No. 81864-9

J.M. JOHNSON, J. (dissent)—Over a four-hour period, Glen Schaler threatened to murder his neighbors Kathy Nockels and Denise Busbin by strangling them with his bare hands. The two victims testified about Schaler's threatening behavior, as did law enforcement officers and a mental health specialist. The jury found that Schaler subjectively intended to communicate an intent to cause bodily injury to these victims. However, the majority holds that Schaler's conviction resulted from erroneous instructions in violation of the First Amendment. That is, Schaler may have reasonably failed to foresee that his repeated statements might be taken seriously as an expression of his intent to kill Nockels and Busbin. The facts show that failure by the trial court to include such a simple negligence mens rea instruction as to foreseeability was harmless. Further, the record reveals that Schaler was aware of this alleged instructional deficiency but did nothing to correct the problem. Schaler thus invited the very error he is complaining of, and he cannot seek reversal on the basis of that error. I dissent.

Harmless Error

The trial court did not include an explicit "true threat" definition in its instructions to the jury, nor was such instruction requested by Schaler. Instead, the trial court gave the jury four separate instructions that, taken together, properly conveyed every aspect of the majority's "true threat" definition except one—whether Schaler foresaw that his conduct would be taken by a reasonable person as a true threat.[1] This failure is subject to a harmless error analysis. *See State v. Johnston*, 156 Wn.2d 355, 364, 127 P.3d 707 (2006). "In order to hold the error harmless, we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). According to the majority, the court should have

[1] This court first adopted a foreseeability requirement for First Amendment true threat analysis in *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001) and *State v. J.M.*, 144 Wn.2d 472, 477-78, 28 P.3d 720 (2001). After *Williams* and *J.M.*, the United States Supreme Court decided *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). In *Black*, the Court found the following statute constitutional under the First Amendment:

> It shall be unlawful for any person or persons, w*ith the intent of intimidating any person or group of persons*, to burn, or cause to be burned, a cross on the property of another, a highway or other public place.

Black, 538 U.S. at 348 (emphasis added). The Court noted at length that the type of intimidation likely to accompany a cross burning was that of bodily harm or death. *Id*. at 348-58. No pseudo-element of foreseeability was required for the statute to pass constitutional muster; the actor's intimidation intent was dispositive. Our jurisprudence suggesting that the First Amendment requires foreseeability in a true threat analysis thus conflicts with the United States Supreme Court's First Amendment jurisprudence.

instructed the jury that, to convict, it had to find Schaler negligently failed to foresee that his conduct would be interpreted as a serious expression to kill Nockels and Busbin.[2] There is no reasonable doubt that the jury would have made the same finding of guilty had it received this added instruction.[3]

The majority suggests Schaler's conduct reasonably could be viewed as stemming from a mental breakdown or confusion. Schaler's first reports that he was covered in blood and had slit his neighbor's throat may reasonably be questioned as true threats; Schaler was very emotional, displayed anxiety-related symptoms, repeatedly referenced a dream of killing his neighbor, and stated he hoped he had not actually killed anyone. But the current criminal charges against Schaler did not arise from this behavior. The charges are based on Schaler's repeated, clear, and direct threatening statements during his hours-long stay at the hospital.

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[2] We have stated that the "reasonable person" inquiry as to whether a statement would be foreseen as a threat is "an objective standard that focuses on the speaker." *State v. Kilburn*, 151 Wn.2d 36, 44, 84 P.3d 1215 (2004). We declared the test was speaker-centric without citation to any authority. *Id*. The statute and jury instructions here, in contrast, employed a listener-centric test. The difference is often semantic. As we recognized in *Kilburn*, the Eighth Circuit of the United States Court of Appeals has explained "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*. at 45 n.3 (citing *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 623 (8th Cir. 2002)). Further, a listener-centric test more directly addresses the first two of the majority's three significant state interests in restricting true threats: protecting individuals from fear of violence, preventing the disruption that fear engenders, and reducing the possibility the threatened violence will occur. Majority at 7-8 (citing *J.M.*, 144 Wn.2d at 478).

[3] The standard is simple negligence, not criminal negligence. *Id.* at 12. As negligence is a lesser mens rea standard than recklessness, knowledge, or intent, a jury's finding as to any of those mental states would also support a true threat conviction.

Schaler repeatedly stated over a four-hour period at the hospital that he wanted to kill Nockels and Busbin. He was specific about the method—strangulation with his bare hands. He gave reasons for wanting to kill the women, including the chain saw incident (that itself led to a police call) and a history of conflicts. He stated he had been thinking of and wanting to kill the women for months. He maintained this position despite a mental health specialist's efforts to dissuade him. All of this occurred *after* Schaler had taken his medication and been in the care of mental health specialists for hours. Schaler showed no remorse for his statements and was able to distinguish between his dream (where he thought he killed Nockels and Busbin) and reality (where he wanted to kill them with his bare hands).

Schaler engaged in further conduct that substantiates his willingness to engage in violent crime. Director Tonya Heller-Wilson had to call Deputy Connie Humphrey back to the hospital twice because of Schaler's behavior. While Humphrey was at the hospital trying to assist the mental health staff, Schaler threatened to start a fight and guaranteed "someone [would] get hurt."[4] Verbatim Report of Proceedings (VRP) (Feb. 6, 2007) at 220. Schaler then said that "next time he was going to get a bunch of guns, and it would be [a] blood bath." *Id*.

[4] Despite Schaler's subsequent statement about his prior back and neck injuries, Deputy Humphrey viewed this threat as serious enough to call for backup.

Prior history also shows reason to perceive the threats as real. On June 1, 2005, Schaler had cut a row of the Busbins' fruit trees with a chain saw. When Nockels asked Schaler to stop, he raised the chain saw toward her and told her not to interfere. In response to a 911 call by Nockels, Deputy Blake arrived and Schaler stated that someone was going to die. Asked to explain himself, Schaler said that "when he became angry, he did feel like that he wanted to kill someone, and that that was a natural human response." VRP (Feb. 6, 2007) at 291.

Shortly thereafter Nockels and Busbin obtained restraining orders against Schaler from a court. Within days, Schaler violated at least one such order. Further, after threatening Nockels and Busbin's lives on August 10, Schaler ran Nockels' car off the road with his car.

Nockels and Busbin believed Schaler's threats on June 1 and August 10 were genuine and had to adjust their lives in response. Heller-Wilson felt Schaler's August 10 threats were genuine and properly exercised her discretion to warn those threatened. Although Schaler tried to invoke the patient-mental health counselor privilege to dismiss the charges or prevent Heller-Wilson from testifying, the trial court properly found that Heller-Wilson was statutorily justified in warning Nockels and Busbin and contacting the authorities. *See* RCW 18.225.105(5); RCW 71.05.390(10). Schaler did not appeal this decision. The jury found Schaler

subjectively intended to communicate an intent to cause bodily injury to Nockels and Busbin and that they were placed in reasonable fear that Schaler's threats would be carried out. As we recognized in *Kilburn*, Nockels and Busbin's reasonable belief that Schaler communicated a true threat carries the same effect as a finding that Schaler should have reasonably foreseen that his statements would be taken as true threats.[5] *Kilburn*, 151 Wn.2d at 45 n.3.

There is no reasonable doubt the jury would have found a person in Schaler's position *at least* negligent in failing to foresee that his conduct would be taken as a true threat. Schaler made repeated, detailed death threats against specific victims who each had protection orders against him. He clearly and emphatically rejected attempts to dissuade him. He was aggressive and displayed disrespect for police officers and court orders. A reasonable person in Schaler's place would understand that his conduct would be taken as a true threat.

The policies embodied by the majority's opinion are disturbing. First, everyone in this case (except Schaler) did exactly what they were supposed to do. Nockels and Busbin obtained restraining orders. Heller-Wilson probed Schaler's mental state and the seriousness of his death threats for hours before warning

[5] Had the jury been instructed to consider "some unique sensitivity unknown to the speaker," then Nockels and Busbin's reasonable belief might not comport with Schaler's reasonable belief. *Kilburn*, 151 Wn.2d at 45 n.3. There is no evidence in this case of the victims having any unique sensitivities.

Schaler's victims. Deputy Humphrey assisted Schaler at his home, convinced Schaler to take his medication, and took him to the hospital. Yet the majority declares this was not enough to justify the State acting to protect Nockels and Busbin, despite conduct that clearly signaled danger to their lives.

Second, the majority's reliance on Schaler dealing with the mental health expert as support for its conclusion may suggest that Heller-Wilson did not act appropriately in warning the victims or contacting the police. Sound policy favors candor between a therapist and patient, but the legislature has expressly provided deference to therapists' professional judgment. The trial court denied Schaler's motion to exclude statements made to Heller-Wilson from evidence due to the patient-mental health counselor privilege. Schaler did not appeal that decision, and we may not question it here. Heller-Wilson felt Schaler's threats were serious enough to warrant intervention, and her judgment is entitled to great deference; lives may depend on it. Today's decision unfortunately may dissuade some therapists from appropriate protective reporting.

Invited Error

Schaler's conviction should also be affirmed because Schaler invited the error alleged. Schaler argues that the trial court erroneously failed to provide an explicit true threat instruction. However, Schaler did not object to the "threat" instruction

given by the trial court or propose an alternate threat instruction despite being clearly cognizant of the supposed shortcoming.[6] Schaler thus invited the error he is complaining about.

Under the doctrine of invited error, a party cannot set up an error and then complain about it on appeal. *State v. Momah*, 167 Wn.2d 140, 153-54, 217 P.3d 321 (2009); *State v. Aho*, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999); *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (quoting *State v. Boyer*, 91 Wn.2d 342, 344-45, 588 P.2d 1151 (1979)). This doctrine applies to alleged constitutional violations. *See Momah*, 167 Wn.2d at 145 (public trial right); *Henderson*, 114 Wn.2d at 869 (due process); *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1204 (10th Cir. 2009) (equal protection and free speech).[7]

The invited error doctrine often arises in the context of parties assigning error to jury instructions they proposed. However, the doctrine is applicable in other contexts. We recently held in *Momah* that a defendant could not complain about court closure during part of voir dire because the defendant "affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not,

[6] In contrast, Schaler did object to instruction 11, which required the State to prove that the victims were aware of the threat but not that Schaler knew the threat would be communicated to them. Schaler also proposed an instruction defining the term "knowing."

[7] Ineffective assistance of counsel claims are the exceptions to the rule. *See Aho*, 137 Wn.2d at 744-45; *State v. Gentry*, 125 Wn.2d 570, 646-47, 888 P.2d 1105 (1995). This exception is not relevant here because Schaler makes no such claim.

actively participated in it, and benefited from it." *Momah*, 167 Wn.2d at 151-52.

Before trial, Schaler moved the court to suppress evidence and dismiss the charges. Key to the motion was this court's true threat definition in *Kilburn* and the argument that Schaler could not reasonably have foreseen his conduct would be interpreted as a true threat. Schaler was thus aware of this court's legal definition of a true threat and argued the importance of the foreseeability aspect the majority discusses. However, Schaler never objected to the trial court's threat definition and never proposed an instruction including foreseeability. The majority now reverses based on an alleged error Schaler knew of but made no effort to cure.

Although Schaler did not propose a faulty instruction, he actively participated in determining the jury instructions and did not object to any relevant instructions; instead, he assented to them. He thus successfully created the very situation the invited error doctrine is designed to prevent: he tries the case and gets a jury verdict; then, if losing, he gets a new trial. We should not condone this strategy.

Conclusion

There is no doubt that a reasonable person would have foreseen Schaler's statements at the hospital—that he would murder his neighbors by strangulation—would be understood as a true threat. Any error by the trial court in failing to include a foreseeability jury instruction is therefore harmless. Further,

Schaler consciously declined to correct the alleged error he now complains of. I would affirm Schaler's conviction. I dissent.

AUTHOR:
Justice James M. Johnson

WE CONCUR:
Justice Susan Owens