

No. 65921-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES BALLEW

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

James Ballew was delusional and involuntarily committed at Harborview Hospital when he telephoned the Port of Seattle Police and reported he had arranged to have bombs placed in the airport. Mr. Ballew was charged and convicted of violating the threats to bomb or injury property statute, RCW 9.61.160.

The threats to bomb statute unconstitutionally chills the rights guaranteed by the First Amendment unless the jury is instructed that the statute only covers “true threats.” The trial court provided a definition of “true threat” that (1) did not include the requirement found in Virginia v. Black, 538 U.S. 343 (2003), that the speaker intend that his speech cause the recipient fear of injury, and (2) did not contain an exemption for idle talk, jokes, or political rhetoric. This Court therefore cannot be assured that the jury did not convict Mr. Ballew for speech protected by the First Amendment, and his conviction must be reversed.

In addition, the jury was instructed as to the two alternative means of committing threats to bomb or injury property, but the State did not prove one alternative means. This Court therefore cannot conclude that the jury verdict was unanimous, and Mr. Ballew’s conviction must be reversed

Finally, in closing argument the prosecutor told the jury that “crazy people” can carry out threats, using John Hinckley as an example. The comparison to Hinckley appealed to the jury’s fear of the mentally ill and was inflammatory, as Mr. Ballew did not assault anyone whereas Hinckley shot four people and paralyzed one. The comparison was further misleading because Hinckley was found not guilty by reason of insanity and confined in a mental hospital, whereas Mr. Ballew did not raise a mental defense, received a felony conviction, and was sentenced to jail. The prosecutor’s misconduct also requires reversal of Mr. Ballew’s conviction.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by giving Instruction 8, because it incorrectly and incompletely defined “true threat.”¹ CP 36.
2. The State did not prove both alternative means of threats to bomb or injure property.
3. The prosecutor committed misconduct when she referred to John Hinckley in closing argument.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The First Amendment protects the right of citizens to free expression. Washington’s bomb threat statute unconstitutionally

¹ Copies of Instructions 8 and 9 are attached as an appendix to this brief.

infringes upon First Amendment rights unless the jury is instructed that the threat is a “true threat.” The trial court’s instruction defining “true threat” (1) did not include the requirement from Virginia v. Black, 538 U.S. 343 (2003), that the speaker intended to place the recipient in fear, and (2) did not inform the jury that idle talk, jokes, and political speech were not “true threats.” After de novo review, should this Court be conclude that the State cannot prove beyond a reasonable doubt that the erroneous jury instruction did not permit Mr. Ballew to be convicted based upon speech protected by the First Amendment?

2. In a criminal case, the constitutional protections of due process require that the State prove every element of the crime beyond a reasonable doubt, and the right to a jury trial mandates that the jury return a unanimous verdict. U.S. Const. amends. V, XIV; Const. art. I, §§ 21, 22. The jury was instructed that it could convict Mr. Ballew under one of two alternative means, but was not given a unanimity instruction. Where the jury returned a general verdict and the State did not prove the second alternative means beyond a reasonable doubt, must Mr. Ballew’s conviction be reversed and remanded for a new trial only on the first alternative means?

3. The prosecuting attorney has a duty to seek a verdict free from passion and prejudice, and the prosecutor's misconduct may violate a defendant's constitutional right to a fair trial. U.S. Const. amends. V, XIV; Const. art. I §§ 3, 22. The prosecutor thus may not appeal to the jury's passions or prejudices, reference infamous criminals, or argue facts not in evidence. The prosecutor argued that "crazy people" carry out threats and told the jury about John Hinckley, who shot several people but was found not guilty by reason of insanity, even though Mr. Ballew was only charged with making a threat and did not raise a mental defense. Where the argument appealed to the jury's fear of the mentally ill, led members of the jury to conclude Mr. Ballew would be treated at a mental hospital if they returned a guilty verdict, and where evidence of Hinckley's crime was not in evidence, was Mr. Ballew prejudiced by the prosecutor's improper argument?

D. STATEMENT OF THE CASE

James Ballew was involuntarily committed by the court in October 2009 because he had a mental illness and was considered a danger to himself or others; as a result Mr. Ballew was placed in the locked psychiatric unit at Harborview Hospital. 7/6/10RP 13-14; RCW 71.05. Patients were permitted to use a cordless telephone

belonging to the unit, and Mr. Ballew used the telephone to call 911 in hopes of talking to Port of Seattle Police Officer Darin Beam. 6/30/10RP 28, 7/6/10RP 14, 22. Officer Beam had been kind to Mr. Ballew when, three days earlier, the Port Police had demanded that Mr. Ballew leave the airport and told him he could not return without a genuine airline ticket. 7/6/10RP 32-33, 37-38.

When Mr. Ballew's call was transferred from the Seattle Police Department to the port, he told the Port of Seattle Police and Fire dispatcher that there were five bombs placed in the airport, that Officer Beam knew who placed them, and he needed to talk to the officer. Ex. 1; 6/30/10RP 12-13, 15-16. Officer Beam was not on duty. Ex. 1; 6/30/10RP 15-16. Mr. Ballew told the dispatcher that his "associates" had placed five bombs in and around the airport and ignored the dispatcher's direct questions about their location. Ex. 1; 6/30/10RP 16. He hung up because the dispatcher would not give him Officer Beam's personal telephone number. Ex. 1.

While the port dispatcher was speaking to Mr. Ballew, the Seattle police dispatcher traced the call to a Harborview Hospital telephone number, and Harborview security soon identified the number as belonging to a telephone in the locked psychiatric unit. Ex. 1; 6/30/RP 19, 22, 30. The dispatcher called the psychiatric

unit, and the staff looked for the cordless telephone, finding it in Mr. Ballew's room. Ex. 1; 7/6/10RP 15-16

The port's on-duty police officers began to search the unsecured areas of the airport – the areas outside TSA security -- for possible explosive devices. 6/30/10RP 48. Port police personnel testified that they were required to investigate every bomb threat whether or not it appeared serious. 6/30/10RP 27, 56-57, 118; 7/6/10RP 52.

Meanwhile, the dispatcher left a message for Officer Beam. The officer quickly returned the call, listened to the 911 call, and immediately identified the caller as Mr. Ballew. 6/30/1-RP 54-55; 7/6/10RP 39-41. The port dispatcher then called Harborview and confirmed that Mr. Ballew was a patient. Ex. 1; 6/30/10RP 31-32.

Officer Robert Stecz went to Harborview Hospital and talked to Mr. Ballew about the bomb threat. 6/30/10RP 94. Mr. Ballew was in a locked ward wearing hospital clothing. 6/30/10RP 94-96. He was disappointed that Office Beam had not come to see him, but Officer Stecz said he was a friend of Officer Beam and could act as a go-between. 6/30/10RP 98. Mr. Ballew initially denied placing the telephone call, but also said he would tell Officer Beam where "his people" had placed the bombs. 6/30/10RP 99-100, 114-

15. Mr. Ballew asked for Officer Beam off and on throughout the conversation. 6/30/10RP 105-06.

Officer Stecz tried to question Mr. Ballew about the size of the purported bombs, but received answers ranging from the size of a bar of soap to a shoe box. 6/30/10RP 100, 102. Mr. Ballew also claimed the bombs could not be found by x-rays, electronic devices, or dogs, which Officer Stecz knew was not possible. 6/30/10RP 100-02. Mr. Ballew further claimed he was an Air Force corporal on undercover assignment working directly for President Obama, and his security clearance was so high it was "cosmic clearance." 6/30/10RP 103-04. Based upon the conversation, Officer Stecz determined Mr. Ballew had not made a "credible threat." 6/30/10RP 104, 115.

Harborview psychiatric nurse Timothy Meeks explained that Mr. Ballew was involuntarily detained at Harborview and his initial diagnosis was bipolar disorder with manic episodes. 7/6/10RP 23-25. He confirmed Mr. Ballew had delusions that he worked for the government and was in frequent contact with President Obama and Mayor Nichols, who Mr. Ballew believed was elected due to his efforts. 7/6/10RP 17, 26.

The airport police were familiar with Mr. Ballew and had escorted him from the airport two times that month. On October 10, a woman reported that Mr. Ballew had threatened her. Mr. Ballew was loud and angry when the police contacted him but did not touch or assault anyone. 6/30/10RP 65, 67-70. The primary officer's report noted Mr. Ballew was clearly mentally unstable. 6/30/10RP 84-86.

The police again contacted Mr. Ballew at the request of a Delta Airline employee when he asked to pay for an airline ticket to Atlanta with a promissory note on October 14. 6/30/10RP 92-93, 110-11. Mr. Ballew was loud and argumentative with the officers. 7/6/10RP 46; 7/6/10RP 32.

Mr. Ballew was wearing a leather jacket but no shirt, dirty sweatpants, and what appeared to be women's nylon stockings, and he was carrying a grocery bag full of wrappers rather than food. 7/6/10RP 31-32. Officer Beam spoke with Mr. Ballew in an effort to determine if he was capable of caring for himself or if the police should refer him for civil commitment as gravely disabled.² Mr. Ballew agreed to leave the airport peacefully after offering the

² Mr. Ballew, who was 70 years old, reported that he had diabetes that he was managing with candy. Officer Beam was unable to confirm that Mr. Ballew had a place to live. CP 2; 7/6/10RP 35-36, 44.

officer a job. 6/30/10RP 93; 7/6/10RP 32-33, 38, 43-44, 46-47. Mr. Ballew said he wanted to get to Atlanta to see his daughter, who had cancer, and added that the next time he would take his private jet to Atlanta. 6/30RP 114; 7/6/10RP 35.

The King County Prosecutor charged Mr. Ballew with making threats to bomb or injure property, contrary to RCW 9.61.160, in October 2009. CP 1. For the next several months, Mr. Ballew's competency to stand trial was at issue, but the court found him competent in May 2010, and he exercised his right to a jury trial and did not raise a mental defense. CP 6-25; 6/30/10RP 2-3. After a trial before Judge Michael Hayden, Mr. Ballew was convicted as charged and sentenced to the high end of the standard sentence range. CP 26, 43-46. This appeal follows. CP 53, 55-65.

E. ARGUMENT

1. THIS COURT MUST REVERSE MR. BALLEW'S CONVICTION BECAUSE IT CANNOT BE CONVINCED THE JURY DID NOT CONVICT MR. BALLEW FOR SPEECH PROTECTED BY THE FIRST AMENDMENT IN LIGHT OF THE COURT'S INCORRECT INSTRUCTION DEFINING "TRUE THREAT"

a. In order to ensure Washington's bomb threat statute does not criminalize speech protected by the First Amendment, the jury must be instructed the statute applies only to true threats. The First Amendment protects the right of an individual to freely express himself in order to permit the free exchange of ideas necessary for a democracy, even if the ideas are distasteful or offensive.³ U.S. Const. amends. I, XIV; Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); New York Times v. Sullivan, 376 U.S. 254, 269-70, 84 S.Ct. 710, 11 L.Ed2d 686 (1964) (noting national commitment to permitting robust public debate that may include vehement and even sharp attacks). Article I, section 5 of the Washington Constitution similarly guarantees the right to freely

³ The First Amendment states, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

The First Amendment is applicable to the states through the Fourteenth Amendment. Black, 538 U.S. at 358.

express ideas.⁴ The right to free speech is both a fundamental right and a key to ensuring the exercise of other constitutional rights.

Nelson v. McClathy Newspapers, Inc., 131 Wn.2d 523, 535-36, 936 P.2d 1123, cert. denied, 118 S.Ct. 175 (1997).

Some speech, however, is exempt from First Amendment protections, including “true threats.” Black, 538 U.S. at 359; Watts v. United States, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). The United States Supreme Court has not provided a definitive definition of the term “true threats,” but held they include “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.

“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 or individuals. The speaker need not actually intend to carry out the threat. Rather a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that violence will occur. 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

⁴ Article I, section 5 reads, “Every person may freely speak, write and publicly on all subjects, being responsible for the abuse of that right.”

of persons with the intent of placing the victim in fear of bodily injury or death.

Id. at 359-60. Thus, the Black Court reversed a conviction under Virginia's cross burning statute where a cross was burned as part of a Ku Klux Klan rally on private property, but affirmed convictions where defendants burned crosses on an African American neighbor's yard in an attempt to intimidate the family. Id. at 348-50, 367-68.

Washington's bomb threat statute, RCW 9.61.160, contains no provision limiting its reach to true threats. RCW 9.61.160. In order to avoid finding the statute unconstitutional, the Washington Supreme Court construed it as applicable only to true threats. State v. Johnston, 156 Wn.2d 355, 359-60, 127 P.3d 707 (2006). The Court held that because the statute is otherwise overbroad, the jury must be given a limiting instruction "so that [the statute] only proscribes true threats." Id. at 363. The Johnston Court did not specify the language of the limiting instruction, but mentioned Black's holding that "true threats" include statements the speaker intends to communicate a serious threat of violence against a person or group of people. Id. at 361-63 (quoting Black, 438 U.S. at 359).

b. The court's jury instruction incorrectly defined true threats in and thus failed to protect Mr. Ballew's First Amendment rights.

The limiting instruction given in Mr. Ballew's case did not protect his First Amendment rights because it incorrectly defined true threat. Under the instruction, the jury was not required to determine if Mr. Ballew intended to communicate a serious threat of violence. The instruction further did not explain that political speech and idle talk do not constitute true threats that may be criminally sanctioned.

The trial court here attempted to limit the scope of the bomb threat statute to constitutionally protected speech through the instruction defining the crime of threatening to bomb or injure property. CP 38. Instruction 8 informed the jury:

A person commits the crime of threatening to bomb or injure property when he or she threatens to bomb or otherwise injure any government property, or any other building or structure, or any place used for human occupancy, or when he or she communicates or repeats any information concerning such threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to whom the information is communicated or repeated.

To be a threat, a statement or act must occur in a context or under circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intent to carry out the threat.

CP 38. The instruction combines the second paragraph from the Washington pattern instruction defining threat and parts of the pattern instruction defining the crime of threatening to bomb or injury property. Washington Supreme Court Committee on Jury Instructions, 11 Washington Practice: Pattern Jury Instructions Criminal, § 2.24 (2008) (definition of “threat”); 11A Washington Practice: Pattern Jury Instructions Criminal, § 86.01 (2008) (definition of threats to bomb) (WPIC).

This Court must review Instruction 8 de novo because it involves an interpretation of the First Amendment State v. Schaler, 169 Wn.2d 274, 282, 236 P.3d 858 (2010).

i. The court’s instruction omits the Black Court’s requirement that, in order to be a true threat, the defendant must intend that his remarks will place the victim in fear. The pattern instruction upon which the court’s instruction was modeled is based upon language in Kilburn, where the Washington Supreme Court defined true threat utilizing the objective speaker-based standard. State v. Kilburn, 151 Wn.2d 36, 43-44, 84 P.3d 1215 (2004); 11 Wash. Prac. at 73-74 (Comment to WPIC 2.24). The Kilburn Court held that a true threat is “a statement made in a context or under such circumstances where in reasonable person would foresee that

the statement would be interpreted . . . as a serious expression of intent to inflict bodily harm upon or take the life of another person.” Kilburn, 151 Wn.2d at 43 (quoting State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001)) (internal quotation marks omitted). The Kilburn Court rejected the defendant’s argument that actual intent to cause injury is required, but added that the harassment statute’s knowledge element requires the defendant “subjectively know” that he is communicating a threat to cause bodily injury to the person threatened or to another person. Id. at 44-48. The court went on to reverse the defendant’s harassment conviction because the evidence, including his relationship with the person who received the threat, showed he was joking and a reasonable person in his position would not foresee that the person who heard the threat would have taken the threat seriously. Id. at 52-53

The Kilburn Court’s definition, however does not comply with the Black Court’s statement that the speaker must mean “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. In fact, Kilburn never cites Black. Black, however, mandates that the jury consider the defendant’s

subjective intent in determining if a threat is a true threat or is protected by the constitution.

Since Black was decided, the Tenth Circuit held that intent to place the victim in fear is a necessary requirement for a true threat. United States v. Magleby, 420 F.3d 1136, 1139 (10th Cir. 2005) (“The threat must be made ‘with the intent of placing the victim in fear of bodily injury or death.’”) The Seventh Circuit also noted that Black undermined the traditional objective test for true threat and it is “likely that an entirely objective definition is no longer tenable.” United States v. Parr, 545 F.3d 491, 500 (7th Cir. 2008). The Ninth Circuit has issued opinions using both the subjective and the objective standard in determining if there has been a true threat. Fogel v. Collins, 531 F.3d 824, 831-33 (9th Cir. 2008) (recognizing circuit had not yet decided which standard to use and finding language in question not a true threat under either standard); United States v. Stewart, 420 F.3d 1007, 1017-19 (9th Cir. 2005) (recognizing split and finding defendant’s threat to have a judge killed was a true threat under either test). See Paul T. Crane, “True Threats” and the Issue of Intent, 92 Va. L. Rev. 1225, 1276 (2006) (arguing for subjective test requiring proof defendant intended to threaten recipient).

When the Johnston Court announced that the jury must be given an instruction limiting the bomb threat statute to true threats in order to prevent the statute from criminalizing speech protected by the First Amendment, the court quoted Black, thus letting the lower courts know that the instruction should include Black's requirements. Johnston, 156 Wn.2d at 361-62. The instruction defining true threat in this case did not protect Mr. Ballew's constitutional right to free expression, as it did not require the jury to find that Mr. Ballew understood that his threats would be taken as a serious threat to property or human life, as required to protect his constitutional right to free speech. Black, 538 U.S. at 360-61.

ii. *The court's instruction did not exclude idle talk or political speech from the speech proscribed by the threat to bomb statute.* To be a true threat, the threat must be a serious threat, not a joke or political argument. Watts, 394 U.S. at 707-08; Schaler, 169 Wn.2d at 283. In Watts, the defendant's statement that the first person he would shoot when inducted into the military was President Lyndon Johnson was protected by the First Amendment. Watts, 394 U.S. at 706. Similarly, the Ninth Circuit held that the following words written on a Volkswagen van were protected by the First Amendment: "I AM A FUCKING SUICIDE BOMBER

COMMUNIST TERRORIST,” “PULL ME OVER! PLEASE I DARE YA,” and “ALLAH PRAISE THE PATRIOT ACT . . . FUCKING JIHAD ON THE FIRST AMENDEMENT! P.S. W.O.M.D. ON BOARD!” Fogel v. Collins, 531 F.3d at 827 (finding the statements were not a true threat under either the objective or subjective tests); accord Bauer v. Sampson, 261 F.3d 775, 780, 783-84 (9th Cir. 2001) (a college professor’s threat to drop a two-ton slate of granite, on which he had etched the college president’s name, on her head was protected speech).

The jury in Mr. Ballew’s case, however, was never instructed that idle talk, jest, or political speech is excluded from the definition of threat. While Instruction 8 is modeled after WPIC 2.24, it specifically excludes the pattern instruction’s language informing the jury this protected speech is not included in the definition of threat. WPIC 2.24 reads in pertinent part:

To be a threat, a statement or act must occur in a context or under circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intent to carry out the threat rather than as something said in [jest or idle talk] [jest, idle talk, or political argument].

WPIC 2.24 (emphasis added). The underlined portion, however, is absent from Instruction 8.

Thus, the jury in Mr. Ballew's case received a true threat instruction that (1) used the objective speaker standard instead of the subjective speaker standard required by Black, and (2) failed to exclude idle talk, jokes, and political speech as required by the First Amendment. Mr. Ballew's constitutional right to free speech was violated by the jury instruction given by the court.

c. Mr. Ballew may address this First Amendment issue on appeal. Mr. Ballew did not specifically except to the court's giving the true threat instruction.⁵ 7/6/10RP 53-56. Normally appellate courts will not review issues not brought to the attention of the trial court, but the court rules provide an exception for constitutional issues because those issues may result in a serious injustice to the accused. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). In determining whether to review a purported constitutional error for the first time on appeal, the appellate court first determines if the error is truly of constitutional magnitude and, if so, determines the effect the error had on the trial using the constitutional harmless error standard. Scott, 110 Wn.2d at 688. Put another way, an error is manifest if it has "practical and

⁵ Defense counsel excepted to the court's failure to include the definition of true threat in the "to convict" instruction as he had proposed. 7/6/10RP 53-55.

identifiable consequences in the trial of the case.” Schaler, 169 Wn.2d at 282.

The appellate courts will consider a challenge to a jury instruction raised for the first time on appeal when the giving or failure to give the instruction invades a fundamental constitutional right, including the right to a jury trial. State v. Green, 94 Wn.2d 216, 231, 616 P.2d 628 (1980). The absence of a jury instruction defining true threat is a manifest error affecting the defendant’s First Amendment rights that may be addressed for the first time on appeal, even if the defendant has assented to giving the incorrect instruction. Schaler, 169 Wn.2d at 282-88. The instruction here permitted the jury to convict Mr. Ballew of threats to bomb without determining that he intended to communicate a threat and place another person in fear as required by the First Amendment. Black, 538 U.S. at 360-61. The instruction further did not exclude idle talk, jokes, or political speech from the definition of true threat. The instruction thus reduced the State’s burden of proof. See State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001) (instruction that relieved State of burden of proving all elements of crime was manifest constitutional error). The instruction had a practical and

identifiable consequence in the trial, and this Court should review Mr. Ballew's First Amendment argument.

d. The State cannot demonstrate beyond a reasonable doubt that the error is harmless, and Mr. Ballew's conviction must be reversed. An erroneous jury instruction given on behalf of the prevailing party is presumed to be prejudicial unless the prevailing party clearly demonstrates the error was harmless. State v. Warrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). The State must demonstrate that the error in giving the incomplete definition of true threat was harmless beyond a reasonable doubt. Johnston, 156 Wn.2d at 366. An instructional error is only harmless if it is "trivial, or formal, or merely academic, was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." Id. Stated another way, error in a jury instruction is not harmless "when the evidence and the instructions leave it ambiguous as to whether the jury could have convicted on improper grounds." Schaler, 169 Wn.2d at 288.

The State cannot prove beyond a reasonable doubt that the court's improper definition of true threat was not harmless. In Schaler, the defendant was seeking help from the mental health crisis center when he made statements about killing his neighbors

that led to his conviction for two counts of felony harassment.

Schaler, 169 Wn.2d at 278-82. The Schaler Court found the lack of a jury instruction defining a “true threat” was not harmless error. Id. at 288-91. The court pointed out that the jury could have viewed Schaler’s comments to the mental health professionals during a mental breakdown were a cry for help rather than a true threat. Id. at 289-90.

[S]chaler’s statements took place in the context of a mental health evaluation, which occurred in a hospital while Schaler received medical treatment. The statements were uttered to a crisis counselor, Heller-Wilson, who testified Schaler was in the midst of a mental breakdown. Schaler appeared to be very upset at the idea that he might have hurt someone. Indeed, he had called the crisis hotline for help and stated he was considering suicide.

Thus, while the jury could have concluded that Schaler’s statements were serious threats and that a reasonable speaker would so regard them, they could also have concluded that Schaler’s threats were a cry for help from a mentally troubled man, directed toward mental health professionals who could help him. For this reason we cannot conclude on the record that there was “uncontroverted evidence” that Schaler’s threats were true threats. Therefore, the omission of a true threat instruction is not harmless.

Id.

Similarly, Mr. Ballew was involuntarily civilly committed and in a locked psychiatric unit of Harborview Hospital when he called

the port and said he had ordered associates to place bombs in the airport in order to gain the attention of a police officer who had established a rapport with him. Mr. Ballew believed he was an undercover agent working for the president and had “cosmic” security clearance, and he offered contradictory descriptions of the bombs that could not actually exist.

A reasonable jury could conclude that Mr. Ballew did not mean to communicate a serious threat of violence as required by Black. Additionally, a reasonable jury could conclude a bomb threat from a person in Mr. Ballew’s position was idle talk or even a joke. This Court must reverse Mr. Ballew’s conviction and remand for a new trial. Schaler, 169 Wn.2d at 288-90; Johnston, 156 Wn.2d at 366.

2. MR. BALLEW’S CONVICTION MUST BE REVERSED BECAUSE THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT BOTH MEANS OF THREATS TO BOMB OR INJURE PROPERTY

a. The accused may not be convicted of a crime unless the State proves every element of the charged crime beyond a reasonable doubt and the jury returns a unanimous verdict. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable

doubt.⁶ Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. V, VI, XIV; Const. art. I, §§ 3, 22. Washington's constitution guarantees a unanimous verdict in criminal cases.⁷ Const. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This includes the right to express jury unanimity as to the means by which the defendant committed the crime when alternative means are charged. Id.

b. The State did not prove beyond a reasonable doubt both means of committing threats to bomb or injure property. Mr. Ballew was charged with threats to bomb or injury property, which may be

⁶ The Fifth Amendment states in part, "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Article I Section 3 of the Washington Constitution states, "No person shall be deprived of life, liberty, or property, without due process of law."

Article I, Section 22 provides specific rights in criminal cases. "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his owns behalf, to have a speedy public trial by an impartial jury . . ."

⁷ Article 1, Section 21 states, "The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto."

committed in two alternative ways. RCW 9.61.160; CP 1. The statute provides:

It shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy or to communicate or repeat any information concerning such a threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to whom the information is communicated or repeated.

RCW 9.61.160(1) (emphasis added). Thus, the crime may be committed in two ways: (1) by a threat, or (2) by communicating information about a false threat with the intent to alarm the hearer.

Id.; CP 39.

The jury was instructed that it could convict Mr. Ballew based upon either of these means. CP 39. The instructions did not inform the jury that was required to unanimously agree as to which means it was finding the defendant guilty, and it returned a general verdict. CP 26-42. Thus, there is no way for this Court to know if the jury returned a unanimous verdict as to one means or whether the jurors were divided as to which means they were relying upon for conviction. See Green, 94 Wn.2d at 233 (court could not conclude jury was unanimous where instructions did not require

jury to be unanimous as to which underlying crime the felony murder conviction relied).

In the absence of clear evidence of jury unanimity, a conviction will be upheld only if the reviewing court determines there is sufficient evidence to support each means. Ortega-Martinez, 124 Wn.2d at 707-08. “On the other hand, if the evidence is insufficient to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed.” Id. at 708 (emphasis in original). Evidence is sufficient if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Id.; Green, 94 Wn.2d at 220-22; Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

In the present case, the State did not prove each of the two means beyond a reasonable doubt. The State presented evidence that Mr. Ballew told a Port of Seattle Police dispatcher that he had arranged for other people to place bombs in the airport and would not reveal any further information unless he was permitted to talk to Port Police Officer Beam. Mr. Ballew, however, was involuntarily committed, in a locked psychiatric ward, and had no apparent

friends or ability to make to place a bomb in the airport. A reasonable person in Mr. Ballew's position would not necessarily believe that his threat would be taken seriously or actually frighten the recipient.

Moreover, the State presented no evidence that Mr. Ballew was knowingly communicating false information about a threat from another person. Nor did the State prove Mr. Ballew intended to alarm the persons to whom he communicated or repeated the information. The State thus failed to prove at least one if not both of the alternative means beyond a reasonable doubt.

c. Mr. Ballew's conviction must be reversed. The evidence did not support an instruction on the second alternative means of committing threats to bomb. Because the jury returned a general verdict, it is impossible to know which prong the jury found persuasive or whether the jury was unanimous as to either prong. Because the State did not produce sufficient evidence to support a conviction under the second alternative means, Mr. Ballew's conviction must be reversed and remanded for a new trial on the first means, threatening to bomb or injure property. Green, 94 Wn.2d at 233-34.

3. MR. BALLEW'S CONSTITUTIONAL RIGHT TO A
FAIR TRIAL WAS VIOLATED BY THE
PROSECUTOR'S MISCONDUCT IN CLOSING
ARGUMENT

a. The accused's constitutional right to a fair trial may be violated when the prosecutor commits misconduct. A criminal defendant's right to due process of law protects the right to a fair trial. U.S. Const. amend. V, XIV; Const. art. I, §§ 3, 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935); State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). Washington courts have long emphasized the prosecutor's obligation to ensure the defendant receives a fair trial and the resulting need for decorum in closing argument. Reed, 102 Wn.2d at 146-49 (and cases cited therein); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). When a prosecutor commits misconduct in closing argument, the defendant's constitutional rights to due process and a fair trial may be violated. Charlton, 90 Wn.2d at 664-65. State v. Carr, 160 Wash. 83, 90-91, 294 Pac. 1016 (1930).

It is improper for the prosecutor to appeal to the jury's passions or prejudices or draw analogies to infamous criminals in closing argument. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); State v. Rivers, 96 Wn.App. 672, 673, 981 P.2d 16 (1999); State v. Neidigh, 78 Wn.App. 71, 79, 895 P.2d 423 (1995). Similarly, the prosecutor should not argue facts unsupported by the record. Belgarde, 110 Wn.2d at 507-08; State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963); RPC 3.4(e), (f).

Here, the deputy prosecuting attorney referenced an infamous criminal, John Hinckley in her closing argument to make the point that "crazy people" both make and carry out threats.

7/6/10RP 66-67.

Defense may just say that this is a person who was delusional, this was a person who had these – these thoughts in his head that he had extra contact with the President, that he had a secret job with the military that no one knew about and, as a result, he cant' possible be taken seriously in any way, that he's just some that needs to be discounted as not making a viable threat at all, and that he possibly couldn't made a bomb.

But just think about who – who does bomb people? Who does bomb an airport? Who does, you know, harm other people? What, crazy people, that's who's going to be making those – that's who's going to be making those threats to begin with. Think about John Hinkley [sic].

7/6/10RP 67.

Mr. Ballew promptly objected that the argument was irrelevant and based upon facts not in evidence, but his objection was overruled. 7/6/10RP 66-67. In overruling the objection, the court emphasized that the deputy prosecuting attorney's remarks were proper because she was allowed to make a "common sense point." 7/6/10RP 66-67. The prosecutor then continued

You think about John Hinkley [sic] and his decision to shoot President Reagan, and doing so out of some, you know, obsessive love for Jodie Foster.

Does anybody really think that, that when you hear that, that that's the mind of a – of a sane person or a cogent person, but it's not something that you can discount, and something it's true.

You have to follow up on these things when they're said, even if they don't make sense.

Because it's not gon'a make sense for lots of people to think that bombs would be placed at the airport.

It's not doing to make sense for you to think I'm – I think it's an okay thing to do to place a bomb at an airport.

Nobody thinks it's okay to place a bomb at an airport. But crazy people will make those threats, and crazy people will follow through on those threats.

7/6/10RP 67.

The prosecutor's comments were misconduct because they compared Mr. Ballew to an infamous criminal and led members of the jury to conclude Mr. Ballew would be treated like Mr. Hinckley, who was found not guilty by reason of insanity.

b. The deputy prosecuting attorney's argument that "crazy people" carry out threats and reference to John Hinckley was misconduct. To determine if a prosecutor's comments or argument constitute misconduct, the reviewing court must decide first if the comments were improper and, if so, whether a "substantial likelihood" exists that the comments affected the jury verdict. Belgarde, 110 Wn.2d at 508. The prosecutor's arguments here were improper.

John Hinckley attempted to assassinate President Ronald Reagan by firing six rounds at the president, hitting him and three other people. While no one was killed, James Brady, the president's press secretary, was permanently paralyzed on one side. The assassination attempt and the resolution of his case by a finding Hinckley was not guilty by reason of insanity were intensely covered by the press and sparked a national debate concerning the

insanity plea.⁸ The prosecutor's reference to Hinckley was improper, as it invited the jury to view people with mental health problems like Mr. Ballew as extremely dangerous.

References in closing argument to infamous criminals have been found to constitute prosecutorial misconduct. Belgarde, 110 Wn.2d at 506-07 (comparing American Indian Movement, of which defendant was a member, to Sean Finn, Irish Republic Army, and Kaddafi); People v. Roman, 323 Ill.App.3d 988, 753 N.E.2d 1074, 1083-84 (2001) (misconduct for prosecutor to compare defendant to killers at Columbine High School); DeFreitas v. State, 701 So.2d 593, 601 (Fla.App. 1997) (prosecutor's comparison of defendant to O.J. Simpson was inflammatory appeal to passion and bias, case reversed based upon this and other misconduct); United States v. Thiel, 619 F.2d 778, 781-82 (8th Cir. 1980) (comparing defense to rationale behind Jonestown mass suicides and Holocaust). By referring to Hinckley as an example of a "crazy" person who carried out a threat, the prosecutor invited the jury to believe Mr. Ballew was like Hinckley even though Mr. Ballew had not harmed anyone and did not have access to a weapon, whereas Hinckley shot and

⁸ See United States v. Hinckley, 140 F.3d 277, 279 (C.A.D.C. 1998); www.pbs.org/wgbh/americanexperience/features/biography/reagan-hinckley.

wounded four people. 7/6/10RP 6-7. This reference was inflammatory and improper.

It is also misconduct for a prosecutor to appeal to the passions and prejudices of the jury. Belgarde, 110 Wn.2d at 507-09; State v. Perez-Mejia, 134 Wn.App. 907, 916-18, 143 P.3d 838 (2006) (argument improperly appealed to ethnic prejudice, patriotism). The prosecutor argued that “crazy people” are the people who not only make threats but also bomb airports. This argument was irrelevant and specifically appealed to the jury’s passion and prejudice – specifically their fear of the mentally ill.

In a somewhat similar case, the Idaho Supreme Court found misconduct where the prosecutor argued that the jury should be concerned with protecting the public, not the defendant’s mental state. State v. Beebe, 145 Idaho 570, 181 P.3d 496 (2007). Beebe was involuntarily committed, but escaped from the hospital and told the clerk at a nearby convenience store to empty the till; he did not make eye contact or threaten her, and he did not have a weapon. 181 P.3d at 498. At trial Beebe argued his conduct, coupled with his mental condition, showed he lacked the intent required for attempted robbery. Id. at 499. In closing argument the prosecutor told the jury this was a criminal, not a civil action, and the case was

thus about protecting the public. *Id.* at 501. She also cautioned the jury not to open the door by telling mentally ill people that they are allowed to commit crimes. *Id.* at 502. The appellate court reversed because the prosecutor had urged the jury to convict the defendant based upon the need to protect the public and disparaged the defense. *Id.* at 501-02. Here the prosecutor's argument also focused on public safety and fears of airport bombings by arguing that "crazy people" are the ones who commit serious crimes and

Third, attorneys may not base their closing argument on facts that were not before the jury. RPC 3.4(e). This is especially true of a public prosecutor due the prestige of her office; reference to facts not before the jury causes her to act as an unsworn witness for the State. Belgarde, 110 Wn.2d at 508-09; Rose, 62 Wn.2d at 312-14; State v. Case, 49 Wn.2d 66, 69, 298 P.2d 500 (1956); American Bar Association, Standards for Criminal Justice: Prosecution Function and Defense Function § 3-5.9 (3rd ed. 1993).

John Hinckley's story was not in evidence. While the prosecutor may occasionally refer to matters of common knowledge in closing argument, they may not use such references to introduce evidence not before the jury and irrelevant to the jury's determination. Mr. Ballew did not raise a not guilty by reason of

insanity or diminished capacity defense, and the prosecutor had successfully moved pre-trial to exclude any evidence relevant to such a defense. 6/30/10RP 3. It was thus improper for the prosecutor to inject this defense into the jury's consideration through mentioning Hinckley in closing argument.

c. Mr. Ballew was prejudiced by the prosecutor's misconduct. By referring the jury to John Hinckley as an example of a mentally ill person who carried out his threats, the prosecutor did irreparable harm to Mr. Ballew's defense.

The issue in the case was whether Mr. Ballew's telephone call stating he had placed bombs at the airport was a "true threat." The jury was thus to look at the evidence to determine if the speaker would reasonably conclude his threats would be taken seriously. CP 38. Mr. Ballew argued that a reasonable person would understand that an individual who had been civilly committed, was being detained in a locked psychiatric facility, and who believed he was close to President Obama and had cosmic security clearance, had not really ordered five associates to place bombs at the airport. The reference to Hinckley, however, encouraged the jury to compare Mr. Ballew to Hinckley, when the cases were very different. Mr. Ballew was charged with a verbal

threat. Hinckley did not threaten anyone but actually shot four people. The argument thus painted Mr. Ballew as more dangerous than he was and appealed to the juror's prejudice against and fear of the mentally ill.

Moreover, the jury was distracted by the Hinckley argument to consider society's need to be protected from Mr. Ballew and Mr. Ballew's need for psychiatric help. CP 67, 71-74. One juror actually wrote to the trial court judge and explained that he believed and persuaded several other jurors that the prosecutor's reference to Hinckley was designed to "telegraph the fact that [Mr. Ballew] would be hospitalized in the same manner" as Hinckley.⁹ CP 72.

The prosecutor's argument thus encouraged the jury to decide the case based upon "powerful emotions, concerns, or prejudices that arise from the facts of the case, rather than the facts themselves." Perez-Mejia, 134 Wn.App. at 920. The prosecutor's argument caused the jury to consider the punishment, including the possibility of hospitalization, rather than deciding the case on its facts. This Court must conclude there is a likelihood that the misconduct affected the jury verdict, reverse Mr. Ballew's

⁹ Mr. Ballew's motion for a new trial based upon prosecutorial and juror misconduct, however, was denied. CP 54, 66-74; 9/10/10RP 4-11.

conviction, and remand for a new trial. Id. at 920-21; Belgarde, 110 Wn.2d at 510.

F. CONCLUSION

James Ballew's conviction for threats to bomb must be reversed and remanded for a new trial because (1) the jury was improperly instructed on the definition of "true threat," (2) the jury verdict may not have been unanimous and the State did not prove one of the alternative means beyond a reasonable doubt, and (3) the prosecutor committed prejudicial misconduct in closing argument.

DATED this 21st day of April 2011.

Respectfully submitted,



Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Appellant

APPENDIX

Jury Instructions 8 and 9

No. 8

A person commits the crime of threatening to bomb or injure property when he or she threatens to bomb or otherwise injure any government property, or any other building or structure, or any place used for human occupancy, or when he or she communicates or repeats any information concerning such threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to whom the information is communicated or repeated.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat.

No. 9

To convict the defendant of threatening to bomb or injure property, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about October 17, 2009, the defendant

a) threatened to bomb or otherwise injure governmental property, any other building or structure a place used for human occupancy; or

b) communicated or repeated any information concerning a threat to bomb or otherwise injure governmental property, or a any other building or structure a common carrier or a place used for human occupancy; and

(i) That the defendant acted knowing such information was false; and

(ii) That the defendant acted with the intent to alarm the person or persons to whom the information was communicated or repeated;
and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that elements 1 and 2 have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. Element 1(a) and element 1(b) are alternatives, and only element 1(a) or element 1(b) need be

proved. If your finding is based on element (1)(b), both (i) and (ii) must be proved.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 65921-9-I
)	
James Ballew,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 22nd DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **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:

[X] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	()	HAND DELIVERY
KING COUNTY COURTHOUSE	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] JAMES BALLEW	(X)	U.S. MAIL
c/o PARK PLACE MOTEL	()	HAND DELIVERY
4401 AURORA AVE N	()	_____
SEATTLE, WA 98103		

SIGNED IN SEATTLE, WASHINGTON THIS 22nd DAY OF APRIL, 2011.

x _____ 

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