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Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 73301-5

Title of Case: State of Washington V Martin Emerson Kilburn,

B.d. 03-02-1987

File Date: 02/12/2004

Oral Argument Date: 10/21/2003

SOURCE OF APPEAL

Appeal from Superior Court,

County

Honorable Susan R Agid

JUSTICES

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Concurring: Bobbe J Bridge

Charles W. Johnson

Gerry L Alexander

Richard B. Sanders

Dissenting: Faith Ireland

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)

)

Respondent,) NO. 73301-5

)

v.) EN BANC

)

MARTIN KILBORN,) FILED February 12, 2004

)

Petitioner.)

)

MADSEN, J. -- Petitioner Martin Kilborn (Kilborn) claims that his juvenile conviction of felony harassment under RCW 9A.46.020 must be reversed because the State failed to prove that he actually intended to carry out the alleged threat made to a classmate and because his statements were intended only as a joke. We hold that proof that the speaker intended to carry out his or her threat is not required by either the First Amendment or the harassment statute. However, we agree with Kilborn that the evidence is insufficient to sustain his conviction.

Facts1

On March 21, 2001, at Mount Baker Middle School in King County, eighth grade student K.J. was sitting next to Kilborn at the end of their last class, an accelerated reading class. Kilborn said to K.J., 'I'm going to bring a gun to school tomorrow and shoot everyone and start with you,' and then he said, 'maybe not you first.' Finding of Fact 3, Clerk's Papers (CP) at 16. K.J. was surprised and said, 'yeah right' and turned away. Finding of Fact 3, CP at 16.

K.J. immediately told a friend about Kilborn's statement but did not tell her teacher because she did not know what to do. She thought Kilborn might have been joking, but she was not sure. K.J. went home and continued

to think all that afternoon and into the evening about what Kilborn had said, and the more she thought about it the more she became afraid that Kilborn was serious.

K.J. did not know Kilborn to be a mean or scary person. He had never done anything like this before. K.J. had no reason to think that Kilborn would make a threat of this kind, but she testified that 'we all knew we weren't suppose to say things like that so the fact that he said it made me think he was serious.' Finding of Fact 8, CP at 17. Kilborn, on the other hand, stated in a written statement admitted at his trial that he had said that '{t}here's nothing an AK 47 wouldn't solve' and stated this was only a joke. CP at 21.

Eventually that evening K.J. told her mother and father what Kilborn had said, and her mother called 911. K.J. testified that she felt that 'if he wasn't joking she saved lives.' Finding of Fact 9, CP at 17. Kilborn was arrested and charged with felony harassment, which requires the State to prove that Kilborn knowingly threatened to cause bodily injury to K.J. immediately or in the future, the threat being one to kill, and by words or conduct placed K.J. in reasonable fear that the threat would be carried out. RCW 9A.46.020.

The trial court found K.J.'s testimony credible and that K.J. reasonably feared that Kilborn would carry out the threat. The trial court adjudicated Kilborn guilty of felony harassment, involving a threat to kill, and entered written findings and conclusions. During its oral ruling, the court rejected Kilborn's argument that the State had to prove

that he actually intended to carry out the threat. In the course of addressing this matter, the court also said that

in retrospect and in analyzing the Respondent, both in terms of, you know, what {K.J.} said about him and any other limited knowledge I have, there is no reason to believe that he in fact intended to bring a gun to school and shoot everybody. But the cases say, and the law says, that that is not relevant; that we are simply talking about whether there is a threat and whether that threat is communicated.

Report of Proceedings (RP) at 119.

At Kilborn's disposition hearing, the court imposed no sanction of confinement, supervision, or community service. The deputy prosecutor stated that just before trial the State offered a deferred disposition, but the offer was rejected. Following trial, the deputy prosecutor again suggested a deferred disposition, but the court advised that a deferred prosecution cannot be imposed after adjudication. The court commented that Kilborn 'has now got a felony; there is nothing I can do about it. This should have been resolved in some other way prior to trial, and it's just--it's a tragedy that it wasn't.' RP at 136. The only penalty imposed was a $100.00 victim penalty assessment.

Kilborn appealed, arguing that for a conviction under RCW 9A.46.020 to satisfy First Amendment requirements, the State must prove that the speaker actually intended to carry out the threat. In his case, he argued, he was joking. He also complained that his threat to 'shoot everyone' could not

reasonably be perceived to be a threat to kill. The Court of Appeals affirmed in an unpublished opinion. State v. Kilborn, No. 49084-2-I (Oct. 21, 2002). This court granted Kilborn's petition for discretionary review.

Discussion

I.

Kilborn maintains that unless the State shows that he intended to actually carry out his threat, it was not a true threat. Under the First Amendment only a true threat suffices for a conviction under RCW 9A.46.020. Thus, he argues, his conviction must be overturned because he was only joking when he made his statements about shooting everyone at the school.

RCW 9A.46.0202 provides in relevant part:

(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. . . .

(2) A person who harasses another . . . is guilty of a class C felony if . . . (b) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened . . . .

The statute criminalizes pure speech. Therefore, it "must be interpreted with the commands of the First Amendment clearly in mind."

State v. Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001) (quoting Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)). 'The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty--and thus a good unto itself--but also is essential to the common quest for the truth and the vitality of society as a whole.' Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984). While laws may proscribe 'all sorts of conduct' the same is not true of speech; the law 'is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.' Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 579, 115 S. Ct. 2388, 132 L. Ed. 2d 487 (1995). 'However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.' Milkovich v. Lorain Journal Co., 497 U.S. 1, 18, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990) (quoting Gertz v. Welch, Inc., 418 U.S. 323, 339-40, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)). Thus, for example, in Brandenburg v. Ohio, 395 U.S. 444, 447-48, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), the United States Supreme Court held that "the mere abstract teaching" of "the moral propriety or even moral necessity for a resort to force and violence" is protected by the First Amendment unless the speech is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' Id. (quoting Noto v. United States, 367 U.S. 290, 297-98, 81 S. Ct. 1517, 6

L. Ed. 2d 836 (1961)).

In order to preserve the vital right to free speech, it is imperative that a court carefully assess statements at issue to determine whether they fall within or without the protection of the First Amendment. It is, at this point, settled that certain kinds of speech are unprotected. The Court has noted that

there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend because they 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'

Bose, 466 U.S. at 504 (quoting Chaplinsky, 315 U.S. at 572). Among these categories are libelous speech, fighting words, incitement to riot, obscenity, and child pornography. Id.

An additional category is at issue here--'true threats,' which are also unprotected speech under the First Amendment. See Watts, 394 U.S. at 707; see also, e.g., United States v. Fulmer, 108 F.3d 1486, 1492-93 (1st Cir. 1997); Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002); Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1074 (9th Cir. 2002) (Planned Parenthood); Williams, 144 Wn.2d at 207; State v. J.M., 144 Wn.2d 472, 477, 28 P.3d 720 (2001). To avoid unconstitutional infringement of protected

speech, RCW 9A.46.020(1)(a)(i) must be read as clearly prohibiting only 'true threats.' Williams, 144 Wn.2d at 208; J.M., 144 Wn.2d at 478.

The reason that 'true threats' are not protected speech is because there is an overriding governmental interest in the "protect{ion of} individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." J.M., 144 Wn.2d at 478 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)). We have adopted an objective test of what constitutes a 'true threat': A 'true threat' is "a statement made in a 'context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life'" of another person. Williams, 144 Wn.2d at 208-09 (quoting State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797 (1998) (quoting United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir. 1990))); accord J.M., 144 Wn.2d at 477-78. A true threat is a serious threat, not one said in jest, idle talk, or political argument. United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1984); J.M., 144 Wn.2d at 478; State v. Hansen, 122 Wn.2d 712, 717 n.2, 862 P.2d 117 (1993). Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker.

Kilborn argues that this court should abandon the test adopted in Williams and J.M. and instead hold that a statement is not a true threat unless the speaker has the actual intent to cause injury. He reasons that

there are two definitions of 'true threat' that have emerged from case law: the objective speaker test this court adopted, and a second, which he describes as a subjective definition focusing on the intent of the speaker. For the latter, he relies on dissents. First, he urges the dissent in the lower court decision in Watts, where Judge Wright maintained that protection of free speech required a specific intent to carry out the threat against the president at issue in Watts. Watts v. United States, 402 F.2d 676, 691 (D.C. Cir. 1968) (Wright, J., dissenting). Kilborn points out, correctly, that when deciding Watts, the United States Supreme Court expressed doubts about interpreting the 'willfulness' requirement in the statute criminalizing threats against the president without a requirement of specific intent to carry out the threat, pointing to Judge Wright's dissent. Watts, 394 U.S. at 707-08. The Court did not reach the question, because it had already held that the statement constituting the alleged threat did not constitute a true threat.

Kilborn also relies on dissents in Planned Parenthood. Neither dissent supports his position. Judge Kozinski in fact wrote '{n}or is there a dispute that someone may be punished for uttering threats, even though he has no intent to carry them out . . . .' Planned Parenthood, 290 F.3d at 1089 n.1 (Kozinski, J., dissenting). Judge Berzon specifically noted the majority's conclusion in Planned Parenthood that the dissents maintained that the speaker must actually intend to carry out the threat, and responded that neither dissent did so. Planned Parenthood, 290 F.3d at 1107 n.8 (Berzon, J., dissenting).

Although not cited by Kilborn, one Fourth Circuit case held that where a threat was directed at the president but not communicated directly to him, proof of specific intent to threaten and the present intention to carry out the threat were required. United States v. Patillo, 438 F.2d 13 (4th Cir. 1971). The case has not been recently followed, however.

There is thus very little support for Kilborn's position, and it really cannot be fairly said, as he urges, that there is a second line of cases representing his view that a true threat may be found only where there is an actual intent to carry out the threat.3

Despite the doubt expressed in Watts, the federal courts have overwhelmingly concluded that the First Amendment does not require that the speaker intend to actually carry out the threat. E.g., United States v. Fulmer, 108 F.3d 1486, 1494 (1st Cir. 1997) (citing United States v. Orozco-Santillan, 903 F.2d 1262, 1265 n.3 (9th Cir. 1990)); United States v. Francis, 164 F.3d 120, 123 (2d Cir. 1999); United States v. Roberts, 915 F.2d 889, 890 (4th Cir. 1990); United States v. Daughenbaugh, 49 F.3d 171, 173 n.2 (5th Cir. 1995); United States v. Rogers, 488 F.2d 512 (5th Cir. 1974), rev'd on other grounds, 422 U.S. 35, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975); United States v. Miller, 115 F.3d 361, 363-64 (6th Cir. 1997); United States v. Aman, 31 F.3d 550, 553-56 (7th Cir. 1994); United States v. Khorrami, 895 F.2d 1186, 1192-93 (7th Cir. 1990); United States v. Patrick, 117 F.3d 375, 377 (8th Cir. 1997); Planned Parenthood, 290 F.3d at 1075-76; United States v. Martin, 163 F.3d 1212, 1215-16 (10th Cir. 1998).

This conclusion accords with the reasons why true threats are not

protected speech. The fear of harm aroused in the person threatened and the disruption that may occur as a result of that fear are some of the reasons why true threats are not protected speech. R.A.V., 505 U.S. at 387-88. That fear does not depend upon whether the speaker in fact intends to carry out the threat. For this reason, we hold, along with the vast majority of courts, that the First Amendment does not require that the speaker intend to carry out a threat for it to constitute a true threat.

Kilborn argues, however, that this court has held there must be an actual intent to carry out the threat. He is mistaken. He cites to Williams, 144 Wn.2d at 208, but the court there simply quoted the test for 'true threat,' which, as noted above, is one that a reasonable person would foresee would be interpreted "as a serious expression of intention to inflict bodily harm . . . ." The requirement is that the words express the intent to inflict harm, not a requirement that the speaker actually intends to carry out the threat. Kilborn also cites J.M., 144 Wn.2d at 481-82. However, we expressly said in J.M. that the speaker need not intend to carry out the threat, and repeated the same point made in Williams--that the communication must be of intent to inflict bodily harm.

In J.M. we also said that the communication must be a serious threat, and not just idle talk, joking or puffery. Kilborn evidently takes this to mean that if the speaker subjectively intends a joke, no true threat is made. This is incorrect. As the State points out, the United States Supreme Court has observed that '{t}he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and

causing a panic.' Schenck v. United States, 249 U.S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 2d 470 (1919). Whether a statement is a true threat or a joke is determined in light of the entire context, and the relevant question is whether a reasonable person in the defendant's place would foresee that in context the listener would interpret the statement as a serious threat or a joke.

Kilborn says that if a true threat is not limited by the actual subjective intent of the speaker to carry out the threat, then many threats against the president would be criminalized where the speaker lacks the present ability to carry out the threat. In fact, there are numerous cases holding that threats against the president may be unprotected true threats without regard to the subjective intent of the speaker. E.g., Howell, 719 F.2d 1258; United States v. Hoffman, 806 F.2d 703 (7th Cir. 1986); United States v. Hanna, 293 F.3d 1080 (9th Cir. 2002); Orozco-Santillan, 903 F.2d 1262.

Kilborn claims that Watts and N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) support his position that the speaker's intended purposes should be considered. However, in each case the Court found the comments at issue to constitute protected political speech, in light of the entire context.

Kilborn argues the State was not put to the proof of showing a compelling governmental interest justifying impairment of a constitutionally protected right. However, if the State establishes that a true threat was made, it has necessarily established the speech is

unprotected, as Watts, R.A.V., and state precedent hold.

Kilborn complains that if RCW 9A.46.020(1)(a)(i) is interpreted to allow a conviction based upon a statement made in jest it is unconstitutionally overbroad. He says the same is true of RCW 9A.04.110(25)(a) (defining threat as 'to communicate, directly or indirectly the intent . . . {t}o cause bodily injury in the future to the person threatened or to any other person'). If a statute criminalizes a substantial amount of constitutionally protected speech, it is unconstitutionally overbroad even if it has some legitimate application. Williams, 144 Wn.2d at 208. However, the court has construed RCW 9A.46.020(1)(a)(i) as only criminalizing true threats, Williams, 144 Wn.2d at 208, J.M., and pursuant to overwhelming authority it need not import a subjective intent element into the 'true threat' definition or into the statute in order to save it from overbreadth.

We hold that the First Amendment does not require that the speaker actually intend to carry out the threat in order for a communication to constitute a true threat, and that the State need not prove such intent.

We add, however, that the harassment statute itself does require a mental element. The statute requires that the defendant 'knowingly threatens . . . .' RCW 9A.46.020(1)(a)(i). This means that 'the defendant must subjectively know that he or she is communicating a threat, and must know that the communication he or she imparts directly or indirectly is a threat to cause bodily injury to the person threatened or to another person.' J.M., 144 Wn.2d at 481. Thus, one who writes a threat in a

personal diary or mutters a threat unaware that it might be heard does not knowingly threaten. Id. The statute does not require that the State prove that the speaker intended to actually carry out the threat.

II.

Kilborn also argues that the evidence is insufficient to convict him of felony harassment. Because he argues that the State must prove that he actually intended to carry out a threat to inflict bodily injury, part of Kilborn's argument on sufficiency of the evidence is that such evidence is lacking. However, as we have explained, this is not a requirement either to show a 'true threat' for First Amendment purposes or to satisfy the elements of RCW 9A.46.020. Instead, the relevant constitutional question under the circumstances here is whether there is sufficient evidence that a reasonable person in Kilborn's position would foresee that his comments would be interpreted as a serious statement of intent to inflict serious bodily injury or death. Kilborn claims that he was only joking.

This sufficiency of the evidence inquiry implicates core First Amendment protection, because it is the heart of the 'true threat' inquiry. The issue therefore requires that we carefully determine and apply the correct standard of review. As we have explained, RCW 9A.46.020's criminalization of threats is a proscription of pure speech. An appellate court must be exceedingly cautious when assessing whether a statement falls within the ambit of a true threat in order to avoid infringement on the precious right to free speech. It is not enough to engage in the usual

process of assessing whether there is sufficient evidence in the record to support the trial court's findings. The First Amendment demands more.

In Bose Corp., 466 U.S. 485, the United States Supreme Court examined the premise that there should be independent review of the record in First Amendment cases in the face of an argument that review should proceed under Fed. R. Civ. P. 52(a) (setting forth a clearly erroneous standard for findings of fact). The case was a defamation action brought by Bose contending that an evaluation in Consumer Reports had falsely stated that speakers produced sound that "wandered about the room." Id. at 487-88.

The Court explained that before Bose it had independently reviewed the record in a number of First Amendment contexts, including cases where speech was claimed to be unprotected fighting words, incitement to riot, obscenity, child pornography, and defamation. See Bose, 466 U.S. at 499, 504-08. The Court has since applied the independent review analysis in other First Amendment contexts. E.g., Hurley, 515 U.S. 557 (question whether Massachusetts could require private citizens organizing a parade to include a group imparting a message that the organizers did not want to communicate; Court had to examine validity of state courts' characterization of parade as lacking the element of expression); City of Houston v. Hill, 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) (civil rights action challenging an ordinance that made it unlawful to oppose, molest, abuse, or interrupt a police officer in the execution of his duty).

The Court explained in Bose that in each of the First Amendment cases

where independent review was undertaken the limits of the unprotected category as well as the unprotected character of certain communications were determined by judicial evaluation of special facts. Bose, 466 U.S. at 504-05. The Court continued:

In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure the protected expression will not be inhibited. . . . The principle of viewpoint neutrality that underlies the First Amendment itself also imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected.

Bose, 466 U.S. at 505 (citation and footnote omitted). The Court observed that it 'must 'make an independent examination of the whole record,'' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.'' Id. at 508 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 285, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) and quoting Edwards v. South Carolina, 372 U.S. 229, 235, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963)). The independent review rule is, the Court said, 'a rule of federal constitutional law.' Bose, 466 U.S. at 510.

The Court contemplated, however, a full review of only those facts in a record that relate to the First Amendment question whether certain expression was unprotected speech. For example, the Court indicated that

findings on credibility would continue to be given deference. The Court said, however, that

{a} finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is 'found' crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment.

Bose, 466 U.S. at 501 n.17. In later cases, the Court similarly explained that the rule of independent review generally requires the appellate court to freshly examine 'crucial facts'--those so intermingled with the legal question as to make it necessary, in order to pass on the constitutional question, to analyze the facts. See, e.g., Hurley, 515 U.S. at 567; Hernandez v. New York, 500 U.S. 352, 367, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688-89, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989). Also, the appellate court may review evidence ignored by a lower court in deciding the constitutional question. Hill, 482 U.S. at 458 n.6.

This court has read Bose (and New York Times) as imposing a mandatory rule of independent review in defamation cases, Richmond v. Thompson, 130 Wn.2d 368, 388, 922 P.2d 1343 (1996), but we have not previously considered whether the rule is limited to this context. We note that a few courts have limited the rule to defamation cases. This limiting appears to us

incorrect, both because Bose also cites First Amendment cases where independent review involved fighting words, incitement to riot, obscenity, and child pornography, and because the Court since Bose has applied this review standard in other First Amendment contexts. There are also differences among courts as to how extensive the review of the record should be--a number of state courts recite the rule as one of complete de novo review. However, Bose and later cases direct that review is of critical facts necessary to the legal determination of whether the speech is unprotected, not complete de novo review. Finally, there have at times been indications that the rule simply accords with rules governing federal review of facts found in state courts. E.g., Hurley, 515 U.S. at 567 (quoting Fiske v. Kansas, 274 U.S. 380, 385-86, 47 S. Ct. 655, 71 L. Ed. 2d 1108 (1927)). However, Bose is not limited to federal review of state court decisions--the case itself originated in federal district court. Further, the rationale offered for independent review, and the Court's reference to it as a 'rule of federal constitutional law' indicate it is not so limited. Also, in explaining the rule, the court in Bose did not analyze any standards or provisions having to do with federal review of state court decisions.

We therefore conclude that the rule of independent review is not limited to defamation cases, but under the First Amendment should apply whenever an inquiry must be made into the factual context to decide if speech is unprotected. However, this review is limited to review of those 'crucial' facts that necessarily involve the legal determination whether

the speech is unprotected.

Here, we apply the rule of independent review because the sufficiency of the evidence question raised involves the essential First Amendment question--whether Kilborn's statements constituted a 'true threat' and therefore unprotected speech. We must independently review the crucial facts in the record, i.e., those which bear on the constitutional question.

As noted, Kilborn maintains he was joking. Some of K.J.'s uncontroverted testimony that did not find its way into the trial court's findings bears this out. Importantly, the trial court found K.J.'s testimony to be credible, a finding this court must defer to. Conclusion of Law 6, CP at 18 (incorrectly denominated a conclusion of law). K.J. testified that at the end of the last class the students were chatting, giggling, and laughing as they often did at the end of the school day. Kilborn and K.J. started talking about books they were reading; Kilborn had a book that had military men and guns on it. Kilborn then turned to K.J. and, half smiling, said he was going to bring a gun the next day and shoot everyone, beginning with her. Then he began giggling, and said maybe not her first. K.J. testified that Kilborn started to 'laugh or giggle' as if he were not serious, and that 'he was acting kind of like he was joking.' RP at 70-71. K.J. testified that she said 'okay,' and that she said 'right' in an exaggerated tone. RP at 71, 81.

At one point K.J. testified that she did not feel scared when Kilborn spoke, just surprised. They had known each other two years and had never had a fight or a disagreement. She testified Kilborn always treated her

nicely. She testified that Kilborn made jokes on occasion and the other students, including her, laughed at the jokes. He also talked and joked with his friend who sat behind him. She testified that she later wondered whether he was joking or serious. RP at 71, 73 (she testified 'he was acting kind of like he was joking, but I didn't know if he was joking or not').

These facts all suggest that a reasonable person in Kilborn's position would foresee that his comments would not be interpreted seriously. In particular the testimony about K.J.'s and Kilborn's past history and relationship, his treatment of her in the past, the regularity of Kilborn joking with her and others, and his giggling or laughter as he made the comments, 'acting kind of like he was joking,' make it difficult to conclude that he would reasonably foresee his comments being taken seriously. In addition, Kilborn and K.J. had been discussing their books, and his had guns on it--perhaps the origin of his comment about guns.

K.J. testified, however, that at the time Kilborn made the statement, 'It freaked me out, cause we know that we're not supposed to say anything about bringing a gun or even say the word 'gun' at school'; she testified that if Kilborn said it, given that the students knew they were not to speak of guns, 'he must have been serious . . . .' RP at 71, 95. She also testified that she 'didn't know if it would happen' and that it 'could have, with all the shooting things going around, and I didn't really know {Kilborn} that well . . . .' RP at 74.

We conclude that the evidence is insufficient for a reasonable person

in Kilborn's place to foresee that K.J. would interpret his statement as a serious threat to cause bodily injury or death, given his past relationship with K.J., his having joked with her and his other friend in the class before, the discussion that had been taking place about the books they were reading, and his laughing or giggling when he made his comments. We are not concerned here with whether he might have been serious or not. We apply an objective standard which is, given the First Amendment values at issue, a difficult standard to satisfy.

Because of the First Amendment implications, a conviction for felony harassment based upon a threat to kill requires that the State satisfy both the First Amendment demands--by proving a true threat was made--and the statute, by proving all the statutory elements of the crime. Here, the State has failed to show a true threat, the conviction must be reversed, and we need not decide whether statutory elements are otherwise satisfied.

Based on insufficient evidence of a true threat, Kilborn's conviction is reversed. Accordingly, we do not reach the additional issue he raises, i.e., whether the evidence is sufficient to show that he made a threat to kill.

Conclusion

An alleged threat to kill under RCW 9A.46.020 must be a 'true threat' in the First Amendment sense. Neither the First Amendment nor the statute requires that the State prove that the defendant actually intended to carry out his or her threat in order to convict under RCW 9A.46.020. To determine whether a speaker has made a true threat, an appellate court must

review the constitutionally critical facts in the record that are necessarily involved in the legal determination whether a true threat was made. Here, under this rule of independent review, we conclude that the evidence does not establish that Kilborn made a true threat that is unprotected speech. The evidence is therefore insufficient to support his conviction. Accordingly, we reverse.

WE CONCUR:

1 The findings of fact are unchallenged and the trial judge formally incorporated her oral decision into the findings and conclusions. A trial court's oral decision has no binding or final effect unless it is formally incorporated into findings of fact, conclusions of law and judgment. State v. Michielli, 132 Wn.2d 229, 242, 937 P.2d 587 (1997); United States v. Mallory, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966).

2 The subsectioning of the statute was changed by amendment in 2003, but the substantive provisions remain the same. Laws of 2003, ch. 53, sec. 69 (effective July 1, 2004).

3 There are, roughly speaking, two lines of cases, but both involve objective tests, the difference being that the second focuses on the reasonable listener. That is, the question is whether, in light of the entire context, the listener could reasonably conclude that the statement expresses the intent to injure presently or in the future. United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996); see also, e.g., United

States v. Roberts, 915 F.2d 889, 891 (4th Cir. 1990) (as noted, Patillo, mentioned above, is not generally followed even in the Fourth Circuit); United States v. Daughenbaugh, 49 F.3d 171, 173-74 (5th Cir. 1995); United States v. J.H.H., 22 F.3d 821, 827-28 (8th Cir. 1994).

One of these courts has reasoned that the difference between the two tests is largely insignificant. The Eighth Circuit explained in Doe, 306 F.3d at 623, that in the vast majority of the cases the outcome should be the same because a reasonably foreseeable response from the listener and an actual reasonable response should be the same. The court foresaw that the only case where there might be a different outcome is where the recipient suffers from some unique sensitivity unknown to the speaker. Id.

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