No. 81864-9

SANDERS, J. (concurring in part and dissenting in part)—I concur with the majority that Glen Schaler's conviction should be reversed because the jury instructions for the harassment statute were required to and did not include the mens rea element.

However, I dissent from the majority to the extent it remands this case for a new trial. A new trial is unnecessary because, as a matter of law, none of Schaler's statements here constitutes a "true threat." There is no remaining issue for the jury to consider on remand, and the RCW 9A.46.020 charge against Schaler should be dismissed.

The harassment chapter under Washington law was enacted to "mak[e] unlawful the repeated invasions of a person's privacy by acts and threats which show a pattern of harassment designed to coerce, intimidate, or humiliate the victim." RCW 9A.46.010. "Threat," undefined in the chapter, is defined elsewhere as "[a] communicated intent to inflict harm or loss on another or on another's property, esp[ecially] one that might diminish a person's freedom to

act voluntarily or with lawful consent . . . ." *Black's Law Dictionary* 1618 (9th ed. 2009); *see also Webster's Third New International Dictionary* 2382 (2002) ("threat" defined as "expression of an intention to inflict loss or harm on another by illegal means and esp[ecially] by mean involving coercion or duress of the person threatened . . ."). Both by the underlying purpose of the harassment statute and the common definition, a threat is something more than merely expressing one *wants* to do something; it is expressing an intention to do it with a purpose to coerce, intimidate, or humiliate someone.

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 individual]."'" *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001) (emphasis added) (alterations in original) (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))).

Let's view Schaler's statements *under the accompanying circumstances*. If Schaler *seriously* intended to kill his neighbors, would he (a) go next door to his neighbor's home and attempt it, (b) tell his friends, co-workers, or even his neighbors that he was going to kill his neighbors, or (c) call a crisis services hotline and seek help? Circumstance (a) demonstrates intent through action.

Circumstance (b), depending upon the accompanying details, may constitute a true threat—a reasonable person might foresee the statements would be interpreted as a serious expression of intent to take another's life. However, circumstance (c) would *not* lead a reasonable person to foresee such intent because the speaker's behavior—seeking help from a crisis services hotline—is entirely inconsistent with actual intent to kill someone. Contacting the hotline implies the individual may have been *tempted* to cause someone harm. But it also shows the person sought help because he or she did *not* want or intend to succumb to that temptation and did *not* want or intend to actually cause harm.

Glen Schaler was a troubled man—no question. During the day, thoughts of killing his neighbors invaded his mind. He woke up from a dream one morning and—not fully able to distinguish fantasy from reality—thought he might have actually killed his neighbors. In fact, he was *extremely upset* by the thought and, despite his hysterical state of mind, called the crisis services hotline.

He then agreed to accompany a police officer to Mid Valley Hospital. Once there, he was involuntarily committed due to his troubled state of mind—which Director Tonya Heller-Wilson, one of the staff members taking part in Schaler's treatment, characterized as "'[v]ery hysterical'" when he originally called, Trial Tr. vol. II, 269, Feb. 6, 2007—and due to his

antagonistic behavior toward staff.

After being involuntarily committed—a restraint that probably did not serve to calm an extremely upset individual—he spoke openly, and very heatedly, to medical professionals, saying he wanted to kill his neighbors. *Id.* at 248. He said he wanted to strangle them with his bare hands. *Id.* He also stated, in light of the vivid dream he had, that he hoped he didn't really kill his neighbors. *Id.* at 267.

A parallel. An alcoholic *wants* to have a drink. It fills his thoughts during the day. He even has dreams where he *does* take a drink. None of that means he *intends* to take a drink. In fact, instead of taking a drink, he attends an Alcoholics Anonymous (AA) meeting. At the meeting he says, "I want to have a drink" and perhaps even, "I've been planning to have a drink and I will sit at the third stool at the Thirsty Scholar Bar and order a Guinness and a shot of Baileys and Jameson." *Under those circumstances*—where the individual attended an AA meeting *instead* of going to a bar, would a reasonable person think the alcoholic seriously intended to have a drink? No. A reasonable person would recognize that the alcoholic is having persistent thoughts about drinking and that he or she is *tempted* to drink again. But the statements in those circumstances, if anything, express the alcoholic's intent *not* to have a drink, an intent *not* to give into temptation. So it is with Schaler who, despite

his thoughts, sought help to resist a temptation he had previously been struggling with alone.

As a matter of law and under the circumstances presented, Schaler's statements do not constitute a true threat. He did not violate RCW 9A.46.020. Schaler may have been fighting a temptation to kill his neighbors, but being tempted to commit an action is not a violation of RCW 9A.46.020 nor, certainly, is *fighting* that temptation or seeking help to prevent acting upon it.

The facts here demonstrate the extent to which RCW 9A.46.020 has been overextended to criminalize speech that is not intended to coerce, intimidate, or humiliate a victim. Schaler's speech in the context here had everything to do with Schaler, his attempt to get help, and his admirable efforts to try to work through his problems and—to the extent he was tempted to actually commit an unlawful act—his intent to resist that temptation. His speech had *nothing* to do with any intent to coerce, intimidate, or humiliate his neighbors. To the extent Schaler posed a danger to his neighbors or the community if released without further treatment, there is a legal mechanism (not at issue here) where a person can be civilly confined involuntarily.[1] RCW 9A.46.020 has no relation to that mechanism, nor should RCW 9A.46.020 be unconstitutionally used as a

[1] I do not question whether Director Heller-Wilson should have informed authorities or Schaler's neighbors of Schaler's statements—an issue neither dictated by RCW 9A.46.020 nor raised here.

substitute.

As a practical matter, I cannot help but consider the ridiculous message Schaler's conviction would send to the public. How should Schaler have avoided transgressing the law? Should he have stayed at home without calling the hotline for help, hysterical after his dream and wrestling alone with his morbid and obsessive thoughts? Should he have lied to, or refrained from fully sharing his thoughts and feelings with, the professionals who were there to assess his condition and help him, undermining their ability to assess and help him? A person having a mental breakdown should not be subject to criminal charges for harassment while he seeks professional help *in earnest*.[2]

[2] I am not suggesting that statements made during therapy can never constitute a true threat. As a clear violation, a patient could make threats against another to his or her therapist, intending to harass or humiliate the target because he or she knew the therapist would relay those threats. Statements made in therapy are not shielded from RCW 9A.46.020, but the constitution requires that the statements be analyzed under the context and circumstances in which they are made. *See Williams*, 144 Wn.2d at 207-08. Schaler's statements, in light of the surrounding circumstances, do not constitute a true threat as a matter of law.

RCW 9A.46.020 is out of control and must be reined in. Although I concur with the majority's decision that Schaler's conviction should be reversed, I dissent from its holding that a new trial is warranted. This case should be remanded with instructions to the trial court to dismiss the RCW 9A.46.020 charge. The facts here fail to establish a violation of the statute as a matter of law.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: