STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HENRY KEVIN GRANT,

APPELLANT

APPELLATE CASE NO 2017-002499

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to instruct the jury that in order to find Appellant guilty of threatening the life of a public official or family member pursuant to S.C. Code §16-3-1040(A), the jury must find that Appellant intended his communication to be a true threat and in determining if a true threat was intended the jury should consider the facts and circumstances surrounding the communication?

STATEMENT OF THE CASE

In August of 2017, the Laurens County Grand Jury indicted Appellant, Henry Kevin Grant, for two counts of threatening the life of a public official or family member, indictments #2017-GS-30-1439, 1440. On November 28, 2017, Appellant proceeded to jury trial before the Honorable Frank R. Addy, Jr. Joel Broome represented Appellant at trial. Margaret Boykin and Dale Scott prosecuted the case. The jury returned verdicts of guilty on both counts. Judge Addy sentenced Appellant to five years on indictment #2017-GS-30-1440 and five years suspended upon the service of sixteen days, time served, followed by three years of probation with probation tolled during the five year active sentence on the other charge. A timely notice of intent to appeal was served on December 4, 2017. This appeal follows.

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

ARGUMENT

The trial judge erred in refusing to instruct the jury that in order to find Appellant guilty of threatening the life of a public official or family member pursuant to S.C. Code §16-3-1040(A), the jury must find that Appellant intended his communication to be a true threat and in determining if a true threat was intended the jury should consider the facts and circumstances surrounding the communication.

The jury found Appellant guilty of two counts of threatening the life of a public official or family member. On June 3, 2017, at approximately 7:42 PM Officers with the Laurens Police Department were called to the scene of a large outside gathering of people based on a 911 call reporting a trespasser. (R. p. 38-39). The officers were unable to determine who placed the 911 call but they noticed an individual in the crowd who looked like an individual they had seen on a wanted poster in their police station. (R. p. 38, lines 1-13). When the officer approached and began to question the individual who resembled the wanted person, Appellant began to curse at them. (R. p. 40, line 14 – p. 41 lines 1-19). The officers determined that the individual at the gathering was not wanted in South Carolina. (R. p. 41, lines 20-21). Appellant, however, continued to curse and the officers arrested him for public disorderly conduct. (R. p. 41, line 22 – p. 42, lines 1-9). On cross examination one of the officers agreed that Appellant was running his mouth like a drunk guy, that Appellant was informed he was being arrested for public intoxication and that Appellant smelled strongly of alcohol. (R. pp. 51-54).

After Appellant was arrested and while he was being placed in the police vehicle he told the arresting officer that he was going to rape his baby. (R. p. 43, lines 11-12). During the transport of Appellant to the jail he told the transporting officer that the next time he saw him he was going to shoot him in the head. (R. p. 44, lines 1-8). The interaction with the officers was recorded on their body cameras, introduced in evidence at trial as State's exhibit #1 and

published to the jury. (R. p. 45, line 25 – p. 46, lines 1-6). Appellant did not resist arrest and he was not in possession of any weapons upon his arrest. (R. pp. 56-57).

During the charge conference Appellant submitted two written requests to charge. (R. p. 92, line 15 – p. 93, lines 1-9). Appellant argued that request to charge number two was based on Elonis v. United States, 135 S.Ct. 2001 (2015), and required the State to prove that Appellant intended his communication to the police to be a true threat based on the facts and circumstances surrounding the communication. (R. p. 93, line 10- p. 94, lines 1-5). The judge declined to charge the request as submitted stating, "I think that the inclusion of the phrase 'knowingly and willfully' in section 1040 – here's the problem. And it sufficiently addresses what the defense wants me to charge number two, which I'll respectfully decline to charge the body of what you've included in request to charge number two. I think the statute is pretty clear on what constitutes criminal conduct and where the line has to be drawn." (R. p. 97, line 19 – p. 98, line 1). The judge then instructed the jury, "In order to prove this crime the State must prove beyond a reasonable doubt the Defendant knowingly and willfully delivered or conveyed to a public official any verbal, written or electronic communication which contained a threat to take the life of or to inflict bodily harm upon the public official or members of his immediate family if the threat is directly related to the public official's professional responsibilities." (R. p. 119, lines 25 – p. 120, lines 1-7). The instruction failed to define threat. The instruction failed to address intent. Following the instructions to the jury the trial judge asked, "Aside from the Court's failure to charge Defendant's number two, any additions, exceptions from the Defense?" (R. p. 123, lines 13-15). Defense counsel responded, "No, Your Honor." (R. p. 123, line 16).

The trial judge erred in refusing to instruct the jury that in order to find Appellant guilty of threatening the life of a public official or family member pursuant to S.C. Code §16-3-

1040(A), the jury must find that Appellant intended his communication to be a true threat and in determining if a true threat was intended the jury should consider the facts and circumstances surrounding the communication. In State v. Perkins, 306 S.C. 353, 354–55, 412 S.E.2d 385, 386 (1991), the South Carolina Supreme Court wrote:

> "[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." City of Houston v. Hill, 482 U.S. 451, 461, 107 S.Ct. 2502, 2505, 96 L.Ed.2d 398, 412 (1987). The State may not punish a person for voicing an objection to a police officer where no "fighting words" are used. Norwell v. Cincinnati, 414 U.S. 14, 94 S.Ct. 187, 38 L.Ed.2d 170 (1973). To punish only spoken words addressed to a police officer, a statute must be limited in scope to fighting words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." Hill, 482 U.S. at 461-462, 107 S.Ct. at 2509-10, 96 L.Ed.2d at 412 (quoting Lewis v. City of New Orleans, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974). As further noted by the United States Supreme Court, the "fighting words" exception may require narrow application in cases involving words addressed to a police officer "because a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen." Hill, 482 U.S. at 462, 107 S.Ct. at 2510, 96 L.Ed.2d at 412. As stated by the high court:
>
> The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state. Id. at 462-63, 107 S.Ct. at 2510, 96 L.Ed.2d at 412-13.

S.C. Code Ann. § 16-3-1040(A) provides:

> It is unlawful for a person knowingly and wilfully to deliver or convey to a public official or to a teacher or principal of an elementary or secondary school any letter or paper, writing, print, missive, document, or electronic communication or verbal or electronic communication which contains a threat to take the life of or to inflict bodily harm upon the public official, teacher, or principal, or members of his immediate family if the threat is directly related to the public official's, teacher's, or principal's professional responsibilities.

There is no question in the present case that Appellant knowingly and willfully delivered a verbal communication to the officers in the case. The question is whether the communication constituted a true threat. The judge's instruction to the jury failed to define true threat and failed to address intent. In order to determine if a true threat was intended, the jury should have been

instructed as to the mens rea required as to the threat. The jury additionally should have been instructed that they should consider the facts and circumstances surrounding the communication in order to determine if a true threat was intended.

In Elonis v. United States, 135 S.Ct. 2001 (2015), the case cited by Appellant at trial, the Court addressed the mens rea required for a violation of 18 U.S.C. §875(c), which provides, "Whoever transmits in interstate or foreign commerce any communication containing ... any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." Elonis, like Appellant in the present case, requested a jury instruction that the government must prove that he intended to communicate a true threat. The trial judge denied the request and instead instructed the jury that, "A statement is a true threat when a defendant intentionally makes a statement 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 the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual." Elonis v. United States, 135 S. Ct. 2001, 2007 (2015). The Court reversed writing, "The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state. That understanding 'took deep and early root in American soil' and Congress left it intact here: Under Section 875(c), 'wrongdoing must be conscious to be criminal.' Morissette, 342 U.S., at 252, 72 S.Ct. 240." Elonis, 135 S. Ct. at 2012. The Court declined to decide if recklessness would suffice for criminal liability pursuant to 18 U.S.C. §875(c).

While the judge in the present case did not instruct the jury that the State need prove only that a reasonable person would regard Appellant's communications as threats, as the judge did in Elonis, the judge in the present case, failed to instruct on the mens rea required as to the threat, failed to define true threat and failed to instruct the jury that in determining if a true threat was intended they should consider the facts and circumstances surrounding the communication. As the Court noted in Elonis, "The parties agree that a defendant under Section 875(c) must know that he is transmitting a communication. But communicating *something* is not what makes the conduct 'wrongful.' Here 'the crucial element separating legal innocence from wrongful conduct' is the threatening nature of the communication. Id., at 73, 115 S.Ct. 464. The mental state requirement must therefore apply to the fact that the communication contains a threat." 135 S. Ct. at 2011. The willful language contained in S.C. Code Ann. § 16-3-1040(A), that was absent in the federal statute at issue in Elonis, indicates that both the communication and the threat must be willful, not simply reckless. The judge should have instructed the jury that the State must prove that Appellant intended to communicate a true threat.

In United States v. White, 810 F.3d 212, 220–21 (4th Cir.), the Fourth Circuit Court of Appeals addressed §875(c) after the Court's decision in Elonis writing:

> What that means, in this circuit after Elonis, is that a conviction pursuant to § 875(c) now entails "what the [statute requires] (a subjectively intended threat) and [also] what constitutional avoidance principles demand (an objectively real threat)." See United States v. Jeffries, 692 F.3d 473, 485 (6th Cir.2012) (Sutton, J., *dubitante*). That is: (1) that the defendant knowingly transmitted a communication in interstate or foreign commerce; (2) that the defendant subjectively intended the communication as a threat; and (3) that the content of the communication contained a "true threat" to kidnap or injure. To prove the second element, the Government, consistent with Elonis, must establish that the defendant transmitted the communication "for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat," or, perhaps, with reckless disregard for the likelihood that the communication will be viewed as a threat. See Elonis, 135 S.Ct. at 2012–13. And to establish the third element, in keeping with our prior cases, the prosecution must show that an ordinary,

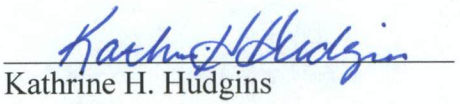
reasonable recipient who is familiar with the context in which the statement is made would interpret it as a serious expression of an intent to do harm. See White, 670 F.3d at 508–10.

Following the logic in White with regard to §875(c), this Court should find that S.C. Code Ann. § 16-3-1040(A) requires that the defendant knowingly and willfully delivered a communication, that the defendant intended the communication as a threat and that the content of the communication contained a true threat. In the present case the judge should have instructed the jury that in order to convict the defendant of threatening the life of a public official or family member they must find that, considering the facts and circumstances surrounding the communication, the defendant intended his communication to be a true threat. As the finders of fact the jury should determine if the defendant intended his communication to be a true threat as opposed to simply opposition to police action.

In State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989), the South Carolina Supreme Court wrote, "Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error. State v. Thompson, 278 S.C. 1, 292 S.E.2d 581, cert. denied, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458 (1982); State v. Daniels, 231 S.C. 176, 97 S.E.2d 902 (1957)." Considered as a whole, the jury instructions in the present case failed to instruct the jury of any criminal intent required for a conviction for threatening the life of a public official. The trial judge erred in refusing to instruct the jury on intent as requested by Appellant.

CONCLUSION

Based on the argument above, this Court should reverse the conviction and remand for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of January, 2019.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 24, 2019

Kathrine H. Hudgins
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

ATTORNEY FOR APPELLANT