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No. 92593-3

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

T.J.M., Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE RAISED

1. What impact, if any, does Elonis v. United States, 135 S.Ct. 2001, 192 L. Ed. 2d 1 (2015), have on this court's precedent adopting an objective test for what constitutes a true threat that is not protected speech?

ANSWER TO ISSUE RAISED

1. Elonis v. United States, 135 S.Ct. 2001, 192 L. Ed. 2d 1 (2015), does not change this court's precedent adopting an objective test for what constitutes a true threat that is not protected speech.

B. ARGUMENT

1. **Elonis does not affect Washington Law.**

In Elonis v. United States, 135 S.Ct. 2001, 192 L. Ed. 2d 1 (2015), the Court interpreted a federal statute. Elonis is therefore, a case of statutory construction, and as such, is limited to 18 U.S.C. § 875 (c). No case reported thus far extends Elonis's holding beyond § 875 (c). The United States Supreme Court's interpretation of a federal statute does not control a state court's interpretation of a state statute. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

The appellate courts of California already have acknowledged that this applies to Elonis. In People v. Murillo, 238 Cal. App. 4th 1122, 1129, 190 Cal. Rptr. 3d 119 (2015), reh'g denied (Aug. 6, 2015), review denied (Oct. 14, 2015), a case involving a threat with facts quite similar to Elonis, the California Court of Appeals declined to consider Elonis. The

court reasoned that because Elonis only involved the mens rea required for conviction under a specific federal statute their decision was governed by their own Supreme Court's interpretation of the state statute. 238 Cal. App. 4th 1122, 1129, 190 Cal. Rptr. 3d 119 (2015), reh'g denied (Aug. 6, 2015), review denied (Oct. 14, 2015). Legal commenters also have noted that Elonis does not change First Amendment jurisprudence. See e.g., Federal Threats Statute-Mens Rea and the First Amendment- Elonis v. United States, 129 Harv. L. Rev. 331, 336 (2015) (“[b]ecause Elonis was decided on statutory grounds, ‘true threats’ remain a doctrinal puzzle for lower courts”). In sum, Elonis does not invalidate Washington’s true threat standard.

The Washington Supreme Court has long held that Washington’s definition of a “true threat” survives constitutional scrutiny, and that remains valid. See State v. Kilburn, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004) (establishing reasonable-speaker standard for true threats); see also State v. Allen, 176 Wn.2d 611, 628, 294 P.3d 679, 688 (2013) (a true threat requires a mens rea of at least negligence) (citing State v. Schaler, 169 Wn.2d 274, 286-87, 236 P.3d 858 (2010)).

2. There is no basis for imputing any additional mental elements into the statute based on Elonis.

In Elonis v. United States, the majority decision reversed the conviction based purely on its interpretation of the federal statute at issue and declined to reach any constitutional issues. 135 S.Ct. at 2012 (stating, “Given our disposition, it is not necessary to consider any First Amendment issues.”).

Elonis was charged with violating 18 U.S.C. §875(c), which prohibits transmitting in interstate commerce “any communication containing any threat to injure the person of another.” The question addressed by the Court in its decision was “whether the statute also requires that the defendant be aware of the threatening nature of the communication.” Id. at 2005. The threats in question had been communicated on Elonis’s Facebook page.

At trial, Elonis unsuccessfully requested a jury instruction that required the government to prove that he intended to communicate a true threat. Id. at 2007. The jury was instructed as to constitutional true threat standard as follows:

A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the

statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

Id.¹

Noting that the federal statute does not specify any mental state with respect to the elements, the Court stated that omission of a mental state from a statute necessarily means that the statute requires no mental state. Id. at 2009. The Court applied the following principle: “When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute ‘only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” Id. at 2010 (quoting United States v. X-citement Video, Inc., 513 U.S. 64, 72, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994)). In some cases, requiring only that the actor act knowingly “would fail to protect the innocent actor.” Id. (quoting Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000)).

While the parties in Elonis agreed that a defendant must know that he is transmitting a communication under the federal statute, the Court

¹ This true threat instruction, required by the First Amendment, is substantially the same as WPIC 2.24, which reads: “To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in [jest or idle talk] [jest, idle talk, or political argument].” 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.24 (3d Ed).

concluded that the “‘crucial element separating legal innocence from wrongful conduct’ is the threatening nature of the communication.” Id. at 2011 (quoting X-citement Video, 513 U.S. at 73). Therefore, the Court held that any mental state requirement must apply to the fact that the communication contains a threat. Id. The Court held that the mental state requirement would be satisfied with evidence that the defendant “transmits a communication for the purpose of issuing a threat” or “with knowledge that the communication will be viewed as a threat.” Id. at 2012. The Court declined to address the question of whether recklessness would also be a sufficient mental state for establishing guilt. Id.

The crime at issue here, unlike the federal statute at issue in Elonis, explicitly requires a mental state. First, the felony harassment statute, RCW 9A.46.020, requires the State to prove that the defendant *knowingly* threatened to kill the person threatened or any other person. In addition, the “true threat” standard, which is imposed to ensure that constitutionally protected speech is not punished, requires the State to prove that the speaker could reasonably foresee that the statement would be viewed as a serious expression of intent to inflict bodily harm or take the life of another person. See State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004).

In other words, for the crime of harassment, the State must prove that the defendant knowingly communicated a threat that a reasonable person would foresee would be viewed as serious expression of an intent to harm or kill. As such, the felony harassment statute does not require imputation of any additional mental states in order to protect “innocent actors.” Because RCW 9A.46.020 explicitly requires that the State prove that the defendant act with knowledge in communicating a true threat, there is no basis for imputing any additional mental elements into the statute based on Elonis.

3. Washington should maintain the objective, reasonable person standard.

The majority of courts apply an objective standard and have adopted (or reaffirmed) the rule after Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). See e.g., Citizen Publ’g Co. v. Miller, 115 P.3d 107, 114 (Ariz. 2005); Jones v. State, 64 S.W.3d 728, 736 (Ark. 2002); People v. Lowery, 257 P.3d 72, 74 (Cal. 2011); People v. Baer, 973 P.2d 1225, 1231 (Colo. 1999); State v. Moulton, 78 A.3d 55 (Conn. 2013); State v. Valdivia, 24 P.3d 661, 671-672 (Haw. 2001); State v. Soboroff, 798 N.W.2d 1, 2 (Iowa 2011); State ex rel. RT, 781 So. 2d 1239, 1245-1246 (La. 2001); Hearn v. State, 3 So. 3d 722, 739 (Miss. 2008); State v. Lance, 721 P.2d 1258, 1266-1267

(Mont. 1986); State v. Curtis, 748 N.W.2d 709, 712 (N.D. 2008); State v. Moyle, 705 P.2d 740, 750-751 (Or. 1985) (en banc); J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 858 (Pa. 2002); Austad v. Bd. of Pardons and Paroles, 719 N.W.2d 760, 766 (S.D. 2006); State v. Johnston, 156 Wn.2d 355, 127 P.3d 707, 710 (2006); State v. Perkins, 626 N.W.2d 762, 770 (Wis. 2001). A minority of States support the subjective test. See e.g., O'Brien v. Borowski, 961 N.E.2d 547, 557 (Mass. 2012); State v. Grayhurst, 852 A.2d 491, 515 (R.I. 2004); State v. Miles, 15 A.3d 596, 599 (Vt. 2011); State v. Pomianek, 58 A.3d 1205, 1217 (N.J. App. Div. 2013).

Some courts have construed Black narrowly as having overturned the Virginia statute for overbreadth because the statute classified public cross burning as prima facie evidence of intent to intimidate when it was sometimes protected speech. See, e.g., United State v. Jeffries, 692 F.3d 473, 479-80 (6th Cir. 2012); United State v. Mabie, 663 F.3d 322, 332 (8th Cir. 2011); United State v. White, 670 F.3d 498, 511 (4th Cir. 2012).

Washington should maintain its objective, reasonable person standard. As explained in State v. Kilburn:

This conclusion accords with the reasons why true threats are not protected speech. The fear of harm aroused in the person threatened and the disruption that may occur as a result of that fear are some of the

reasons why true threats are not protected speech. R.A.V., 505 U.S. at 387-88. That fear does not depend upon whether the speaker in fact intends to carry out the threat. For this reason, we hold, along with the vast majority of courts, that the First Amendment does not require that the speaker intend to carry out a threat for it to constitute a true threat.

...

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 serious threat or a joke.

151 Wn.2d 36, 46, 84 P.3d 1215 (2004).

C. CONCLUSION

Based on the above arguments, Elonis does not change Washington Law. There is no basis for imputing any additional elements into Washington's felony harassment statute based on Elonis. Furthermore, Washington should maintain the objective, reasonable person standard.

Respectfully submitted this 15th day of January, 2016,


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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on January 15, 2016, by agreement of the parties, I emailed a copy of State's Brief of Respondent to David L. Donnan and Lila Jane Silverstein at wapofficemail@washapp.org. I also mailed a copy of said brief to the following attorneys by U.S. mail:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 15th day of January, 2016 at Yakima, Washington.



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Good morning,

Attached for filing is the State's Supplemental Brief in case number 92593-3, State v. T.J.M.

Thank you,

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