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No. 92593-3

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

Trey M.,

Juvenile Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

APPELLANT'S SUPPLEMENTAL BRIEF ON CERTIFIED ISSUE

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A. INTRODUCTION

Trey M. was improperly convicted of felony harassment for statements he made to a mental health counselor while working through his feelings following a childhood of severe physical abuse and verbal harassment. He never responded to his tormentors with violence, instead discussing his thoughts in therapy. But the judge said, “you shouldn’t be thinking that way. So that’s the problem.” RP 258.

As explained in the opening and reply briefs, the convictions are invalid for four independent reasons – including that Trey’s statements were not “true threats” under the objective (negligence) standard and *State v. Kilburn*.¹ But this Court should take the opportunity to re-evaluate the propriety of the negligence standard in light of intervening U.S. Supreme Court cases. Indeed, the Seventh Circuit – on whose judgment this Court relied in adopting the objective standard – has since recognized that this standard “is no longer tenable.”² Several other courts agree.

This Court should hold that a person may not be convicted of issuing a “true threat” unless the State proves the speaker subjectively intended to place the victim in fear of bodily harm or death. This standard is required under the Constitution, and will prevent the thought-policing that occurred here.

¹ 151 Wn.2d 36, 44, 84 P.3d 1215 (2004).

² *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008).

B. SUPPLEMENTAL ARGUMENT

This Court should hold that in order to convict a person of issuing a true threat, the State must prove the defendant intended to cause the victim to fear bodily injury or death.

1. This Court adopted a negligence standard before the U.S. Supreme Court decided *Virginia v. Black* and *Elonis v. United States*.

Because the right to free speech is “vital,” only a few narrow categories of communication may be proscribed. *Kilburn*, 151 Wn.2d at 42; U.S. Const. amend. I. Although a “threat” is one of those categories, the only type of threat which may be criminalized without running afoul of the First Amendment is a “true threat.” *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); *Kilburn*, 151 Wn.2d at 43.

In *Watts*, the U.S. Supreme Court reversed the conviction of a man who objected to the draft and said, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” *Watts*, 394 U.S. at 706. The Court noted that the statute at issue criminalized pure speech, and emphasized that such statutes “must be interpreted with the commands of the First Amendment clearly in mind.” *Id.* at 707. The statute required “the Government to prove a true ‘threat,’” *id.* at 708, and “[w]hat is a threat must be distinguished from what is constitutionally protected speech.” *Id.*

at 707. Although it held the defendant's statements were protected speech and not a true threat, the Court did not set forth a standard for determining the difference in future cases. *See id.* at 707-08.

In the wake of *Watts*, most courts adopted an objective test for evaluating whether a statement is a true threat or constitutionally protected speech. This Court adopted such a standard in *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001). In so doing, this Court relied on the judgment of the Seventh Circuit. *See id.* (citing *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990)); *State v. J.M.*, 144 Wn.2d 472, 479 n.4, 28 P.3d 720 (2001) (citing *Khorrami*). This 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 individual].

Williams, 144 Wn.2d at 207-08 (internal quotations omitted). In other words, this Court adopted a civil negligence standard for determining whether a defendant has uttered a true threat instead of constitutionally protected speech. *See State v. Schaler*, 169 Wn.2d 274, 287, 236 P.3d 858 (2010).

Although *Williams* endorsed the above standard, it was immaterial to the outcome. This Court reversed the defendant's conviction for felony harassment on two independent grounds unrelated to the definition of

“true threat.” It held that a prior version of the harassment statute was both vague and overbroad insofar as it criminalized threats to “mental health.” *Williams*, 144 Wn.2d at 212. Thus, the Court had no need to analyze the “true threat” definition in depth, and did not do so. *See id.* at 207-08.

Two years after *Williams*, the U.S. Supreme Court decided *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). As will be discussed below, *Black* called into question the constitutionality of the objective (negligence) standard for assessing true threats. Following *Black*, several courts replaced the objective negligence standard with a subjective intent standard, holding that the First Amendment requires prosecutors to prove the speaker *intended to intimidate* the victim – in other words, that the speaker intended to place the victim in fear of bodily harm or death. *See United States v. Heineman*, 767 F.3d 970, 976 (10th Cir. 2014); *Brewington v. State*, 7 N.E.3d 946, 964-65 (Ind. 2014); *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011); *see also United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (not reaching issue because jury was instructed it had to find intent, but opining that negligence standard is unconstitutional under *Black*).

Unlike these courts, this Court has not yet had occasion to address the impact of *Black* on the negligence standard. The Court should do so here. It should once again follow the Seventh Circuit, and recognize that

“an entirely objective definition is no longer tenable” under the First Amendment. *Parr*, 545 F.3d at 500.

The Supreme Court’s even more recent decision in *Elonis* also provides persuasive authority for the proposition that a negligence standard is insufficient. *See Elonis v. United States*, ___ U.S. ___, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015). The Court did not reach the First Amendment question in *Elonis*, but rejected a negligence standard for threats on statutory construction grounds. *See id.* at 2012. The Court’s holding relied heavily on due process considerations which are equally applicable in Washington. *See id.* at 2009-11.

In sum, this Court should reject the negligence standard in light of *Black* and *Elonis*. It should hold that a person may not be convicted of issuing a “true threat” unless the State proves the speaker subjectively intended to place the victim in fear of bodily harm or death.

2. A mens rea of negligence is insufficient under the First Amendment and *Virginia v. Black*.

Virginia v. Black involved consolidated cases in which three defendants were convicted of the crime of cross-burning with the intent to intimidate. *Black*, 538 U.S. at 347-48. Although the Virginia statute at issue required the prosecution to prove subjective intent to cause fear, it

also provided that “burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.” *Id.* at 348.

This presumption made sense in light of the history of cross-burning in this country. “Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan[,]” a group that “imposed a veritable reign of terror throughout the South.” *Id.* at 352-53 (internal quotations omitted). “Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence.” *Id.* at 354. The victims in *Black* felt “terrible” and “very nervous,” because “a cross burned in your yard ... tells you that it’s just the first round.” *Id.* at 349-50.

In addressing the constitutionality of the statute, the Court reiterated that because the First Amendment protects freedom of speech, only true threats may be criminalized. The Court stated, “‘True threats’ encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Black*, 538 U.S. at 359 (emphasis added). The Court held that Virginia could ban “cross burning with intent to intimidate,” because “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker

directs a threat to a person or group of persons *with the intent of placing the victim in fear* of bodily harm or death.” *Id.* at 360 (emphasis added).

But the Court struck down the subsection creating a rebuttable presumption that any cross-burning was done with intent to intimidate. *Id.* at 364 (Four-justice lead opinion); *id.* at 380-81 (Three justices would have invalidated the statute in its entirety under the First Amendment). The plurality explained, “The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.” *Id.* at 367. Although he would have applied a different remedy, Justice Scalia endorsed the plurality’s view that “‘a burning cross is not always intended to intimidate,’ and nonintimidating cross burning cannot be prohibited.” *Id.* at 372 (Scalia, J., concurring in part).

The convictions in *Black* were reversed even though (1) all of the defendants intentionally burned crosses; (2) the burning crosses caused people to fear harm; and (3) this fear was reasonable in light of the context and history of cross-burning. *See id.* at 348-50. The Court concluded that because of the vital values protected by the First Amendment, even making statements that cause fear of violence is protected unless the statements were made with a *purpose* of causing that fear. *Id.* at 360. This

Court should impose a similar requirement in Washington in order to comport with the First Amendment and *Black*.

3. Other courts have abandoned the negligence standard in light of *Black*.

Other courts have had the opportunity to reassess the true-threat standard in light of *Black*, and have renounced the objective (negligence) standard previously used in favor of a subjective (intent) requirement.

The Tenth Circuit engaged in a particularly thorough analysis in *United States v. Heineman*, 767 F.3d 970 (10th Cir. 2014). There, the defendant was charged with the crime of “sending an interstate threat” after he e-mailed a frightening message to a professor. *Id.* at 971-72. The defendant requested a jury instruction that “the government must prove that the defendant intended the communication to be received as a threat.” *Id.* at 972. After the trial court rejected the request, the defendant moved to dismiss, arguing the statute violated the First Amendment if it did not require proof that “the defendant intended to place the hearer in fear of bodily harm or death.” *Id.*

Although the district court denied the defendant’s motions, the circuit court agreed with his position and reversed. *Heineman*, 767 F.3d at 971. The court rejected the government’s reliance on prior Tenth Circuit opinions, because those decisions either pre-dated *Black* or did not raise

the issue of whether a new true-threat standard was required in light of *Black*. *Id.* at 973-74. The court explained, “we are facing a question of first impression in this circuit: Does the First Amendment, as construed in *Black*, require the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened? We conclude that it does.” *Id.* at 975.

The court acknowledged the complexity of *Black*, but found, “a careful review of the opinions of the Justices makes clear that a true threat must be made with the intent to instill fear.” *Heineman*, 767 F.3d at 976. It noted that a majority of the Court described true threats as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence” and that the majority also said, “Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* (quoting *Black*, 538 U.S. at 359-60).

The Tenth Circuit recognized that only four justices held the prima facie provision of the statute was “overbroad,” but noted that Justice Scalia also endorsed the view that proof of intent to threaten was constitutionally required. *Heineman*, 767 F.3d at 978. The court explained that another circuit’s rejection of *Black* made no sense: the Sixth Circuit

“said that *Black* had no need to impose a subjective-intent requirement because the Virginia statute already required that intent.” *Id.* at 979. But “[i]f the First Amendment does not require subjective intent, how could [The U.S. Supreme Court] invalidate the [Virginia] statute for allowing a jury to find subjective intent on improper or inadequate grounds?” *Id.* at 980. After also rejecting the Sixth Circuit’s illogical grammatical deconstruction of *Black*, the Tenth Circuit held:

In short, despite arguments to the contrary, we adhere to the view that *Black* required the district court in this case to find that defendant *intended to instill fear* before it could convict him of violating 18 U.S.C. § 875(c).

Heineman, 767 F.3d at 982 (emphasis added).

The Indiana Supreme Court has also read *Black* to require a subjective standard. *Brewington v. State*, 7 N.E.3d 946, 963 (Ind. 2014). In other words, the State must prove the speaker intended to place the victim in fear of bodily harm or death. *Id.* Because of its “strong commitment to protecting the freedom of speech,” the Court imposed a two-pronged approach for future cases:

We therefore hold that “true threat” under Indiana law depends on two necessary elements: that the speaker intend his communications to put his targets in fear for their safety, and that the communications were likely to actually cause such fear in a reasonable person similarly situated to the target.

Id.

The Ninth Circuit has similarly held that, following *Black*, proof of subjective intent to threaten is required under the First Amendment. *United States v. Bagdasarian*, 652 F.3d 1113, 1116-18 & 1122 (9th Cir. 2011). The court noted that oftentimes an objective element must *also* be satisfied under the relevant statutes, but in all cases the subjective intent standard must be satisfied as a matter of constitutional law.³ *Id.* at 1117-19.

Finally, as mentioned earlier, the Seventh Circuit has construed *Black* as requiring proof of subjective intent to cause fear. *Parr*, 545 F.3d at 500. The court did not have to resolve the issue in *Parr* because the district court had granted the defendant's request to instruct the jury that it could convict only if Parr "intended his statement to be understood" as a threat. *Id.* The court acknowledged that *Black* was somewhat cryptic and "[i]t is possible that the Court was not attempting a comprehensive redefinition of true threats...." *Id.* "It is more likely, however, that *an entirely objective definition is no longer tenable.*" *Id.* (emphasis added).

³ Like some of the statutes the Ninth Circuit referenced, Washington's harassment statute requires proof that the alleged victims feared bodily injury or death and that this fear was reasonable. RCW 9A.46.020(b). This statutory element of course remains in addition to the *mens rea* required by the First Amendment under *Black*.

The only question the court believed to be open was whether the subjective intent standard should be combined with a requirement of proving the listener's reasonable fear:

[A] standard that combines objective and subjective inquiries might satisfy the constitutional concern: the factfinder might be asked first to determine whether a reasonable person, under the circumstances, would interpret the speaker's statement as a threat, and second, whether the speaker intended it as a threat. In other words, the statement at issue must objectively *be* a threat and subjectively be *intended* as such.

Parr, 545 F.3d at 500.⁴

This Court followed the Seventh Circuit when it initially adopted the objective standard in *Williams*, 144 Wn.2d at 207-08. *See also J.M.*, 144 Wn.2d at 479 n.4. This Court should again follow that court's lead in recognizing that "an entirely objective definition is no longer tenable." *Parr*, 545 F.3d at 500. Instead, a true threat is a statement made with subjective intent to cause fear of bodily injury or death. *Black*, 538 U.S. at 360. Both the statement itself and all relevant "contextual factors" must be considered in determining whether the defendant uttered a true threat. *Id.* at 367.

⁴ Again, Washington's harassment statute already requires proof that the alleged victim reasonably fear that the threat will be carried out. What is lacking and must be added under the First Amendment is a requirement that the State prove subjective intent to cause such fear.

4. A mens rea of negligence is insufficient in light of due process principles as explained in *Elonis*.

Although *Black* is binding authority on the First Amendment question and compels a subjective-intent standard, it is also worth noting that due process concerns support such a standard. The U.S. Supreme Court construed a federal threat statute in light of due process principles and rejected the negligence standard in *Elonis*, 135 S.Ct. at 2011.

Anthony Elonis was charged with multiple counts of the federal crime of communicating a threat, after he posted frightening Facebook messages about how he would kill his ex-wife and others. *Id.* at 2004-07. Elonis explained that he posted the messages for “therapeutic” reasons, to help him “deal with the pain” of divorce. *Id.* at 2005. Over Elonis’s objection, the trial court gave a jury instruction on “true threat” that applied the same reasonable-speaker (negligence) standard that this Court adopted in *Williams*. *Elonis*, 135 S.Ct. at 2006. Elonis was convicted of most of the charges, and he appealed on statutory and First Amendment grounds. *See id.*

The Supreme Court did not reach the First Amendment question, but reversed the convictions after holding that due process did not permit a construction of the statute which allowed conviction based on a mens rea of mere negligence. *Id.* at 2009-12. The Court explained:

Such a “reasonable person” standard is a familiar feature of civil liability in tort law, but is inconsistent with “the conventional requirement for criminal conduct – *awareness* of some wrongdoing. Having liability turn on whether a “reasonable person” regards the communication as a threat – regardless of what the defendant thinks – “reduces culpability on the all-important element of the crime to negligence, and we “have long been reluctant to infer that a negligence standard was intended in criminal statutes.”

Elonis, 135 S.Ct. at 2011 (internal citations omitted); *Cf. State v. Bauer*, 180 Wn. 2d 929, 936-37, 329 P.3d 67 (2014) (declining to import causation standard from tort law because “criminal law and tort law serve different purposes” and “the consequences of a determination of guilt [in criminal cases] are more drastic”).

The Sixth Circuit further explained the due-process problems with the negligence standard in *United States v. Houston*, 792 F.3d 663, 667-68 (6th Cir. 2015). There, the defendant was upset about the fact that his defense attorney foreclosed on part of his property after he failed to pay for the lawyer’s services. *Id.* 665. A jail guard overheard the defendant say, “When me and my brother get out, we’re going to go to that law firm and kill every last one of them.” *Id.* The next day, the defendant called his girlfriend. He told her, “I’ll kill that [expletive] when I get out. Hey, I ain’t kidding! ... When I get out of this, ... he’s dead!” *Id.* He continued to rant about his plan to kill the lawyer, and urged his girlfriend to tell his family

members they had his “permission” to kill him. *Id.* at 665-66. The girlfriend responded that no one was going to kill anybody. *Id.* at 666.

The telephone call had been recorded, and the defendant was charged with crimes for these statements. *Id.* The trial court instructed the jury on the definition of “true threat” using the objective standard. *Id.*

Following *Elonis*, the Court of Appeals reversed. *Houston*, 792 F.3d at 666-68. The court reiterated the principle that “[i]nstead of permitting liability to turn on mere negligence – how acts ‘would be understood by a reasonable person’ – criminal statutes presumptively require ‘awareness of some wrongdoing.’” *Id.* at 666 (quoting *Elonis*, 135 S.Ct. at 2011) (emphasis in original). After citing additional sections of *Elonis*, the court contributed its own analysis to the issue:

And having liability turn on a “reasonable person” standard, we would add, permits criminal convictions premised on mistakes – mistaken assessments by a speaker about how others will react to his words. If a legislature wishes to criminalize negligent acts – and especially negligent utterances – it should say so explicitly; the criminalization of “threats” in “interstate commerce” does nothing of the sort.

Houston, 792 F.3d at 667.

Although the issue had been raised for the first time on appeal, the court reversed in light of “the importance of state-of-mind instructions in ‘threat’ cases” as well as “the oddity of permitting a criminal conviction to

stand based on a reasonable-person – which is to say, negligence – standard.” *Id.* at 668. And as to Houston’s case specifically, the reduced burden on the mens rea was not harmless: “Recognizing that Houston was speaking with his girlfriend, a jury could reason that he was venting his frustration to a trusted confidante rather than issuing a public death threat to another.” *Id.* at 667-68.

The due process principles relied on in *Elonis* are equally applicable in Washington. *See, e.g., State v. Anderson*, 141 Wn. 2d 357, 366-67, 5 P.3d 1247 (2000). Furthermore, the First Amendment provides special protection against the criminalization of speech. *See Black*, 538 U.S. at 358. In light of these twin constitutional concerns, this Court should hold that a person may not be convicted of issuing a “true threat” unless the State proves the speaker subjectively intended to place the victim in fear of bodily harm or death.

5. The facts of Trey’s case demonstrate the importance of adopting a subjective intent standard.

What happened in the case at hand demonstrates the importance of protecting the rights of free speech and due process, and the necessity of abandoning the negligence standard in this state. *See Br. of Appellant* at 4-13; *see also Amicus Br. of ACLU*. A child was convicted of felonies for statements made in therapy, even though talking through one’s feelings in

counseling should be encouraged. Trey never acted with violence, and did not try to scare the three boys who are the alleged victims in this case. He did exactly what a person should do when having frightening thoughts: he was open about his feelings in therapy.

The Court in *Elonis* ruled the adult in that case – who claimed to use Facebook for “therapeutic” purposes – could not be held criminally liable for the fear his statements caused based on a mere negligence standard. 135 S.Ct. at 2005. The court in *Houston* held the adult in that case – who claimed to use his girlfriend as a “trusted confidante” to whom he could “vent his frustrations” – could not be held criminally liable for the fear his statements caused based on a mere negligence standard. 792 F.3d at 667-68. Yet here, a 14-year-old who spoke to an *actual professional psychologist* was held criminally liable for the fear his statements caused, based on a mere negligence standard.

The trial judge’s own disposition demonstrates the problem with this outcome. She told Trey he “shouldn’t be thinking that way” and if he did, he shouldn’t “tell anybody about it, including your therapist.” RP 258. But she immediately ordered Trey to return to therapy and required him to participate in at least one counseling session before he could go back home after being released from jail. RP 262-63. The therapy order was appropriate; the thought-policing was not.

The rights to freedom of expression and due process are too precious to permit criminal liability for speech under a civil negligence standard. This Court should hold that a person may not be convicted of issuing a “true threat” unless the State proves the speaker subjectively intended to place the victim in fear of bodily harm or death.

In the alternative, the convictions in this case should be reversed under the existing standard and *State v. Kilburn*, Br. of Appellant at 21-26; Reply Br. of Appellant at 13-17.

C. CONCLUSION

This Court should hold that a person may not be convicted of issuing a “true threat” unless the State proves the speaker subjectively intended to place the victim in fear of bodily harm or death. Regardless of whether a new standard is adopted, the convictions should be reversed and the charges dismissed for several independent reasons explained in the opening and reply briefs.⁵

Respectfully submitted this 15th day of January, 2016.

/s Lila J. Silverstein
Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant Trey M.

⁵ These reasons are:

(1) The State presented insufficient evidence to prove the alleged victims feared that any threat would be carried out, as required under RCW 9A.46.020(1)(b). All three boys learned of the allegations after Trey had already been arrested and placed in detention, and all three testified they did not fear Trey would harm them. Br. of Appellant at 15-19; Reply Br. of Appellant at 6-10.

(2) The State failed to prove that any fear the boys felt was caused by Trey’s “words or conduct,” as required under the statute. RCW 9A.46.020 (1)(b). None of the three alleged victims testified that they heard Trey’s statements, either directly or indirectly. Nor did they have any idea the statements were made to a mental health counselor during a therapy session. Br. of Appellant at 19-21; Reply Br. of Appellant at 10-12.

(3) Trey’s statements were not true threats under the negligence standard and *Kilburn*, because he made the statements in a private therapy session and all of the boys knew Trey to be a nice person who would not harm anyone. Br. of Appellant at 21-25; Reply Br. of Appellant at 13-17.

(4) Trey’s statements were not true threats under the subjective intent standard and *Black* and *Elonis*. Br. of Appellant at 26-28; Reply Br. of Appellant at 17-20; Br. of Amicus ACLU; Supp. Br. of Appellant.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 92593-3
v.)	
)	
TREY M.,)	
)	
Juvenile Appellant.)	

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To the Clerk of the Court:

Please accept the attached documents for filing in the above-subject case:

1. **Notice of Substitution of Counsel; and**
2. **Appellant's Supplemental Brief on Certified Issue.**

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