

65921-9

65921-9

No. 65921-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES BALLEW

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THIS COURT MUST REVERSE MR. BALLEW'S
CONVICTION BECAUSE THE JURY MAY HAVE
CONVICTED MR. BALLEW BASED UPON SPEECH
PROTECTED BY THE FIRST AMENDMENT IN
LIGHT OF THE COURT'S INCORRECT
INSTRUCTION DEFINING "TRUE THREAT"

The breadth of Washington's bomb threat statute, RCW 9.61.160, permits defendants to be convicted for speech that is protected by the First Amendment. RCW 9.61.160; State v. Johnston, 156 Wn.2d 355, 359-60, 127 P.3d 707 (2006). In a threat to bomb case, the jury must therefore be given a limiting instruction explaining that conviction is limited to true threats. Johnston, 156 Wn.2d at 363. Mr. Ballew's conviction must be reversed because the true threat instruction given in his case was incomplete and allowed him to be convicted for conduct protected by the First Amendment.

a. Instruction 8 did not require the jury to find Mr. Ballew intended that his remarks place the hearer in fear. In Virginia v. Black, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), a majority of the United State Supreme Court explained that 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” whether or not the speaker intends to carry out the threat. The jury in Mr. Ballew’s case, however, was instructed that it could convict Mr. Ballew if it found a reasonable person in his position would have known his statements would be interpreted as a serious threat. CP 38. Thus, it was not instructed that Mr. Ballew intended to communicate a threat for one of the two alternative means of threatening to bomb or injure government property. CP 39-40; RCW 9.61.160.

The State argues the jury was nonetheless properly instructed because the instruction was “expressly approved by the state supreme court” in Schaler.” Brief of Respondent at 11 (citing State v. Schaler, 169 Wn.2d 274, 287 n.5, 236 P.3d 858 (2010)). The Schaler footnote, however, is dicta. While the footnote addresses the pattern instruction, that instruction not given in Schaler and was thus not before the court. Commodore v. University Mechanical Contractors, Inc., 120 Wn.2d 120, 131, 839 P.2d 314 (1992); Seattle School District No. 1 of King County v. State, 90 Wn.2d 476, 537, 585 P.2d 71 (1978).

Moreover, the United State Supreme Court provides the ultimate interpretation of the First Amendment. This Court must

first look to United States Supreme Court precedent in interpreting the First Amendment rather than Washington Supreme Court cases. U.S. Const. amends. I, XIV; Black, 538 U.S. at 358 (First Amendment applicable to states); see Witters v. State Commission for the Blind, 112 Wn.2d 363, 368, 771 P.2d 1119 (1989) (accepting U.S. Supreme Court's interpretation of First Amendment and using independent analysis only under Art. I, § 5).

b. Instruction 8 omitted an important component of the true threat definition – that the threat not be idle talk. Even if the Washington pattern jury instruction was expressly approved of in the Schaler footnote, the jury in Mr. Ballew's case was not given the pattern instruction. A simple comparison of the language of WPIC 2.24 and the instruction given in Mr. Ballew's case shows that critical language was omitted from Instruction 8, thus disproving the prosecutor's argument that the pattern instruction was given here. Brief of Respondent at 10.

A critical component of the definition of true threat is the exclusion of idle talk, hyperbole, or speech spoken in jest as well as political speech. Watts v. United States, 394 U.S. 705, 707-08, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); State v. Kilburn, 151 Wn.2d 36, 42-43, 84 P.3d 1215 (2004).

The First Amendment prohibits the State from criminalizing communications that bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole.

Schaler, 169 Wn.2d at 283. The language of WPIIC 2.24 mirrors this constitutional prohibition by including the requirement that the speech in question not be political or in jest. Washington Supreme Court Committee on Jury Instructions, 11 Washington Practice: Pattern Jury Instructions Criminal, § 2.24 (3rd ed. 2008). The pattern instruction includes two alternative endings, but each alternative requires the proviso that the statement or act cannot be reasonably construed as “something said in jest or idle talk.” Id. WPIIC 2.24 provides, 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].

Id.

Thus, in contrast to the State’s claim, the pattern instruction includes the explanation that the act or statement in question not be jest or idle talk; the only option for the trial court is whether or not to include political argument in the exception. Id. This Court should

reject the prosecutor's suggestion that the jury was properly instructed using WPIC 2.24.

c. Mr. Ballew may raise this issue on appeal. The State argues that Mr. Ballew may not challenge the true threat definition given to the jury because his attorney did not object to Instruction 8. Brief of Respondent at 13-14. The defendant in Schaler did not submit a jury instruction defining true threat or object to the State's incomplete definition of threat. Schaler, 169 Wn.2d at 281-82. The Schaler Court dispensed with the State's argument that the error was not manifest, holding that the lack of a true threat instruction was critical and thus could be raised for the first time on appeal. Id. at 284-88.

This error was manifest and affected a constitutional right. Because they did not comply with the First Amendment's "true threat" requirement, the instructions given at trial allowed the jury to convict Schaler based on his utterance of protected speech. The trial court could have corrected the error given the clear state of the law at the time that it was instructed. We therefore hold that the error was manifest and thus properly addressed on appeal.

Id. at 287-88 (citations omitted).

Just as the court's instructions in Schaler permitted the defendant to be convicted based upon constitutionally protected speech, so did the instructions in Mr. Ballew's case. The instruction

permitted the jury to convict Mr. Ballew for speech that was idle talk or hyperbole. Given that Mr. Ballew was involuntarily committed in a locked hospital psychiatric wing, a reasonable jury could easily conclude that his speech was idle talk or hyperbole. Mr. Ballew may challenge the improper jury instructions for the first time on appeal. Schaler, 169 Wn.2d at 287-88.

d. The erroneous jury instruction is not harmless. Mr. Ballew's conviction should be reversed because the jury instructions permitted him to be convicted for constitutional speech. The importance that the jury be instructed that constitutionally-protected idle talk cannot constitute the basis for a criminal conviction is demonstrated in a recent Iowa Supreme Court case, State v. Soboroff, 798 N.W.2d 1 (2011). Soboroff had posted a slideshow on a website stating that he had obtained 500 pounds of "Thorazine [sic]" and was considering putting in his town's water supply, pointing out that some citizens "could use some medication."¹ Id. at 3. Many people in the community knew the website was Soboroff's and that he was mentally ill. Id. at 3.

A city official drained the water supply system, but did not take a sample of the water to determine if it contained any

¹ Thorazine is a psychotropic drug with serious side effects. Soboroff, 798 N.W.2d at 4.

Thorazine. Soboroff, 798 N.W.2d at 3. Soboroff told the police he was not “f-ing around with anybody anymore,” but they did not find Thorazine in a search of his residence. Id. at 3-4. He was convicted under an Iowa statute prohibiting threats to use “any destructive substance or device in any place where it will endanger persons or property.” Id. at 4, 6; Iowa Code § 712.8.

The Iowa Supreme Court reversed Soboroff’s conviction based upon ineffective assistance of counsel because his attorney had not offered a true threat instruction. Soboroff, 798 N.W.2d at 9-10. In response to the State’s argument that the error was harmless, the court pointed to evidence from which the jury could have concluded Soboroff’s slide presentation was “idle talk,” including testimony that it would be nearly impossible for him to obtain the quantity of Thorazine he mentioned and his reputation in the community for instability. Id. at 9.

Here, Mr. Ballew was even more mentally unstable than Soboroff. Mr. Ballew was not mentally competent, as he had been involuntarily committed to a psychiatric hospital. 7/6/10RP 13-14, 23-25. He also believed he was in the military working on secret assignment for President Obama and had “cosmic” security clearance. 6/30/10RP 103-04; 7/6/10RP 17, 26.

Mr. Ballew also had even less apparent ability than Soboroff to carry out a bomb threat. He was in a locked psychiatric facility at the time he made the threat. 6/30/10RP 94-96. His inconsistent descriptions of the purported bombs were so unrealistic that the police officer sent to interview Mr. Ballew instantly knew that the bomb threat was not “credible.” 6/30/10RP 100-02.

An erroneous 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. Given the facts of this case, the State cannot demonstrate beyond a reasonable doubt that the error in providing and incomplete definition of true threat is harmless. 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**

Threatening to bomb or injure property may be committed in two alternative ways. RCW 9.61.160. Mr. Ballew argues his conviction must be reversed because the jury was not instructed it had to be unanimous as to which means it convicted Mr. Ballew

and the State did not prove each alternative means beyond a reasonable doubt.

The State concedes that the jury was not given a unanimity instruction, but argues for the first time in this Court that the threats to bomb statute “is not an alternative means crime.” Brief of Respondent at 8, 9. This argument must be rejected because the statute clearly provides two different ways in which the offense of threatening to bomb or injure property may be committed.

RCW 9.61.160 reads:

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 is false and with intent to alarm the person or persons to whom the information is communicated or repeated.

RCW 9.61.160 (emphasis added). The goal of the statute is to deter bomb threats. State v. Vermillion, 112 Wn.App. 844, 862, 51 P.3d 188 (2002), rev. denied, 148 Wn.2d 1022 (2003). It does this by criminalizing (1) a threat to bomb or injure property or (2) repeating or communicating a threat that the speaker knows is false in order to alarm the hearer(s). RCW 9.61.160.

This court interprets a statute in order to ascertain and carry out the Legislature's intent. State v. Sweany, 162 Wn.App. 223, ___ P.3d ___, 2011 WL 2315170, Slip Op. at 3 (2011). The first place to look is the plain language of the statute. Id. If the statute is clear, the court "must give effect to the language as the expression of legislative intent." Id. Thus, this Court must give effect to the clear language of RCW 9.61.

The State now argues that the bomb threat statute does not contain two alternative means because "the use of the disjunctive in a statute does not make it an alternative means crime." Brief of Respondent at 8 (citing State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010)). In Peterson, however, the court found that the different statutory deadlines for reporting all applied to the same "criminal act" – moving from a residence without notifying the sheriff. Peterson, 168 Wn.2d at 770. The threat to bomb statute, in contrast, criminalizes two separate acts – (1) making a threat or (2) making or communicating a false threat. Other cases relied upon by the State also do not support its argument. State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007) (the common law definition of assault defines words within the assault statutes but does not create alternative means of committing the assault

statutes); State v. Linehan, 147 Wn.2d 638, 56 P.3d 542 (2002) (the statute defining terms within the theft statutes does not create alternative means of committing theft), cert. denied, 538 U.S. 945 (2003).

The jury was instructed as to two alternative ways to commit the crime. CP 39-40. The instruction reads in relevant part:

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 [sic] a place used for human occupancy; or

b) communicated or repeated any information concerning a threat to bomb or otherwise injure governmental property, or 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.

CP 39. The instruction goes on to explain that elements 1(a) and 1(b) “are alternatives,” and only one need to be proved. CP 39-40. The instruction was proposed by the State, thus demonstrating the prosecutor’s belief that the statute created two alternative means. SuppCP ____ (State’s Instructions to the Jury With Citations, sub. no. 36, 6/30/10) (citing WPIC 86.02).

The Washington Supreme Court’s Pattern Jury Instructions Committee also treats the bomb threat statute as creating two separate means and cautions the court not to instruct on an alternative that was not charged or supported by the evidence. Washington Supreme Court Committee on Jury Instructions, 11A Washington Practice: Pattern Jury Instructions Criminal, WPIC 86.02, at 235-36 (3rd ed. 2008).

The instruction is drafted for cases in which the jury needs to be instructed using two or more of the alternatives for element (1). Care must be taken to limit the alternatives to those that were included in the charging documents and are supported by sufficient evidence.

Id. at 236. Thus the threats to bomb statute creates two alternative means. Because the jury was not instructed as to unanimity, this Court must reverse Mr. Ballew’s conviction unless the State proved

each alternative means beyond a reasonable doubt. State v. Oretega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994).

The State argues in the alternative that it presented sufficient evidence to support a conviction under both of the alternative means of threatening to bomb or injure property. Brief of Respondent at 9. The State, however, did not prove that a reasonable person in a locked psychiatric ward like Mr. Ballew would believe his threat would be taken seriously or that Mr. Ballew intended to communicate a threat. And the State did not prove beyond a reasonable doubt that Mr. Ballew knew the threat he communicated was a false one. Mr. Ballew's conviction must be reversed and dismissed. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

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

A criminal prosecutor plays a unique role in the criminal justice system that requires him to act impartially and seek a just verdict based upon matters in the record. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935); State v. Monday, 171 Wn.2d 667, ___ P.3d ___, 2011 WL 2277151, Slip

Op. at 5 (2011); RPC 3.8. Washington courts have long emphasized that a prosecutor's misconduct in closing argument may violate the defendant's right to due process and a fair trial. State v. Reed, 102 Wn.2d 140, 146-49, 684 P.2d 699 (1984) (and cases cited therein); State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Carr, 160 Wash. 83, 90-91, 294 Pac. 1016 (1930).

The deputy prosecuting attorney in Mr. Ballew's case committed misconduct in closing argument by referencing John Hinckley, an infamous criminal who was found not guilty by reason of insanity. The prosecutor argued that "crazy people" like Hinckley are the people who make and carry out threats. 7/5/10RP 67. The reference to Hinckley was inflammatory because (1) Hinckley did not make idle threats, but shot four people and seriously injured one, (2) Hinckley was not involuntarily committed when he committed the crimes, and (3) Hinckley was found not guilty by reason of insanity. The argument was so off-point that it led one or more jurors to conclude that the prosecutor was trying to let the jury know that Mr. Ballew would similarly be placed in a mental hospital even though he had not proposed a not guilty by reason of insanity defense. CP 72.

It is clear that the prosecutor may not make appeals to prejudice based upon race, national origin, or religion, as such appeals undermine the Fifth Amendment protection of a fair trial as well as the Fourteenth Amendment's guarantee of equal protection under the law. McCleskey v. Kemp, 481 U.S. 279, 309 n.30, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); State v. Perez-Mejia, 134 Wn.App. 907, 918, 143 P.3d 838 (2006) (references to Central American defendants' "machismo"); State v. Torres, 16 Wn.App. 254, 257-58, 554 P.2d 1069 (1976) (references to defendants as Mexicans). It is also professional misconduct for a Washington attorney to engage in conduct that demonstrates prejudice on the basis of race, national origin, religion or "disability." RPC 8.4.

The Washington Supreme Court recently made it clear that prosecutors may not insert racial prejudice into a prosecution. Monday, supra. A King County senior deputy prosecuting attorney committed misconduct by claiming that the witnesses' testimony was influenced by a code that "black folks don't testify against other black folks" or talk to the police. Monday, Slip Op. at 4, 6. Even subtle references can trigger racial or ethnic prejudice. Id. at 6. "Like wolves in sheep's clothing, a careful word here and there can trigger racial bias." Id.

Similarly, a word here or there can trigger prejudice or bias against the mentally ill. Here, the prosecutor's argument appealed to the jury's fear and prejudice against the mentally ill by citing an example of a dangerous mentally ill person who ended up in a mental hospital. The example was significantly different from Mr. Ballew's situation, and the effect was to insert facts not in evidence. In addition, the comparison to an infamous criminal like Hinckley is misconduct. Gonzales v. State, 115 S.W.3d 278, 283-86 (Tex.App. 2003); People v. Kelley, 142 Mich.App. 671, 370 N.W.2d 321 (1985). The prosecutor's reference to a mentally ill man who had shot innocent people and was then placed in a mental hospital played to the jury's fears and prejudices and violated Mr. Ballew's right to a fair trial. His conviction must be reversed. Monday, Slip Op. at 8.

B. 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 23rd day of August 2011.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 65921-9-I
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)	
JAMES BALLEW,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF AUGUST, 2011, 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:

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