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No. 68568-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN W. BRADFORD,

Appellant.

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

The Honorable Mariane C. Spearman

REPLY OF APPELLANT

SARAH M. HROBSKY
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A. ARGUMENT

1. The harassment provision of the stalking statute that criminalizes constitutionally protected speech is facially overbroad.

The harassment provision of the stalking statute reaches a substantial range of constitutionally protected speech, such as threats¹ or cross-burning.² A statute that criminalizes speech is unconstitutionally overbroad unless it reaches only unprotected speech, such as “true threats,” “fighting words,” or words that produce a “clear and present danger.” Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L.Ed.2d 664 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L.Ed.2d 1031 (1942); Schenck v. United States, 249 U.S. 47, 52, 39 S. Ct. 247, 63 L.Ed.2d 470 (1919); U.S. Const. amend. I; Wash. Const. art. 1, § 5. Accordingly, the harassment provision is unconstitutionally overbroad and Mr. Bradford’s convictions must be reversed. See State v. Immelt, 173 Wn.2d 1, 13-14, 267 P.3d 305 (2011) (conviction for violating unconstitutionally overbroad statute required reversal).

The State argues the statute is constitutional because it includes a mens rea element of “evil intent.” Br. of Resp. at 15-18. This is

¹See, e.g., State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) and cases cited therein (harassment by threats limited to “true threats” to avoid overbreadth).

²See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 391-95, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (content-based prohibition against cross-burning unconstitutional).

inaccurate. It may be noted, the State set out a portion of the statute with emphasis on the phrase “intentionally and repeatedly harasses or repeatedly follows another person.” Br. of Resp. However, the cases cited by the State consider whether the defendant acted with criminal intent, not whether the act itself was intentional. For example, in Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), the Court ruled cross-burning was protected speech unless committed with an intent to intimidate. “The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation.” 538 U.S. at 363.

Contrary to the State’s assertion, the stalking statute is not limited to speech or conduct committed with a criminal intent. RCW 9A.46.110(1) provides, in pertinent part:

- (c) The stalker either:
 - (i) Intends to frighten, intimidate, or harass the person; or
 - (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed **even if the stalker did not intend to place the person in fear or intimidate or harass the person.**

(Emphasis added).³ In fact, the Legislature expressly excluded lack of a criminal intent as a defense to stalking. RCW 9A.46.110(2)(b) provides, in pertinent part:

(b) It is not a defense to the crime of stalking under subsection (1)(c)(ii) of this section that the stalker did not intend to frighten, intimidate, or harass the person.

(Emphasis added).

The State's claim that the statute prohibits only communication with intent to harass is belied by the plain language of the statute and contrary to the basic canon of statutory construction that a statute be interpreted so no language is rendered superfluous or meaningless. See State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 106 (2005).

Accordingly, the State's reliance on cases upholding statutes against an overbreadth challenge where the statutes included an element of specific intent is inapt. See Br. of Resp. at 16, 18 n.6. It may be noted, the State's reliance on State v. Lee, 135 Wn.2d 369, 379, 957 P.2d 741 (1998), is equally inapt insofar as that case interpreted a former version of the stalking statute that did not include the harassment provision at issue here. Br. of Resp. at 18-19.

³ Mr. Bradford was charged under both subsection (1)(c)(i) or (1)(c)(ii) and the jury was instructed on both alternatives. CP 11, 12-13 (Second Amended Information Count I, IV); CP 67, 68, 70 (Instruction Nos. 9, 10, 11).

2. The term “harasses,” as used in the stalking statute, is void for vagueness.

A statute is void for vagueness if either (1) the statute “does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed” or (2) the statute “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990); accord City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000). A statute is unconstitutionally vague if either criterion is not satisfied. State v. Halstien, 122 Wn.2d 109, 117-18, 857 P.2d 270 (1993).

The harassment provision of the stalking statute is void for vagueness under the first criterion, failure to understandably define the offense. The statute provides, “‘Harasses’ means unlawful harassment as defined in RCW 10.14.020.” RCW 9A.46.110(6)(c). RCW 10.14.020, in turn, consists of two definitions; section (1) that defines “course of conduct,” and specifically excludes “constitutionally protected free speech” and “[c]onstitutionally protected activity,” and section (2) that defines “unlawful harassment” as a “course of conduct” which “seriously alarms, annoys, harasses, or is detrimental” to a specific person and which “serves no legitimate or lawful purpose.”

Even though the stalking statute does not refer to the definition of “course of conduct,” the State, in accord with case law, incorporates both the definition of “unlawful harassment” and the definition of “course of conduct” into the definition of “harassment.” Br. of Resp. at 22; State v. Kintz, 169 Wn.2d 537, 548, 238 P.3d 470 (2010); State v. Becklin, 163 Wn.2d 519, 524-25, 527, 182 P.3d 944 (2008). However, the stalking statute refers to the definition of “unlawful harassment” only, and not to the definition of “course of conduct.” Accordingly, the rules of statutory construction preclude a court from adding the definition of “course of conduct” to the definition of “unlawful harassment.” See State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (“We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.”).

Assuming the definition of “harasses” includes the definition of “course of conduct,” the Legislature cannot absolve itself from thoughtfully and narrowly drafting a statute that understandably defines an offense merely by inserting a caveat that the offense does not reach protected activity. The caveat simply muddies the water by failing to offer any meaningful guidance for ordinary citizenry. “Labeling certain types of speech as ‘unprotected’ is easy. Determining whether specific instances of speech actually fall within ‘unprotected’ areas of speech is

much more difficult. The United States Supreme Court has repeatedly noted that the line between protected and unprotected speech is very fine.” In re Marriage of Suggs, 152 Wn.2d 74, 82-83, 93 P.3d 161 (2004). Significantly, in the section immediately following RCW 10.14.020, the Legislature provided extensive guidelines for courts when determining whether a “course of conduct” served a legitimate purpose. RCW 10.14.030. But those guidelines are relevant to issuance of a civil anti-harassment order and are not incorporated into the stalking statute.

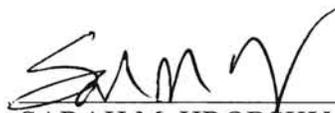
“The requirement that a statute provide sufficient definiteness ‘protects individuals from being held criminally accountable for conduct which a person of ordinary intelligence could not reasonably understand to be prohibited.’” State v. Bauer, No. 43511-0-II, 2013 WL 864843, at 8 (Wn. App. Mar. 8, 2013) (quoting Douglass, 115 Wn.2d at 178). In the absence of “sufficient definiteness,” the harassment provision of the stalking statute must be stricken and Mr. Bradford’s convictions for violating the unconstitutional provision of the harassment statute must be reversed. See State v. Valencia, 169 Wn.2d 782, 795, 239 P.3d 1059 (2010) (imposition of unconstitutionally vague terms of community custody required reversal).

B. CONCLUSION

The harassment provision of the stalking statute is unconstitutionally overbroad and void for vagueness. A conviction pursuant to an unconstitutional statute cannot stand. For the foregoing reasons, and for the reasons set forth in the Brief of Appellant, Mr. Bradford respectfully requests this Court reverse his convictions for stalking, violation of a court order, and violation of an anti-harassment order.

DATED this 15th day of March 2013.

Respectfully submitted,



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v.)	
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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF MARCH, 2013, 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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