” to have occurred. In this case based on the facts presented it is clear that the words were communicated, the intended recipient was in fact beaten.

The letter in question stated in part:

So now you know what I want primo, don't hesitate vato. take action reep the rewards later. Don't think, just act. thinking is already hesitating. hit me up when after the shit get's handled. Do it on the 25 cause that's when I have court, I want to have a smile on my face that day knowing that, that fool's getting a lil tast of what's comeing to him. The 25 is the day I get sentenced. Good looking out primo, don't let me down fucker! I knew I could depend on you, a lil late but better late than never, que-no.

State Ex. ID (errors in original).

“Detective Rollinger believed that the letters referred to Jaime Ava-los who had been a witness in Mr. Ozuna’s prior trial. She was present in the courtroom when Mr. Avalos testified in that trial. (RP 312, ll. 11-14; RP 318, ll. 1-5; ll. 9-14; RP 319, l. 21 to RP 320, l. 9) Detective

Rollinger showed the letters to Mr. Avalos on June 14, 2010. Mr. Avalos was later attacked in a jail holding cell. He received a six (6) cm. laceration to the posterior scalp and a cut to his upper lip. Stitches were needed. He was transported to Yakima Regional Hospital emergency room. (RP 325, ll. 10-19; RP 341, ll. 2-4; ll. 12-14; RP 343, ll. 1-11)” (Apps Brief at 3-4) “Prior to Mr. Avalos being attacked in the jail a safety alert had been issued. David Soto was the inmate who attacked Mr. Avalos. Mr. Ozuna, Mr. Avalos and Mr. Soto all have ties with the Sürenos. (RP 296, ll. 23-25; RP 297, ll. 9-10; ll. 17-25; RP 300, l. 16 to RP 301, l. 2; RP 305, l. 12 to RP 306, l. 1; RP 323, l. 24 to RP 324, l. 5)” (Appellant’s Opening brief 5-6)

The State in this intimidation case was no less entitled to rely on the inferential meaning of words and the context in which they were used. State v. Rempel, supra, 83-84.

Ozuna cites to State v. Anderson, 111 Wn.App. 317, 44 P.3d 857 (2002) as dispositive that “communication” must occur. Taking Ozuna’s argument at face value then there was no “communication” by Anderson to the “victim” of his diatribe. The only communication by Anderson was when the police contacted the victim with regard to the letter and later spoke to the mother and to Anderson. Ozuna’s argument would require that State to prove that there was an actual transmission of the message to

the victim. In this day that is a slippery slope. The mere posting of a comment on an electronic message board, twitter, your Facebook account or any of the nearly uncountable means of communication can lead to a reaction or fulfillment of the threat imparted by the author. The use of this type of communication is rampant. One needs only put forth the message to one's followers by way of a post to twitter or Facebook, or as was the case here a literally open letter in a jail cell in a jail housing numerous other gang members, and later that edict is followed. This can be done using third party verbiage or be in the form of a "story" but the message and its intent are then out in the world to do what they will and if this court adopts the line of reasoning proffered by Ozuna threats such as this never will be prosecuted.

It is clear in this instance that the threat was communicated. The victim was assaulted. Perhaps the actual delivery of the letter did not occur but once again just as the message board or Facebook, twitter or whatever form of communication is accessed, here the jail "grapevine", the intent of and action looked for by Ozuna was in play in the world. While it is clear that any person has the freedoms set forth in our constitution there comes with those rights responsibility and the laws that govern that responsibility.

Ozuna states that he was identified as the writer of the letters but then makes a enormous speculative leap not supported by the facts when he indicates “the contents were never communicated by him to anyone else.” At best what can be said is that there was no physical delivery of the letters but Ozuna cannot state that the content was not communicated, jails are rife with means and methods of communication. He furthers this claim when he states that “if the letter had been mailed then a communication would have occurred.” If Ozuna read that letter to anyone it would have been “communicated.” A scenario which is probably based on the actual assault that occurred on the victim who was the person referred to in the letter and the fellow gang member who had previously testified against Ozuna.

In considering charges of intimidating a witness, jurors must ascertain the inferential meaning of statements alleged to be threats, because the literal meaning of words is not necessarily the intended communication. State v. Gill, 103 Wn. App. 435, 445, 13 P.3d 646 (2000).

The legislature has set forth this class of crime which includes Intimidating a Judge, Intimidating a Public Servant, Intimidating a Witness, Jury Tampering, Intimidating a Juror and Intimidating a Witness which all rely on the definition set forth in RCW 9A.04.110. If this court were to adopt Ozuna’s argument that each and every time these crimes are

charged the State has to prove beyond a reasonable doubt that the letter is actually delivered or that the communication was such that it actually was "communicated" to the victim these crimes would never be charged and threats and intimidation would be unchecked. As this court can see there are numerous statutes which use the same or similar language which would be greatly affected the decision of the Court of Appeals were to be overturned.

RCW 9A.72.160. Intimidating a judge

- (1) A person is guilty of intimidating a judge if a person directs a threat to a judge because of a ruling or decision of the judge in any official proceeding, or if by use of a threat directed to a judge, a person attempts to influence a ruling or decision of the judge in any official proceeding.
- (2) "Threat" as used in this section means:
 - (a) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
 - (b) Threats as defined in * RCW 9A.04.110(25) .
- (3) Intimidating a judge is a class B felony.

RCW 9A.76.180. Intimidating a public servant

- (1) A person is guilty of intimidating a public servant if, by use of a threat, he or she attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant.
- (2) For purposes of this section "public servant" shall not include jurors.
- (3) "Threat" as used in this section means:
 - (a) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
 - (b) Threats as defined in RCW 9A.04.110 .
- (4) Intimidating a public servant is a class B felony.

RCW 9A.72.140. Jury tampering

- (1) A person is guilty of jury tampering if with intent to influence a juror's vote, opinion, decision, or other official action in a case, he or she attempts to communicate directly or indirectly with a juror other than as part of the proceedings in the trial of the case.

(2) Jury tampering is a gross misdemeanor.

RCW 9A.72.130. Intimidating a juror

(1) A person is guilty of intimidating a juror if a person directs a threat to a former juror because of the juror's vote, opinion, decision, or other official action as a juror, or if, by use of a threat, he or she attempts to influence a juror's vote, opinion, decision, or other official action as a juror.

(2) "Threat" as used in this section means:

(a) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or

(b) Threats as defined in RCW 9A.04.110 .

(3) Intimidating a juror is a class B felony.

RCW 9A.72.110. Intimidating a witness

(1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:

(a) Influence the testimony of that person;

(b) Induce that person to elude legal process summoning him or her to testify;

(c) Induce that person to absent himself or herself from such proceedings; or

(d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.

(2) A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness's role in an official proceeding.

(3) As used in this section:

(a) "Threat" means:

(i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or

(ii) Threat as defined in * RCW 9A.04.110(27) .

(b) "Current or prospective witness" means:

(i) A person endorsed as a witness in an official proceeding;

(ii) A person whom the actor believes may be called as a witness in any official proceeding; or

(iii) A person whom the actor has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child.

- (c) "Former witness" means:
 - (i) A person who testified in an official proceeding;
 - (ii) A person who was endorsed as a witness in an official proceeding;
 - (iii) A person whom the actor knew or believed may have been called as a witness if a hearing or trial had been held; or
 - (iv) A person whom the actor knew or believed may have provided information related to a criminal investigation or an investigation into the abuse or neglect of a minor child.
- (4) Intimidating a witness is a class B felony.
- (5) For purposes of this section, each instance of an attempt to intimidate a witness constitutes a separate offense.

See also

RCW 9A.36.080. Malicious harassment - Definition and criminal penalty

“(6) For the purposes of this section:

- (a) "Sexual orientation" has the same meaning as in RCW 49.60.040.”;
- (b) "Threat" means to communicate, directly or indirectly, the intent to:
 - (i) Cause bodily injury immediately or in the future to the person threatened or to any other person; or
 - (ii) Cause physical damage immediately or in the future to the property of a person threatened or that of any other person.;

RCW 9A.36.070. Coercion

- (1) A person is guilty of coercion if by use of a threat he or she compels or induces a person to engage in conduct which the latter has a legal right to abstain from, or to abstain from conduct which he or she has a legal right to engage in.
- (2) "Threat" as used in this section means:
 - (a) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
 - (b) Threats as defined in * RCW 9A.04.110(27) (a), (b), or (c).

The “victims” in this class of crime are for lack of a better phrase a special class. The legislature has seen fit to set define this class using the same definition of threat. The legislature has seen fit to protect this class with a statute that by the very wording (and rulings of courts of review)

protects the class without the need or requirement that the threat actually cross the void.

This can be seen in the statutes below that protect judges and juries and witnesses. Our system of justice cannot suffer the abuse which would be caused if in each and every case, especially now with the internet and the innumerable means of communication it allows, the state would be required as Ozuna argues, to prove that the threat was actually communicated to the victim.

It is easy to see, to understand, how the standard of proof allowed in this line of cases could be looked upon as State regulation of free speech, that a person could be convicted of a crime based solely on an angry ramble written down and set aside. But the court must look to the criminal act and the facts that were presented in this specific case. Here the letter was not “mailed” or “delivered” but the circumstantial evidence is such that the State was able to prove to a jury of Mr. Ozuna’s peers that this treat had in fact been communicated. Here there was not just the letter but the recorded phone call, the specific language in the letter regarding the victim and most importantly the actual assault on the victim, who was himself a gang member, by a member of his own gang, the same gang that Ozuna was a member of.

Cases such as State v. Lizotte, 256 A.2d 439 (Me. 1969) address similar statutes where the act in question was not the writing of a letter but a statement by a defendant regarding a victim that communicated to a third party. The Court in Lizotte were asked to rule on whether a statement made to an officer fit within the State's statute regarding "making a threatening communication." That court ruled:

The jury could properly find that the language employed by the defendant fairly imported a promise or declaration of a present intent sometime in the future to kill the complaining officer. Although couched in the language of the street, the expression was readily understandable by the ordinary hearer as 'pregnant with the promise of evil.' State v. Cashman, supra at page 30. The jury could properly take into account the circumstances which then existed and the relation between the defendant and the person threatened. It matters not whether the defendant had or had not the intention later to carry out the threat. The essence of an oral threat is that it is a verbal act and if that act is of such a nature as to convey the menace to an ordinary hearer, the statute is violated. No more does it matter whether or to what degree the threat engenders fear or intimidation in the intended victim. Some men are braver than others and less easily intimidated. We do not ask whether or not this defendant succeeded in frightening a police officer. We ask only whether or not he used words which would under the circumstances then existing be heard by an ordinary person as being spoken not in jest but as carrying the serious promise of death. State v. Lizotte, 256 A.2d 439, 442 (Me. 1969)

In State v. Peck, 459 N.W.2d 441, 443; S.D (1990) the Supreme court of South Dakota when addressing whether a similar

statute required proof that an actual “official proceeding” was required to uphold conviction of Peck stated;

The focus of anti-tampering statutes is on the actions and intent of the person trying to influence the witness. State v. Bartilson, 382 N.W.2d 479, 481 (Iowa App. 1985). The evil prohibited is conduct which would threaten the veracity and cooperation of witnesses. People v. Moyer, 670 P.2d 785, 791 (Colo. 1983). The defendant need not succeed or actually induce the witness to do anything. *Id.*

One of the material elements of the offense is intent to induce a witness to withhold testimony and information. Boutchee, *supra*. [State v. Boutchee, 406 N.W.2d 708 (S.D.1987)] Only the intent to induce has to be proven by State, i.e., actual false testimony is not required. It is axiomatic that intent involves the state of mind and may be proven by the surrounding facts and circumstances as they exist with regard to the defendant's action. State v. Blakey, 332 N.W.2d 729 (S.D. 1983); State v. Cody, 323 N.W.2d 863 (S.D. 1982). Therefore, it was not necessary under our statute for State to prove that Peck was successful in her effort to influence Pennington to testify falsely. Boutchee, *supra*; see also United States v. Jeter, 775 F.2d 670 (6th Cir. 1985); United States v. Brimberry, 744 F.2d 580 (7th Cir. 1984).

This court should not lose sight of the statutory purposes, i.e., the protection of participants in judicial proceedings and preventing interference with the administration of justice by corrupt methods. See United States v. Chandler, 604 F.2d 972 (5th Cir. 1979), cert. denied, 608 F.2d 524, cert. dismissed, 444 U.S. 1104, 100 S. Ct. 1074, 63 L. Ed. 2d 317 (1980). In State v. Crider, 21 Ohio App. 3d 268, 487 N.E.2d 911 (Ohio App. 1984), the court stated:

The intimidation statute was designed to protect those people who saw, heard or otherwise knew, or were supposed to know, material facts about the criminal proceeding. Once a person becomes possessed of such

material facts, he likewise becomes a 'witness' within the meaning of [the statute], and subject to its protection.

Baker v. State, 22 P.3d 493, 500, (Alaska Ct. App. 2001).

Baker conceivably is arguing that the statute is unconstitutional because it is not confined to overt threats -- because it allows a person to be punished for making veiled threats. If this is Baker's argument, we reject it. As explained above, Alaska's statutory definition of "threat" includes "[any] menace, however communicated". The legislature's reason for including implied threats in this definition is obvious. Almost everyone is familiar with movies and television shows in which a mobster intimidates a witness by remarking that "accidents happen" or that "it would be too bad if something happened to your family". The Constitution does not protect threats, whether they be express or veiled. 12 [12] See Commonwealth v. Chou, 433 Mass. 229, 741 N.E.2d 17, 23 (2001); People v. Borrelli, 77 Cal.App.4th 703, 91 Cal.Rptr.2d 851, 861 (2000); Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 23 F.Supp.2d 1182, 1188-1190 (D.Or.1998).

State v. Schweppe, 306 Minn. 398, 237 N.W.2d 609, 613, 614

(1975) considering appeal from a case wherein appellant was charged and convicted of the crime of terroristic threats states;

A threat is a declaration of an intention to injure another or his property by some unlawful act. See, Armstrong v. Ellington, 312 F. Supp. 1119, 1125 (W.D. Tenn. 1970); State v. Gunzelman, 210 Kan. 481, 502 P. 2d 705 (1972). The test of whether words or phrases are

harmless or threatening is the context in which they are used. United States v. Prochaska, 222 F. 2d 1 (7 Cir. 1955); United States v. Pennell, 144 F. Supp. 317 (N.D. Cal. 1956). Thus the question of whether a given statement is a threat turns on whether the "communication 'in its context' would 'have a reasonable tendency to create apprehension that its originator will act according to its tenor.'" United States v. Bozeman, 495 F. 2d 508, 510 (5 Cir. 1974). Id at 613

The court in Schweppe went on to state;

Other courts have concluded that a defendant need not directly communicate the threat to the intended victim to be guilty of making a criminal threat. See, Gurley v. United States, 308 A. 2d 785 (D.C. App. 1973); State v. Lizotte, 256 A. 2d 439, 442 (Maine 1969). Id at 614

Ozuna states that “[i]f the threat is never conveyed to another person, then it is nothing except self-expression.” (Appellant’s opening brief at 12) The statements in the letters written by Ozuna are not simple “self-expression.” As this court is well aware it must interpret a statute that criminalizes pure speech with the First Amendment in mind. State v. Kilburn, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004). Threats are a form of pure speech. State v. Tellez, 141 Wn. App. 479, 482, 170 P.3d 75 (2007). Therefore the speech criminalized must be unprotected speech, such as a true threat. Kilburn, 151 Wn.2d at 43. A “true threat” is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious

expression of intent to inflict bodily harm on or to take the life of another person. Kilburn, 151 Wn.2d at 43. A true threat is a serious threat, not one said in jest, idle talk, or political argument. Kilburn, 151 Wn.2d at 43. Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Kilburn, 151 Wn.2d at 44. Whether a statement is a true threat or a joke is determined in light of the entire context, and the relevant question is whether a reasonable person in the defendant's place would foresee that, in context, the listener would interpret the statement as a threat or a joke. Kilburn, 151 Wn.2d at 46.

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). But the independent appellate review does not extend to factual determinations such as findings on credibility. Johnston, 156 Wn.2d at 365-66.

E. CONCLUSION

Ozuna's conviction should stand. The State presented more than just this "undelivered" letter as evidence to support the charges. With the information networks literally at the fingertips of most of society use of the standard championed by Ozuna would make proof of this nature of crime nearly impossible.

The actions of the trial court and the Court of Appeals should not be disturbed.

Respectfully submitted this 20th day of January 2015.

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Certificate of Service

I, David B. Trefry, hereby certify that on this date I served copies, by email, by agreement of the parties on Mr. Dennis Morgan at nodglspk@rcabletv.com.

Dated at Spokane, WA this 20th day of January, 2015.

s/ David B. Trefry

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Please find attached the State's supplemental brief in this matter.

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