

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	No. 36821-1-III
)	
Respondent,)	
)	
v.)	PUBLISHED OPINION
)	
D.R.C.,)	
)	
Appellant.)	

PENNELL, C.J. — The State is prohibited from penalizing constitutionally protected speech. But not all speech is protected. When it comes to the crime of harassment, speech is not protected if it constitutes a true threat, as opposed to mere bluster or hyperbole. The test for a true threat is objective, though not abstract. The State must show a reasonable person in the defendant’s position would have foreseen the speech would be perceived as a true threat by the individuals in the defendant’s intended audience.

Here, D.R.C. sent a series of text messages to her friends, indicating she wanted to kill her mother. The texts were sent in the midst of a mother-daughter fight. They were vaguely worded and peppered with smiling emojis and the initialism “LOL.”¹ There is no indication D.R.C. ever meant for her mother to see the texts or that D.R.C. ever threatened her mother directly. Given these circumstances, the State has not met its burden of proving a true threat. The record shows nothing more than odious expressions of frustration. D.R.C.’s guilty adjudication and disposition is therefore reversed.

BACKGROUND

The case against 17-year-old D.R.C. began with a mother-daughter dispute over whether D.R.C. violated house rules by possessing gang-colored clothing. The argument took place in D.R.C.’s bedroom, and at some point D.R.C. slammed her door shut. D.R.C.’s mother responded by removing the door from its hinges.

During the argument with her mother, D.R.C. was on her phone and texting with several friends. The primary correspondent was an individual identified as “Joshua.” The message thread between D.R.C. and Joshua read as follows:

JOSHUA
How was school

¹ Laugh out loud.

[D.R.C]
My mom took my fucking shit and she
fucking took my door off
She's a dumb fucking cunt

JOSHUA
Hahahah no door !'
Damn guess u can't masterbate

[D.R.C.]
Imma fucking do whatever tf^[2] I want she's
fucking stupid

JOSHUA
Haha beat her ass

[D.R.C.]
Bet imma get her killed if anything

JOSHUA
Woh chill just beat her ass that's it lol

[D.R.C.]
Nah
I hope she does
Does



JOSHUA
Damn too wild you are

² The fuck.

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[D.R.C.]
I'm running away
She's stupid
N she takes my fucking shit
So fuck her what's the point of fucking
being here

JOSHUA
Haha dude mows not the time to do that
with court coming up and Shit

Exs. 1, 4.

D.R.C. also had the following text exchange with "Lexy":³

[D.R.C.]
Can't wait to fucking move out tired of this bullshit 😂🔥

[LEXY]
Damn she's being hella harsh on u

[D.R.C.]
Imma fucking kill this bitch
She is tryna make me go to my dads

Ex. 2.

After removing D.R.C.'s bedroom door, the mother confiscated D.R.C.'s phone and turned to leave the room. As she was leaving, D.R.C.'s mother heard a loud noise.

³ The exhibit documenting this exchange with Lexy fails at times to clearly distinguish one speaker from the other. Our identification of the different speakers is based on context.

D.R.C. had punched her bedroom wall, leaving a hole in it. D.R.C.'s mother called the police. The police arrived and talked to D.R.C. and her mother, but did not take further action.

Later that night, D.R.C.'s mother reviewed D.R.C.'s phone and discovered the texts between D.R.C., Joshua, and Lexy. She also saw a series of older texts between D.R.C. and Lexy, wherein D.R.C. made violent comments about an acquaintance. The older messages read as follows:

[D.R.C.]
. . . I'll shank a hoe with my pencil or bald point
pen let a bitch get ink poisoning and bleed
out n die stupid hoe really trying me.

LEXY ❤️
Damnn bitch i can't with you 😭 u really
scare me sometimes !!

[D.R.C.]
Lmfao^[4] I scare hella people ion care tho wtf^[5]
😂👉 a bitch wanna think she about it Imma
take her life 🐱 don't fw^[6] my girls 😊❤️ family
over everything so if a bitch fw u lmk^[7] and
imma fucking take her life or slam her face
in the wall if she's lucky

⁴ Laughing my fucking ass off.

⁵ What the fuck.

⁶ Fuck with.

⁷ Let me know.

I love u too bitch❤️❤️❤️

Ex. 3.

D.R.C.'s mother found the texts alarming. Although D.R.C. had never threatened her mother directly or engaged in any physical violence, D.R.C.'s mother took precautionary measures. She changed the locks on the entry doors to the house and slept with a knife under her pillow until she was able to obtain a stun gun. D.R.C.'s mother took screen shots of D.R.C.'s text messages and shared them with the police.

The State charged D.R.C. with harassment in juvenile court. The case proceeded to trial. The State presented testimony from D.R.C.'s mother and introduced printouts of the foregoing texts.

D.R.C. testified in her defense. She explained she never intended her messages to be seen by anyone other than her friends. Nor did she intend her texts to be taken seriously. They were instead a form of venting and expressing her emotions. D.R.C. testified she and her friends often used exaggerated language in their texts. Violent language was common but was not intended to be taken literally. According to D.R.C., she and her friends often denoted sarcasm through the use of emojis and initialisms such as LOLs or LMFAOs. D.R.C. did not think any of her friends would have taken the text messages about her mother seriously.

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The juvenile court found D.R.C. guilty of harassment under RCW 9A.46.020(1) and (2)(a). The court reasoned D.R.C.'s messages constituted true threats, as required by the First Amendment to the United States Constitution, because they were taken seriously by both D.R.C.'s mother and Joshua, who advised D.R.C. to tone things down. The court imposed 13 days' confinement and 12 months' community supervision.

D.R.C. timely appeals.

ANALYSIS

D.R.C. claims the State's evidence was insufficient to justify her conviction. Faced with this type of challenge, we review the evidence in the light most favorable to the State and ask whether "any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.'" *Id.* (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

D.R.C.'s challenge goes not to the State's proof of harassment's criminal elements; rather, she claims the State failed to meet the additional burden of proving a true threat. As D.R.C. points out, because the crime of harassment penalizes pure speech, its enforcement raises First Amendment concerns. *State v. Williams*, 144 Wn.2d 197, 206-07,

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26 P.3d 890 (2001). To penalize a defendant for harassment, the State must prove not only the elements of the offense but also that the defendant's words were not the type of speech protected by the First Amendment. Proof of a true threat meets this requirement. *State v. Allen*, 176 Wn.2d 611, 630, 294 P.3d 679 (2013) (plurality opinion).

“A true threat is a serious threat.” *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). It is not an idle statement, a joke, or even a “hyperbolic expression[] of frustration.” *State v. Kohonen*, 192 Wn. App. 567, 583, 370 P.3d 16 (2016). When assessing whether a statement at the heart of a criminal prosecution constitutes a true threat, our analysis is more demanding than otherwise applicable in a sufficiency challenge. We look carefully at context and independently assess whether a statement in fact “falls within the ambit of a true threat in order to avoid infringement on the precious right to free speech.” *Kilburn*, 151 Wn.2d at 49.

The focus of the true threat analysis is on the speaker. But we do not look at the speaker's actual intent. *State v. Trey M.*, 186 Wn.2d 884, 893, 383 P.3d 474 (2016). Instead, the test is objective. *Id.* We ask whether a reasonable person in the speaker's position would foresee their statement would be interpreted as a serious expression of intent to cause physical harm. *Williams*, 144 Wn.2d at 207-08.

While the true threat analysis requires an objective analysis with respect to the speaker, the same is not true of the audience. When assessing whether a reasonable person in the speaker's position would foresee a statement interpreted as a serious threat, we look at the speaker's actual intended audience, not a reasonable audience or an unintended recipient. *See Kilburn*, 151 Wn.2d at 52-53 (reviewing foreseeable impact on the actual audience, a juvenile identified as "K.J."); *Kohonen*, 192 Wn. App. at 580 (reviewing foreseeable impact on the actual audience, a juvenile defendant's peer group on Twitter).

Our case law has identified various tools for distinguishing true threats from hyperbole or a joke. Specific plans of causing harm are more threatening than vagaries. *State v. Locke*, 175 Wn. App. 779, 793, 307 P.3d 771 (2013). A threat will be perceived as more serious when it is conveyed with a serious demeanor. *Trey M.*, 186 Wn.2d at 906-07. And a threat is understood as more serious when it is repeated to different audiences. *Id.*

In assessing whether the defendant's speech constituted a true threat, it is helpful to hear from members of the defendant's intended audience. An audience member's actual reactions are often typical of what would be expected and therefore provide a guide

for “what reaction a reasonable speaker under the circumstances would have foreseen.”
Kohonen, 192 Wn. App. at 580.

With these principles in mind, we consider D.R.C.’s case. D.R.C.’s intended audience was not her mother, it was her two friends Joshua and Lexy. Thus, whether D.R.C.’s mother found her daughter’s texts alarming is not our focus. We instead must ask whether a reasonable person in D.R.C.’s position would have foreseen that either Joshua or Lexy would have interpreted D.R.C.’s texts as true threats, as opposed to merely a joke or an expression of emotion.

Our analysis of the perspective of Joshua and Lexy is hampered by the fact that neither was called as a witness at trial. Unlike prior cases such as *Kilburn* and *Kohonen*, we lack testimony here explaining the actual reactions of D.R.C.’s audience to her texts. Such reactions would be important in assessing whether it was reasonable for D.R.C. to believe her statements would have been interpreted as a joke or merely venting. These reactions also would have been helpful in analyzing the meaning of the various emojis D.R.C. sprinkled throughout her texts. Without explicatory testimony, we are left with only our impressions of the text message exchanges.

We look first to D.R.C.’s exchange with Joshua. According to the State’s exhibit, Joshua was the one who started using violent language when he texted, “Haha beat her

ass.” Ex. 1. By prefacing his comment with “Haha,” Joshua unambiguously indicated he was entertaining a joke. D.R.C. then made the comment, “imma get her killed.” *Id.* At this point, Joshua did not change his joking tone. Instead he completed his comment “Woh chill just beat her ass” with the initialism “lol.” *Id.* Given the entirety of this exchange, the record simply does not suggest Joshua interpreted D.R.C. as conveying a serious threat.

Even if Joshua had been troubled by D.R.C.’s comments, the context of the text messages is still not indicative of a true threat. Immediately after Joshua’s “lol” text, D.R.C. reiterated the joking nature of the exchange by accenting her message with an emoji entitled “rolling on the floor laughing,” 🤣.⁸ Ex. 4. A reasonable person using this emoji in the context of Joshua’s “Haha” and “lol,” would not have foreseen D.R.C.’s statements as conveying a true intent to cause harm.

We next look at D.R.C.’s statements to Lexy. Unfortunately, the State’s exhibits do not provide much context for this exchange. We do not have Lexy’s response to D.R.C.’s text, “Imma fucking kill this bitch.” Ex. 2. However, D.R.C. prefaced her text with an emoji entitled “face with tears of joy,” 😂.⁹ *Id.* In addition, D.R.C. indicated she

⁸ *Full Emoji List, v11.0*, UNICODE, <http://www.unicode.org/emoji/charts-11.0/full-emoji-list.html> (last updated Dec. 19, 2018). “Unicode is the leading organization attempting to standardize emojis.” Eric Goldman, *Emojis and the Law*, 93 WASH. L. REV. 1227, 1232 (2018).

⁹ *Full Emoji List, supra.*

was upset because her mother was going to make D.R.C. live with her father. This parent-child conflict is the type of circumstance commonly associated with teenage frustration, but not homicidal ideation. Given the vagueness of D.R.C.'s statement that she wanted to kill her mother, and the other contextual indicators, the statement to Lexy is not reasonably interpreted as a true threat.

D.R.C.'s past conversation with Lexy supports D.R.C.'s testimony that she tended to use hyperbolic language with her friends. In the prior text between D.R.C. and Lexy, D.R.C. accompanied her statements about harming or killing a mutual acquaintance with "Lmfao"; the face with tears of joy emoji, 😂; a shrug emoji, 🤷; a smiling face with horns emoji, 🐉;¹⁰ a zany face emoji, 😜; and a heart emoji, ❤️. Ex. 3. The combination of the initialism and emojis conveyed an unmistakable message of sarcasm, as opposed to a serious intent to cause harm or death.

The fact that D.R.C. repeated the statements about her mother to both Joshua and Lexy is not indicative of a serious threat to kill. Both Joshua and Lexy were known to

¹⁰ A smiling face with horns is used to convey playful mischief. *Smiling Face with Horns*, EMOJIPEDIA, <https://emojipedia.org/smiling-face-with-horns/> (last visited June 18, 2020); *Smiling Face with Horns Emoji*, DICTIONARY.COM, <https://www.dictionary.com/e/emoji/smiling-face-with-horns-emoji/> (last visited June 18, 2020).

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D.R.C. and appeared to be a part of the same social group. As a result, D.R.C.’s messaging to both Joshua and Lexy is akin to a peer group tweet, *see Kohonen*, 192 Wn. App. at 580, as opposed to a statement that was repeated to nonpeers in positions of authority. *Trey M.*, 186 Wn.2d at 907.

The language used by D.R.C. was distastefully violent, but it was not as disturbing as some of the past statements held to fall within First Amendment protections. In *Kilburn*, the juvenile defendant said to a classmate, “I’m going to bring a gun to school tomorrow and shoot everyone and start with you . . . maybe not you first.” 151 Wn.2d at 39. Despite the specificity of this statement and the fact the classmate found it troubling, our Supreme Court ruled that, in context, the statement did not constitute a true threat. If *Kilburn*’s statement was not a true threat, then D.R.C.’s emoji-filled texts certainly were not.


Because the record fails to establish D.R.C.’s statements constituted true threats, we reverse her adjudication of guilt. While we rule in D.R.C.’s favor, our disposition should not be interpreted as approval of D.R.C.’s choice of language. We, like the trial court, find nothing funny in the texts. Nevertheless, the First Amendment protects all sorts of speech, even when the sentiment is hurtful or vile. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 458, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011); *Collin v. Smith*, 447 F.

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Supp. 676, 686 (N.D. Ill. 1978). D.R.C. would do well to heed the advice of the juvenile court judge and find a peer group that does not consist of “mean girls.” 1 Report of Proceedings (Apr. 22, 2019) at 115. It appears from the record D.R.C. had turned her life around by the time of trial. We hope that remains the case.


CONCLUSION

The adjudication and disposition is reversed.

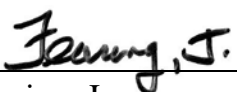


Pennell, C.J.

WE CONCUR:



Siddoway, J.



Fearing, J.