

NO. 73701-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ANDREW FAST,

Appellant.

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FILED  
Jun 27, 2016  
Court of Appeals  
Division I  
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE TIMOTHY A. BRADSHAW

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

Under the First Amendment, the State may proscribe only those threats defined as “true threats.” A jury found the defendant guilty of two counts of misdemeanor harassment. As to count 2, has the defendant shown that there was insufficient evidence for the jury to have found he made a “true threat?”

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

As pertinent here, the defendant was charged with two counts of felony harassment, with a jury finding him guilty of the lesser included offenses of misdemeanor harassment. CP 10-11, 60-63. The defendant received consecutive 364 day suspended sentences on condition he serve 180 days confinement (with 142 days credit for time served), that he undergo alcohol, drug and mental health evaluations, and that he complete a domestic violence treatment program. CP 173-76.

**2. SUBSTANTIVE FACTS**

As to count 1, the defendant was convicted of threatening to cause bodily harm to his wife, Andrea Fast, and by his words or conduct he placed her in reasonable fear that the threat would be carried out. CP 10, 40, 63. As to count 2, the defendant was

convicted of threatening to cause bodily harm to Andrea Fast, and by his words or conduct he placed one of his best friends, Jacob Altinger, in reasonable fear that the threat would be carried out. CP 11, 42, 66. It is this latter count, count 2, that the defendant contests here. Thus, the statement of facts will be limited to addressing only this count, although some background of the relationship troubles between Andrea and the defendant is necessary.

Andrea Fast began dating the defendant while she was in high school in Alaska. 5RP<sup>1</sup> 401. At the time of her high school graduation, Andrea was six months pregnant. 5RP 402. The two married in 2009. 5RP 403. To help support his family, the defendant joined the army and ultimately became an Army Ranger. 5RP 402. With the defendant's duty station being Fort Lewis-McChord, the couple ended up moving to an apartment on Lake City Way in Seattle.

Another Army Ranger and one of the defendant's few friends was Jacob Altinger. 4RP 206, 208; 5RP 407; 8RP 931. On May 1, 2014, after leaving the military, Altinger moved into an apartment in

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP—4/20/15, 2RP—4/22/15, 3RP—5/4/15, 4RP—5/5/15, 5RP—5/6/15, 6RP—5/7/15, 7RP—5/11/15, 8RP—5/12/15, 9RP—5/13/15, 10RP—5/14/15, 11RP—5/18/15, and 12RP—6/26/15.

the same complex that the defendant and Andrea lived. 2RP 212-13; 5RP 407.

Andrea and the defendant's relationship was filled with domestic violence,<sup>2</sup> constant arguments, and infidelity on both of their parts. 5RP 404. Both parties knew of the other's infidelities. 5RP 405. At various times, they both talked about divorce, but for a variety of reasons, including the fact that they had a second child, the two stayed together. 5RP 405-07.

One night in June of 2014, Andrea, knowing that the defendant had been having multiple affairs, had dinner with Altinger, and after they both had too much to drink, they ended up having sex together. 5RP 409-11. The defendant knew what had occurred and essentially had given his okay. 5RP 412-14. He claimed that he forgave each of them. 9RP 996.

By the summer of 2014, Andrea had decided that she wanted to get a fresh start. 5RP 406-07. She enrolled in college with the intent of obtaining a degree in business and a job.

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<sup>2</sup> The domestic violence included incidents of the defendant throwing household items at Andrea, him destroying her personal items in front of her, him slashing paintings with his army knife, him shoving her to the ground and giving her a black eye as she tried to stop him from putting his hands around her neck, and him grabbing her wrists so hard he left bruises. 5RP 414-18, 421-22, 450-51, 456-58. Andrea never called the police, in part because the defendant had threatened to commit suicide by cop and he carried a gun with him at all times. 5RP 458-59.

5RP 407. While in school, she met and confided in a classmate, Reece Cabe. 5RP 449. The two ultimately entered into a dating relationship. 5RP 464.<sup>3</sup>

On the evening of February 1<sup>st</sup>, 2015, Andrea returned home from Cabe's house to find the defendant sitting on the couch, smoking pot and drinking whiskey. 5RP 476-77. The two talked for a few hours, with the defendant telling Andrea that he had quit his job (he had previously left the military and was working a job as a caregiver), and Andrea telling the defendant that she had been over at Cabe's house. 5RP 406, 477-78; 7RP 738. The conversation was actually civil. 5RP 478.

The next morning, as Andrea was getting ready for school, she heard the defendant talking to their eldest daughter. 5RP 479-80. Although Andrea had told the defendant where she had been the prior day, the defendant began questioning his daughter. 5RP 477, 480. The defendant became angry when his daughter told him they had all been at a friend's house, a person named Kim. 5RP 481. On previous occasions, Andrea had instructed her

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<sup>3</sup> The defendant would later threaten Cabe via text messaging, telling Cabe that he was "dead on sight" and that if he was "not scared," he must be "stupid." 5RP 466-68.

daughter to lie about where they had been in order to avoid the defendant's jealousy and anger. 5RP 481-82.

In his anger, the defendant ordered Andrea to do the "iron chair," a form of physical punishment where Andrea was told to sit against a wall as if sitting in a chair but where there was no chair. 5RP 482-84. The defendant called this a way of "correction." 8RP 947. After about ten minutes, the defendant ordered Andrea to stand in front of the mirror and tell bad things about herself. 5RP 487. Finally, Andrea said she had to get ready for school and she walked into the bedroom. 5RP 488.

Throughout this episode the defendant ranted, including threatening to kill Andrea, the kids and himself. 5RP 489-91. While the defendant had threatened to kill Andrea many times in the past, he had never before threatened to kill their children. 5RP 492. Although in fear, Andrea remained calm and was eventually able to get out of the apartment with the kids. 5RP 492.

Andrea knew she was done; that she could not live her life in constant fear. 5RP 492; 7RP 657. She called Altinger and told him what had happened, said that she was not safe and that she wanted him to distract the defendant while she grabbed some

things from the apartment for her and the children and flee. 7RP 662.

Cabe drove Andrea back to the apartment, parking out of sight a few blocks away. 7RP 665. Andrea walked the rest of the way to the apartment and opened the door to find the apartment and her possessions in ruins. 7RP 666. The defendant had shredded Andrea's clothing, cut up the children's diaper bag, slashed the bed, couch and walls, and tossed everything around the apartment. 7RP 666-67, 682. Andrea's personal journal was on the table, a journal that she kept in her dresser drawer and in which she wrote about her life, her thoughts and her feelings, including things about the defendant. 7RP 668, 671.

The defendant was laying on the couch when Andrea walked in. 7RP 666. He jumped up, grabbed the journal and his gun and then tried to grab Andrea. 7RP 668. Andrea fled out the door and ran up to Altinger's apartment. 7RP 673. She told Altinger what had happened, that the defendant was angry and that she needed to leave now with his help. 7RP 674. Andrea told Altinger that he should have some other guys present during the time he was to keep the defendant occupied. 7RP 676. She then ran down to the apartment storage unit to grab a suitcase. 7RP 675. When she

came back up the stairs, she could hear the defendant knocking on Altinger's door. 7RP 677.

Altinger had witnessed some of the angry arguments between the defendant and Andrea and he was quite familiar with the violence that existed in their marriage and the defendant's problem with anger. 4RP 219. Over time, Andrea had told Altinger about the problems in her marriage and the abuse that had occurred. 4RP 218.

Shortly after Altinger moved to the same apartment complex as the defendant, there was one occasion when the defendant, Altinger, Andrea and the children were in the car driving to a mall when the defendant got angry at another driver. 4RP 219. He then became "raving angry" at random things for the rest of the drive. 4RP 220. Once in the parking lot, he started cursing at another driver. 4RP 220. When Andrea pointed out that he, the defendant, was driving the wrong way in a one-way lane, the defendant slammed on the brakes and screamed at her. 4RP 220. Afterward, Altinger talked to the defendant about his anger and how he had scared him and his daughters. 4RP 224. Around this same time period, the defendant told Altinger that he would kill himself before he would ever be arrested by the police. 4RP 223, 225.

Another concerning incident Altinger was aware of consisted of the defendant taking a framed photograph of himself and Andrea, stabbing his knife through the glass and the image of Andrea and then posting a photo on Facebook of the knife sticking through the image of Andrea. 4RP 221-25. Again Altinger talked with the defendant about his anger and violence. 4RP 225. Together with another Army Ranger friend, Altinger confronted the defendant and asked him if he had done the things Andrea had disclosed, including pushing her around and destroying things in the apartment. 4RP 225. The defendant admitted that it was true and that it was a problem he needed to work on. 4RP 225. Altinger told the defendant that Andrea and the children were in fear of him. 4RP 225.

When Andrea called Altinger on February 2, 2015 to ask for his help, Altinger thus knew of the defendant's violent temper and the things he had done -- and the defendant was aware that Altinger knew this as well.

Altinger testified that when Andrea called asking for his help, she was scared and panicky and she told him about the events of the morning, including the apartment being destroyed and the threats to kill her and the kids. 4RP 237, 244. Altinger agreed to

help even though he knew "it was potentially a dangerous situation." 4RP 239. Not wanting to be alone with the defendant in his apartment, Altinger had two friends come over, Brian DeMarco, a former military man, and another acquaintance, Ryan Dundon. 4RP 239, 241, 246.

Before Altinger's friends arrived, the defendant knocked at Altinger's door. 4RP 247. The defendant was visibly angry, was talking in a loud voice and he was waving around Andrea's personal journal. 4RP 248-49. Altinger told the defendant to calm down and offered him a drink. 4RP 248. The defendant refused the drink, stating that he had been drinking whiskey earlier. 4RP 248.

When the defendant started reading aloud out of the journal, Altinger said that he did not want to hear it. 4RP 248. He told the defendant that he had some friends coming over and that they should all just chill out the rest of the day. 4RP 248. Over the next hour, the four sat around and swapped army stories. RP 257, 260. While the defendant seemed to relax a bit, Altinger's nerves were on edge. 4RP 260.

After a while, Altinger noticed that the defendant had gotten tense, had stopped talking, and was just staring out the window.

4RP 261. Altinger thought it was a good idea if he could disarm the defendant so he started a conversation about buying a gun and asked if he could handle the defendant's gun to see how it felt in his hand. 4RP 261. The defendant refused. 4RP 262. Altinger then received a text message from Andrea saying that she had just left the apartment. 4RP 262. Less than a minute later, the defendant suddenly got up and said he had to leave. 4RP 262. Altinger partially blocked his way and asked the defendant why he had to leave so suddenly. 4RP 262. The defendant did not explain; instead, he pushed past Altinger and said he had to leave right now. 4RP 262, 264. Altinger was worried that the defendant had seen Andrea through the window. 4RP 265.

Altinger then grabbed an empty liquor bottle, tossed another to DeMarco, and then he stood in front of the door and told the defendant that he needed to stay. 4RP 265-68. Altinger told the defendant that he knew what had happened that morning, that Andrea was packing her things to leave, and that he needed to stay and calm down. 4RP 270. Altinger placed his hand on the defendant's chest. 4RP 217. The defendant immediately pulled his gun out and although it was pointed down, he held the gun with his

finger in a ready-fire position.<sup>4</sup> 4RP 271-72. Altinger told the defendant that he did not need to shoot anyone. 4RP 275. The defendant responded something along the lines of "you don't want to be so sure of that." 4RP 275.

When Altinger agreed to put his bottle down, the defendant set his gun on the adjacent table, but he never actually took his hand off it. 4RP 271. Altinger asked the defendant how he could be assured the defendant would not leave and hurt Andrea and the kids. 4RP 273; 5RP 379. The defendant responded that "You don't know, you can't know." 4RP 273. The defendant was visibly very angry and staring directly at Altinger. 4RP 273. Concerned for his own safety, Altinger was also very concerned that the defendant was going to be violent towards Andrea and the kids and he took the defendant's words as a threat to harm them. 4RP 274, 289; 5RP 379. As the incident continued, the defendant appeared to get angrier and more aggressive. 6RP 525.

This confrontation continued until Altinger, believing that Andrea had had enough of a head start to be safe, opened the door for the defendant. 4RP 278. The defendant then walked out the

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<sup>4</sup> DeMarco testified that he recalled the defendant actually pointing the gun at Altinger. 6RP 526. Dundon's testimony was consistent with Altinger that the gun was pointed down. 6RP 577.

door with his gun. 4RP 279. Altinger locked the door behind the defendant and immediately called Andrea, fearing that the defendant might attempt to kill them. 4RP 280. He told her to call the police. 4RP 280. Altinger did not call the police himself because the defendant had previously told him that he would kill himself and everyone else before he would allow himself to be arrested. 4RP 281.

Andrea did call the police and she told them that the defendant had threatened to kill her and the kids and that he was a danger to himself. 7RP 680, 751, 753. Officers were unable to locate the defendant at the scene. 7RP 681. Two days later, the defendant was located walking in a parking lot close to the apartment. 5RP 435-39. When contacted, the defendant reached for the center area of his waistband before an officer was able to grab his wrist. 5RP 439-40. The defendant's handgun was recovered from his waistband. 5RP 443.

The defendant testified and admitted to the prior acts of violence as listed above and that Altinger had indeed confronted him twice about his violent acts against Andrea. 9RP 1016-19. He also admitted to being in a "rage" on the morning that he cut up Andrea's clothing and destroyed the apartment. 8RP 969-70. He

said he “exploded” and “couldn’t stop.” 8RP 969. When he went up to Altinger’s apartment, he admitted that he was still “really mad,” and that he grabbed his gun and Andrea’s journal before heading up. 9RP 1031.

The defendant admitted to having the confrontation at the door with Altinger when he went to leave the apartment. 9RP 1039, 1049-54. He testified that he had his hand on the grip of his gun in his waistband and that he tried to stay a certain distance away from Altinger so that he could draw his gun and shoot if he had to. 9RP 1051-54. He admitted that at one point he pulled his gun out and held it in front of him before Altinger put the bottle he was holding down and he put his gun on the table. 9RP 1055-57. He said that he was “pretty angry,” and talking “pretty aggressive[ly].” 9RP 1053. He said that he told Altinger that “you have let evil prevail. You are part of what’s going on in this,” and that you have “crossed the line” before and you are “crossing it again.” 9RP 1059.

The defendant testified that when Altinger asked him how he could be sure he wasn’t going to hurt Andrea, he responded “you don’t know. We don’t have any trust between us.” 9RP 1060. The defendant said that he told Altinger he would shoot him if he had to. 9RP 1062. He admitted that he has a hard time controlling his

anger and that Altinger could have been killed if he had done the wrong thing. 9RP 1152; 10RP 1255. Despite all this, the defendant professed that the things he said to Altinger did not constitute a threat to harm Andrea or the kids. 9RP 1060.

On cross, the defendant admitted that he was angry when he took his gun and Andrea's journal up to Altinger's apartment. 10RP 1263. He admitted to telling Altinger that he had destroyed the apartment. 10RP 1264. He admitted that he was angry when he pulled up his jacket to show Altinger that he had a gun and that he told Altinger "once I pop, I can't stop." 10RP 1266. After admitting that he told Altinger that he could not be sure he would not hurt Andrea, he was asked if he understood how Altinger and DeMarco would be terrified about letting him leave the apartment with Andrea downstairs. The defendant answered "Yes. I can see how they could be concerned." 10RP 1267.

**C. ARGUMENT**

**1. EVIDENCE SUPPORTS THE FACT THAT THE DEFENDANT UTTERED A "TRUE THREAT"**

As to count 2, the defendant contends that there was insufficient evidence for the jury to have found he uttered a "true threat" as that term is defined for First Amendment purposes. The

defendant is incorrect. The facts show, and the defendant essentially admitted at trial, that he uttered a true threat.

**a. The Harassment Statute Proscribes Only  
“True Threats”**

States and the government have a valid and sometimes an overwhelming interest in proscribing actual threats of violence. See Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969); State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001). While a person may use threatening type language in a variety of contexts, actual threats of violence are not protected by the First Amendment and may be punishable under criminal statutes. Watts, supra; J.M., supra. Thus, because threatening language said in one context may be protected -- for example, a veiled threat uttered as part of political speech, while in another context the threatening language is not protected, statutes that proscribe pure speech must be interpreted with the commands of the First Amendment in mind. Watts, 394 U.S. 707. Specifically, what is an actual threat must be distinguished from what is constitutionally protected speech. Id. In this regard, courts have coined the phrase “true threats” to indicate the type of utterances

that are unprotected by the First Amendment. J.M., 144 Wn.2d 477-78.

A "true threat" is defined as:

A statement [made] 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 a statement as a serious expression of intention to inflict bodily harm.

J.M., 144 Wn.2d at 479 n.4 (this definition "best reflects First Amendment considerations").

It is important to note that the First Amendment does not require that the speaker intend to actually carry out the threat. State v. Kilburn, 151 Wn.2d 36, 46, 84 P.3d 1215 (2004). It is the risk of fear of harm engendered in the person threatened, and the disruption that may occur as a result of that fear, that make true threats unprotected speech. Id. (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 387-88, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)). In other words, the potential for fear exists regardless of whether the speaker intends to carry out his threat. Id.<sup>5</sup>

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<sup>5</sup> True threats are not the only type of speech left unprotected by the First Amendment. Other types of speech provided no First Amendment protection include libelous speech, fighting words, incitement to riot, obscenity, and child pornography. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (citing Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)).

In Washington, the legislature enacted RCW 9A.46.020, the harassment statute, with the intent of proscribing threats of violence. In doing so, the legislature stated “that the prevention of serious, personal harassment is an important government objective” that “can be accomplished without infringing on constitutionally protected speech or activity.” RCW 9A.46.010. The Washington Supreme Court has previously held that the portion of the harassment statute at issue here proscribes only “true threats.” J.M., 144 Wn.2d at 478; State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001).

Although not challenged here, the *statutory* elements of harassment are as follows:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person;...and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out....

RCW 9A.46.020.<sup>6</sup> Along with these statutory elements, to ensure that a jury determination is limited to finding guilt based on a “true threat,” the definition of what constitutes a “true threat” must be incorporated in the jury instructions. State v. Johnston, 156 Wn.2d 355, 364, 127 P.3d 707 (2006). A threat does not have to be a literal word for word translation; rather, the threat can be implied based on the facts and circumstances involved. State v. C.G., 150 Wn.2d 604, 610-11, 80 P.3d 594 (2003).

Here, the jury was properly instructed that,

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.

CP 59; WPIC 2.24.

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<sup>6</sup> A conviction for harassment requires that the State prove (1) that a “true threat” was made and (2) the additional statutory elements of the crime. Kilburn, 151 Wn.2d at 54. For example, RCW 9A.46.020(1)(b) requires that the victim be placed in reasonable fear that the threat will be carried out. The test for what constitutes a “true threat” does not depend on the victim’s fear. In fact, many threat statutes do not even require that the victim hear of the threat. See e.g., United States v. Merrill, 746 F.2d 458 (9th Cir. 1984) (defendant mailed letters to community leaders threatening President Ronald Reagan – 18 U.S.C. §871(a), the threats against the president statute, does not require that the president learn of the threat and no evidence he did in this case); United States v. Gordon, 974 F.2d 1110 (1992) (defendant’s threat, made to arresting officers, to kill a former president constituted a true threat despite lack of proof that the former president ever learned of the threat); United States v. Khorrami, 895 F.2d 1186 (7th Cir. 1990) (defendant’s threats to kill various Israeli political figures contained in letters sent to American Jewish charitable foundations constituted true threats despite no indication that the political figures ever learned of the letters).

Generally, evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992). Reviewing courts defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the testimony. State v. Gerber, 28 Wn. App. 214, 216, 622 P.2d 888 (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)), rev. denied, 95 Wn.2d 1021 (1981). While still giving deference in regards to credibility issues, in determining whether a defendant has uttered a true threat, a reviewing court makes an “independent examination” of the facts that necessarily involve the legal determination whether the speech is unprotected. Kilburn, 151 Wn.2d at 50-53.

The relevant question then “is whether there is sufficient evidence that a reasonable person in [the defendant’s] position would foresee that his comments would be interpreted as a serious statement of intent to inflict bodily injury.” Kilburn, at 48 (substituting “the defendant” for “Kilburn”).

The court applies an objective standard that focuses on the content of the threat and the circumstances in which the threat was made. Kilburn, at 44; J.M., 144 Wn.2d at 478; Schenck v. United States, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed 470 (1919) (statements may be constitutionally protected if said in one forum while lawfully punished if said in another). The analysis necessarily excludes statements that a reasonable person would know were made in jest, as idle talk or as political hyperbole (e.g., the threats to “kill the ump” during a baseball game or the threatening banter spoken during a political protest). J.M., 144 Wn.2d at 478, 482. Watts, 394 U.S. at 707-08 (statements made at an anti-war rally clearly political hyperbole); Roy v. United States, 416 F.2d 874 (9th Cir. 1969) (claim that statement was made in jest is relevant only where circumstances would indicate to a reasonable person the levity of the statement).

**b. The Defendant Uttered A True Threat**

In applying the test for what constitutes a “true threat,” there can be little question but that a reasonable person in the defendant’s position would foresee that his statements would be interpreted as a serious expression of intention to inflict bodily harm

– a standard that when testifying, the defendant essentially admitted had been met.

The defendant admitted he was very angry, almost uncontrollable, when he went up to Altinger's apartment and during the confrontation that occurred at the door when he tried to leave. 9RP 1031; 10RP 1264. He admitted to pulling out his gun and telling Altinger that he would use it if necessary. 9RP 1062. He admitted that during the time span in which he uttered threats, he was "pretty angry" and talking "pretty aggressively." 9RP 1053. And most telling, he admitted that under the circumstances, he understood how Altinger would fear that he was going to harm Andrea and the kids. 10RP 1267. There are no facts suggesting that the defendant was joking or engaging in speech with some other intent in mind.

The defendant's arguments to the contrary are misguided. The defendant cites to State v. Alvarez,<sup>7</sup> and asserts that "the State failed to show Altinger subjectively feared that Fast would carry out his alleged threat." Def. br. at 17. As stated in the sections above, a "true threats" analysis does not require that a victim be placed in fear or that a victim even hear of the threat. Those requirements

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<sup>7</sup> 74 Wn. App. 250, 872 P.2d 1123 (1994), aff'd, 128 Wn.2d 1 (1995).

are statutory requirements and are not part of a “true threats” First Amendment analysis. Alvarez dealt with the issue of whether there was sufficient evidence supporting the statutory elements of the crime. 74 Wn. App. at 255 (“he claims that insufficient evidence exists to convict him under the language of the statute”). A true threats analysis focuses only on the speaker and whether a reasonable person in the speaker’s position would foresee that his utterance would be interpreted as a serious expression to cause bodily injury. J.M., 144 Wn.2d at 479.

The defendant also asserts that because Altinger’s knowledge of the abuse heaped upon Andrea by him came from Andrea, a true threat does not exist. Def. br. at 17. Again, the defendant focuses on the wrong point. How Altinger obtained the knowledge regarding the defendant’s anger problems and violent tendencies is irrelevant to a true threats analysis. What is relevant is that the defendant *knew* Altinger possessed this knowledge. It is part of the circumstances in which the defendant uttered his statements and why a speaker in his position would realize that a listener with such knowledge would be even more likely to interpret his statements as a serious expression to inflict bodily harm.

In making his arguments, the defendant also makes a factual claim that is incorrect. He asserts in briefing that Altinger and Andrea were having an affair at the time the threats were made, that he knew about the affair and that Altinger knew that the defendant was aware of their affair. Def. br. at 17. Thus, according to the defendant, his statements should be interpreted merely as expressions of distrust and venting. However, Andrea and Altinger were not having an affair. The two engaged in two acts of sexual intercourse in May or June of 2014. 4RP 212, 227-32. There was never a romantic relationship. 4RP 233. In fact, by September of 2014, Altinger had ceased having any contact with both Andrea and the defendant. 4RP 233. He resumed having contact with the defendant, not Andrea, in December of 2014, and the two of them got back to being on good terms. 4RP 234. Thus, the defendant's argument that the statements he made on February 2, 2015 were about an ongoing affair between Andrea and Altinger is simply not supported by the record.

In short, the defendant had a known and admittedly violent temper that he had difficulty controlling. At the time of this incident, he was extremely angry, armed with a gun, and in a very aggressive and intense manner he made statements with the actual

intent of suggest he would harm his wife and children. A reasonable person in his circumstances would know his utterances would be taken as a serious express to cause bodily harm.

**2. THERE SHOULD BE NO DETERMINATION ON APPELLATE COST**

The defendant asks this court to waive appellate cost due to indigence. This Court should not, as a part of this appeal, determine whether appellate cost ought to be waived due to indigence.

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review. RAP 14.2. The State respectfully disagrees with this Court's approach to costs on appeal set forth in State v. Sinclair.<sup>8</sup> A decision on the State's petition for review of Sinclair is expected at the end of June, 2016. As in most cases, the defendant's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. As such, the record does not contain sufficient information about the defendant's financial status and the State did not have the right to obtain information about the defendant's financial situation. The declaration that the defendant filed when he requested the

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<sup>8</sup> 192 Wn. App. 380, 367 P.3d 612 (2016).

appointment of appellate counsel addressed only his present financial circumstances and his ability to pay appellate costs up front. It does not address his future ability to pay. It is a defendant's future ability to pay, not his current ability to pay, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments).

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 27 day of June, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: 

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Jared Steed of Nielsen, Broman & Koch, PLLC, containing a copy of the Brief of Respondent, in STATE V. FAST, Cause No. 73701-5-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name  
Done in Seattle, Washington

06-27-16  
Date