

62579-9

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NO. 62579-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,
v.
ANTONIO JAKO,
Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 NOV -5 11:43 AM '09

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

The Honorable Catherine Shaffer

APPELLANT'S REPLY BRIEF

Susan F. Wilk
Attorney for Appellant

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A. ARGUMENT IN REPLY

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In State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006), the Washington Supreme Court held, “the jury must be instructed that a conviction under RCW 9.61.160 requires a true threat and must be instructed on the meaning of the true threat.” This unambiguous language notwithstanding, the State alleges, “the Court in Johnston discussed the fact that a ‘true threat’ is a definition[.]” Br. Resp. at 6 (citing Johnston, 156 Wn.2d at 366). This citation does not support the State’s assertion.¹ To the contrary, the Court’s holding indicates that by “constru[ing] the bomb threat statute, RCW 9.61.160 to apply only to true threats,” the Court has read into the statute a “true threat” element. See Johnston, 156 Wn.2d at 366.

¹ In another portion of the State’s brief, the State makes the same assertion. See Br. Resp. at 7 (asserting, “The parties were in further agreement, and the Supreme Court concurred, that the jury instructions “were erroneous because they did not define ‘true threat.’” (State’s emphasis) (quoting Johnston, 156 Wn.2d at 364). Under no reasonable construction can the quoted portion of the Johnston opinion be termed a holding, or indeed, anything more than the Court’s acknowledgment of the propriety of the State’s concession of error in that case.

2. COURTS IN OTHER JURISDICTIONS HAVE
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Both the federal courts and at least one other state supreme court have expressly held that whether a threat is a “true threat” is an element of a harassment crime. In State v. Robert T., 7146 N.W.2d 564 (Wis. 2008), the Wisconsin Supreme Court construed its own “bomb scares” statute. That statute provided,

Whoever intentionally conveys or causes to be conveyed any threat or false information, knowing such to be false, concerning an attempt or alleged attempt being made or to be made to destroy any property by the means of explosives is guilty of a Class I felony.

Wis. Stat. § 947.015 (2003-04)

Discussing its own cases interpreting the “true threat” requirement, the Court concluded, “we are satisfied that upon reading into the elements of the crime a requirement that it must be a “true threat” renders Wis. Stat. § 947.015 constitutional.” Robert T., 746 N.W.2d at 568. The Court further observed, “Indeed, this is exactly what the supreme court of the state of Washington did with a similar statute prohibiting threats.” Id. (citing Johnston).

The Ninth Circuit has also held that a “true threat” requirement is an element of a harassment offense. United States

v. Cassel, 408 F.3d 622 (9th Cir. 2005) (construing 18 U.S.C. § 1860, which proscribes interfering with a federal land sale). The Court conducted a lengthy analysis of the Supreme Court's decision in Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), and concluded, based on this assessment, that "intent to threaten is a constitutionally necessary element of a statute punishing threats." Cassel, 408 F.3d at 630-34. Applying this rule, in an appeal following a conviction for making interstate threats to injure, in violation of 18 U.S.C. § 875(c), the Court noted, "specific intent to threaten is an essential element of a §875(c) conviction[.]" United States v. Sutcliffe, 505 F.3d 944, 962 (9th Cir. 2007).

The Seventh Circuit reached a like result in United States v. Fuller, 387 F.3d 643 (2004). While noting a circuit split on the question whether a "true threat" must include a subjective component, the Court held, "the only two essential elements for [a prosecution under 18 U.S.C. § 871] are the existence of a true threat to the President and that the threat was made knowingly and willfully." 387 U.S. at 647; accord United States v. Lockhart, 382 F.3d 447, 450 (4th Cir. 2004) ("The statute governing threats against the President . . . has been interpreted to include two major

elements: (1) the proof of a “true threat” and (2) that the threat is made “knowingly and willfully.”)

3. THE WASHINGTON PATTERN JURY INSTRUCTIONS DO NOT DEFINE THE ELEMENTS OF CRIMES.

The State briefly contends that because in 2007 the Washington Supreme Court approved pattern jury instructions which did not contain a “true threat” element in the pattern “to convict” instructions for threat crimes, then the instructions must be correct. Br. Resp. at 8-9. But the Washington Supreme Court has never held that the Washington Pattern Jury Instructions accurately state the law. In fact, the Court has expressly cautioned against reliance on the pattern instructions rather than the Court’s own decisions. State v. Studd, 137 Wn.2d 533, 547-49, 973 P.2d 1049 (1999). This Court may no more conclude that the “approval” of the Washington Pattern Jury Instructions signals the Court’s acquiescence in the State’s theory than the Court may infer the Court concurs in an intermediate appellate court’s holding because it did not accept review. See Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 365 n. 1, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973) (referencing “well-settled view” that “denial of certiorari

imparts no implication or inference concerning the Court's view of the merits.")

4. PRINCIPLES OF *STARE DECISIS* REQUIRE *TELLEZ* BE OVERRULED.

Under principles of *stare decisis*, established case doctrine is binding unless it is shown to be both incorrect and harmful. State v. Robbins, 138 Wn.2d 486, 494, 980 P.2d 725 (1999). This Court has held that a "true threat" is a mere definitional term that need not be in the "to convict" instruction, and the State urges this Court to adhere to this holding. State v. Tellez, 141 Wn. App. 479, 482-84, 170 P.3d 75 (2007).

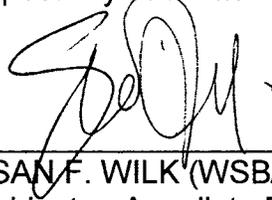
But the federal and state decisions cited in argument 2 establish that this Court's conclusion is incorrect. Further, the holding is harmful to the extent that if this constitutional predicate is treated as a "definition," the State's burden of proof is diluted, and the Court cannot be confident that the jury's verdict in a given case did not reach protected speech. Tellez should be overruled.

B. CONCLUSION

Based on the foregoing arguments and the arguments made in the Brief of Appellant, this Court should conclude the “true threat” requirement is an essential element of a harassment offense. To the extent that Tellez conflicts with this conclusion, Tellez must be overruled.

DATED this 5th day of November, 2009.

Respectfully submitted:



SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> DENNIS MCCURDY, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> ANTONIO JAKO 821820 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____

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X _____


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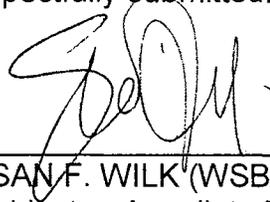
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