ORIGINAL (e-filed)

20070249

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)
	) Supreme Court No. 200700249
Plaintiff/Appellee,	)
	)
vs.	)
	) Cass Co. No. 07-K-00158
Edward Dana Curtis,	)
	)
Defendant/Appellant.	)

FILED
IN THE OFFICE OF THE
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STATE OF NORTH DAKOTA

APPEAL FROM THE CRIMINAL JUDGMENT AND COMMITMENT ENTERED BY THE DISTRICT COURT FOR THE EAST CENTRAL JUDICIAL DISTRICT THE HONORABLE BURT L. RISKEDAHL PRESIDING ON AUGUST 16th, 2007.

BRIEF OF THE APPELLANT

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

I. Whether the statements Defendant made in the email are constitutionally protected speech?

II. Whether the evidence was sufficient as a matter of law to support the Defendant's conviction of harassment?

STATEMENT OF THE CASE

NATURE OF THE CASE AND PROCEDURAL HISTORY

¶1 This appeal is taken from a Criminal Judgment entered by the Honorable Burt L. Riskedahl, Judge of the District Court for the East Central Judicial District on August 16th, 2007, convicting the Defendant and Appellant Edward Curtis of harassment. (Docket 74; App. at 11A). Notice of Appeal was filed on August 22, 2007. (Docket 75; App. at 12).

STATEMENT OF FACTS

¶2 On November 24. 2006 Mr. Curtis sent an email to numerous attorneys all over the State of North Dakota. Tr. 26, 59. The memo was addressed to Jeanette Boechler but the memo line is addressed to "Fargo Lawyers". App. 4.

The memo stated "It is 100% in your court on when and how I get paid but it will be cash and in your best interest, BEFORE CHRISTMAS. The system has destroyed you minds and it will cost 20 million dollars to fix them BEFORE Christmas or a lot more after. You have 2 choices on how this overthrow happens. It can be peaceful and the money put to good use for the reeducation of this state or it can go another way until you people are trophy mounts on your victims walls". The memo goes on to say, "You all didn't want my e-mails so I will go to the jury….." App. 4.

¶3 Mr. Curtis was charged with harassment on the basis that Mr. Curtis "with intent to frighten or harass another, communicated in writing a threat to inflict injury upon Jeanette Boechler's person, reputation or property if she did not pay him 20 million dollars". App. 3. A jury trial was held on August 16, 2007. See Transcript of Proceeding. App. 13-103. At the conclusion of the State's case and prior to the presentation of the defense, Mr. Mottinger, Mr. Curtis's stand-by counsel, moved the Court under N.D.R.Crim.P. 29 for a judgment of acquittal. App. 61-62. The district court denied this motion.

¶4A Notice of Appeal was filed by Mr. Curtis through his stand-by counsel, Attorney Mottinger. on August 16. 2007. App. 12. In this manner. Mr. Curtis brings before the Court the questions of whether the email of November 24, 2006 is protected speech.

LAW AND ARGUMENT

I. The statements Defendant made in the email are constitutionally protected speech.

¶5 Our freedom of speech, protected by the first Amendment in the Bill of Rights and incorporated in the North Dakota Constitution (Article I, Section 23), is one of our most basic constitutional rights. The fundamental right of free speech, which is protected from Federal action by the First Amendment, is afforded the same protection from State action through application of the Due Process Clause of the Fourteenth Amendment. Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936).

¶6 When Free Speech arguments are made, the reviewing court must independently scrutinize the record to see if the charged conduct is protected. Houston v. Hill, 482 U.S. 451, 458 n. 6, 107 S.Ct. 2502, 2507 n. 6, 96 L.Ed.2d 398 (1987) (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 n. 50, 102 S.Ct. 3409, 3427 n. 50, 73 L.Ed.2d 1215 (1982)). As Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, --- U.S. ----, ----, 115 S.Ct. 2338, 2344, 132 L.Ed.2d 487 (1995). Courts must be careful to distinguish what is a threat from what is constitutionally protected speech when the alleged "threat" is made in the midst of what may be other protected political expression. *See* Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); Martin v. United States, 691 F.2d 1235, 1239 (8th Cir.1982), *cert. denied*, 459 U.S. 1211, 103 S.Ct. 1207, 75 L.Ed.2d 447 (1983); United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir.), *cert. denied*, 429 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976); United States v. Barcley, 452 F.2d 930, 933 (8th Cir.1971).

¶7 The charge of harassment was the result of a mass email/fax Mr. Curtis sent out to almost every attorney in the city of Fargo. It is submitted that the fax sent out by

Mr. Curtis, when taken in its entirety, does not emulate a "true threat" on Ms. Boechler. Rather, the fax is protected speech under the 1st amendment.

¶8 In Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), the United States Supreme Court determined that an individual should not be prosecuted for statements he made about killing the President at a political rally. The comments made, the Court held, were not threats under the particular facts of the case, and true threats "must be distinguished from what is constitutionally protected speech." Id. at 707, 89 S.Ct. at 1401, 22 L.Ed.2d 664.

¶9 All the courts that have decided this issue have consistently adopted an objective test that focuses on whether a reasonable person would interpret the alleged threat as a serious expression of an intent to cause a present or future harm. The views among the courts differ in determining from whose viewpoint the statement should be interpreted. Doe v. Pulaski County Special School Dist., 306 F.3d 616, 622 (8th Cir. 2002). The federal courts of appeals that have announced a test to parse true threats from protected speech essentially fall into two camps. *See* United States v. Fulmer, 108 F.3d 1486, 1490-91(1st Cir. 1997). Doe v. Pulaski County Special School Dist., 306 F.3d 616, 622 (8th Cir. 2002). The eighth circuit has adopted the objective test that considers the viewpoint of the recipient, not the sender.

> Our court is in the camp that views the nature of the alleged threat from the viewpoint of a reasonable recipient. In United States v. Dinwiddie, we emphasized the fact intensive nature of the true threat inquiry and held that a court must view the relevant facts to determine 'whether the recipient of the alleged threat could reasonably conclude that it expresses 'a determination or intent to injure presently or in the future.'" 76 F.3d 913, 925 (8th Cir.) (quoting Martin v. United States, 691 F.2d 1235, 1240 (8th Cir. 1982)), *cert. denied,* 519 U.S. 1043, 117 S.Ct. 613, 136 L.Ed.2d 538 (1996); *see also* United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000) (quoting Dinwiddie's statement of what amounts to a true threat), *cert. denied,* 531 U.S. 1114, 121 S.Ct. 860, 148 L.Ed.2d 774 (2001).

Doe v. Pulaski County Special School Dist., 306 F.3d 616, 622-23 (8th Cir. 2002).

¶10 In the present case, a reasonable recipient would not take this memo as a direct threat against themselves. Mr. Curtis sent this memo to virtually every attorney in Fargo. Out of all the attorneys that received this memo only one felt threatened. This is strong evidence as to what a reasonable recipient would perceive this memo.

¶11 The Eighth Circuit, in United States v. Dinwiddie, 76 F.3d 913 (8th Cir.), outlined a non-exhaustive list of factors to consider when determining how a reasonable recipient would view the alleged threat which include: 1) the reaction of those who heard the alleged threat; 2) whether the threat was conditional: 3) whether the person who made the alleged threat communicated it directly to the object of the threat; 4) whether the speaker had a history of making threats against the person purportedly threatened; and 5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.

1. The Reaction of those who heard the alleged threat.

¶12 This email was a mass email sent to almost every attorney in Fargo. Out of all of the attorneys to have received the memo, only one attorney felt threatened by the memo. This clearly shows a reasonable attorney receiving this memo would not feel threatened. This factor weighs in favor of Mr. Curtis's position.

2. Whether the threat was conditional.

¶13 In the memo Mr. Curtis stated if he did not get the money, he would "take it to the jury" – i.e. he would sue. The ultimate condition imposed in the memo is a threat to sue which is not criminal. This factor weighs in favor of Mr. Curtis's position.

3. Whether the person who made the alleged threat communicated it directly to the object of the threat.

¶14 Although the fax is addressed to Ms. Boechler, the memo line is addressed Fargo lawyers. Moreover, the body of the memo does not reference a single attorney; rather, Mr. Curtis is speaking to all of the Fargo attorneys. This factor weighs in favor of Mr. Curtis's position.

4. Whether the speaker had a history of making threats against the person purportedly threatened.

¶15 Ms. Boechler testified that this was the first correspondence she had received from Mr. Curtis and that she did not know of Mr. Curtis prior to receiving this fax. This was Ms. Boechler's first encounter with Mr. Curtis. This factor weighs in favor of Mr. Curtis's position.

5. Whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.

¶16 Ms. Boechler testified that this was the first correspondence she had received from Mr. Curtis and that she did not know of Mr. Curtis prior to receiving this fax. Given the lack of contact between Mr. Curtis and Ms. Boechler prior to sending the memo, Ms. Boechler would not have any knowledge regarding Mr. Curtis' predisposition to engage in violence. This factor weighs in favor of Mr. Curtis's position.

¶17 When considering the facts of the present case and weighing them against the 8th Circuits factors to consider, it is clear a reasonable recipient would not have viewed this fax as threatening.

¶18 Although whether the words used in the communication constitute a true threat is generally a question for the jury. *E.g.*, Martin v. U.S., 691 F.2d 1235, 1240 (C.A.Mo. 1982); United States v. Carrier, 672 F.2d 300, 306 (2d Cir.), *cert. denied,* 457

U.S. 1139, 102 S.Ct. 2972, 73 L.Ed.2d 1359 (1982). Nevertheless, there are cases where a court should determine as a matter of law that a particular threat does not constitute a "true threat". There is a point beyond which an appellate court may not simply defer to the jury's determination on the matter. State v. Haugen, 392 N.W.2d 799 (N.D. 1986).

¶19 As a matter of law, Mr. Curtis' fax cannot truly be construed as constituting a threat to Ms. Boechler. Moreover, even if we entertain the notion that Mr. Curtis' fax does constitute a sufficient threat to Ms. Boechler, it is nevertheless, a threat to sue.

¶20 Mr. Curtis demands 20 million dollars from the attorneys in Fargo for the purpose of reeducation of North Dakota. In his email, Mr. Curtis states that if he does not get the money before Christmas, he will "go to the jury". This clearly shows that if Mr. Curtis did not receive the 20 million dollars before Christmas, he would sue. This Court has previously addressed the issue of whether threatening to sue constitutes a "true threat" in the case of State v. Haugen, 392 N.W.2d 799, 800-01 (N.D. 1986).

¶21 During early March 1985, the Commissioners of Griggs County received by certified mail letters allegedly signed by the defendants that read, in part:

> 'You are given Notice to the effect that you are interfering in a Law case on crime in your county. This is an out and out effert (sic) to try to get rid of an honest Sheriff who is trying to follow the Laws of our country and allow the people and our children, and Grandchildren to live in a free country as we have. There has been a complete effort in North Dakota to get rid of our Constitution, and the Laws that it stands for. This Constitution has given us the right of speach (sic) and press.
>
> 'States Attorney James Wold has either convenced (sic) you that he has the authority to decide what is Law and what is not or you have joined in the conspiracy to cover up organized crime in your county. This notice is to let you know that you have ten (10) days from this Notice to let us know that you will not or are not in anyway (sic) going to stand back and help James Wold commit this crime against our Sheriff. You are county Commissioners, your duty is to keep up on whats (sic) going on in your county, to find the truth about whats (sic) going on. The Sheriff has done his own investigation, which is his job. He has not taken

> our word for it. He has known about some of the crimes for about two years, he has not jumped into this on our word. He is doing his duty. Now you do yours.
>
> 'If you fail to implement good faith restitution within ten (10) days from this Notice it will result in Civil and Criminal process to commence against you for DAMAGES. Re: Title 42 U.S.C. 1983, 1985, 1986. Title 28 U.S.C. 1331, 1343. Title 18 U.S.C. 241, 242, 2381, 2382, 2384. 892, 893 and 894 and other sections that will obviously appy (sic) as the Action is started against you.
>
> ....

State v. Haugen, 392 N.W.2d 799, 800-01 (N.D. 1986).

¶22 Melford Haugen, Jarl Hegvick and Bernice Hegvick were all charged with threatening public servants under N.D.C.C. § 12.1-12-06(2)(b). This Court held that:

> As a matter of law, the defendants' "Constructive Notice and Demand" letters cannot seriously be construed as constituting a threat to accuse the commissioners of a crime. A threat to bring a civil action against a public official is not proscribed by the statute. The statement that 'If you fail to implement good faith restitution within ten (10) days from this Notice it will result in Civil and Criminal process to commence against you for DAMAGES' can only reasonably be construed as threat to commence a civil action against the commissioners. Although the letters refer to criminal process, the alleged threat is qualified by use of the term 'DAMAGES,' which are only recoverable in a civil action. Under the circumstances, the reference to criminal process and federal criminal statutes is nothing more than the 'kind of political hyperbole' [*Watts, supra*], and 'rowdydowdy argot' [*Barcley, supra*], of a particular species of misinformed, misled, and misguided pro se litigant. 'Taken in context, ... we do not see how it could be interpreted otherwise.' Watts, *supra.*

State v. Haugen, 392 N.W.2d 799, 805-06 (N.D. 1986).

¶23 This language of a mislead and misguided litigant could be easily be applied to Mr. Curtis and his writings could be paralleled to the political hyperbole and the "rowdydowdy argot" described in State v. Haugen. In the present case. Mr. Curtis threatens to "take it to the jury" if he is not paid 20 million dollars. In North Dakota, it is not a crime to threaten to sue. Just like Haugen. Mr. Curtis' memo is not worded in the best way. However, in reviewing the memo in its entirety, the memo clearly expresses, at the very most, a threat to sue.

¶24 The only purpose of the alleged threat was to induce attorneys in Fargo to rethink and reform the judicial system. Mr. Curtis was provoking lawyers in Fargo to conform their conduct to the law as Mr. Curtis perceived the law to be. Mr. Curtis may have an unpopular point of view about the United States government. Be that as it may, as a citizen of the United States, Mr. Curtis is entitled to express his point of view. "[C]onstitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered." State v. Haugen, 392 N.W.2d 806 (N.D. 1986) (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963)).

II. The evidence was insufficient as a matter of law to support the Defendant's conviction of harassment.

¶25 The standard of review regarding a claim of insufficiency of the evidence has been well-settled by this Court. On appeal, when considering the sufficiency of the evidence, this Court will sustain the guilty verdict if "upon reviewing the evidence in a light most favorable to the verdict, we determine that there is substantial evidence to support it." State v. Ohnstad, 359 N.W.2d 827, 834 (N.D. 1984). This Court views the evidence and all reasonable inferences in the light most favorable to the prosecution and then determines whether a rational factfinder could have found guilt beyond a reasonable doubt. State v. Lambert, 539 N.W.2d 288, 289 (N.D.1995).

¶26 "This Court will reverse a conviction on the ground of insufficient evidence only if, after viewing the evidence and all reasonable inferences in the light most favorable to the verdict, no rational factfinder could have found the defendant guilty beyond a reasonable doubt." State v. Steen, 2000 ND 152, ¶ 17. 615 N.W.2d 555. (citation omitted).

¶27 Even under this high standard, the evidence does not support a finding that Mr. Curtis had the requisite intent. In order to sustain its burden of proof, the State must present evidence sufficiently strong to establish beyond a reasonable doubt that Mr. Curtis' email conveys a threat of injury to Ms. Boechler and that Mr. Curtis intended to threaten Ms. Boechler.

¶28 When the communication contains language which is equally susceptible of two interpretations, one threatening, and the other nonthreatening, the government carries the burden of presenting evidence serving to remove that ambiguity. Absent such proof, the trial court must direct a verdict of acquittal. *See* United States v. Jones, 418 F.2d 818 (8th Cir. 1969). *See also* United States v. Kelton, 446 F.2d 669 (8th Cir. 1971); Lerma v. United States, 387 F.2d 187 (8th Cir. 1968).

¶29 In evaluating the sufficiency of the evidence presented by the State to establish that the language in this case conveyed a threat, this Court must consider that the memo communicated Mr. Curtis' dissatisfaction with the United States government, the United States judicial system and the United States banking system. Mr. Curtis testified that he did not intend to threaten anyone. Rather, the purpose of the memo was to get Fargo attorneys to think about the judicial system and the problems Mr. Curtis perceived with the judicial system. The language of the political arena, like the language used in labor disputes, see Linn v. United Plant Guard Workers of America, 383 U.S. 53, 58 [86 S.Ct. 657, 15 L.Ed.2d 582] (1966), is often vituperative, abusive, and inexact. [Id. at 708, 89 S.Ct. at 1401-1402.].

¶30 Considering the context in which Mr. Curtis wrote the email, and the principles articulated in Watts, the language presented in Mr. Curtis' memo does not

establish the conveyance of a threat and fails to establish any intent on the part of Mr. Curtis to convey a threat. In this case and under the circumstances shown above, the State failed to prove Mr. Curtis' guilt beyond a reasonable doubt. Therefore, this email falls within the periphery of the First Amendment.

CONCLUSION

¶31 Based upon the submission, pleadings, testimony, argument and authority contained herein, Appellant respectfully requests that this Court find that, as a matter of law, that the speech contained in Mr. Curtis' fax is protected speech. In the alternative, Appellant respectfully requests that this Court find that the evidence was insufficient to support Mr. Curtis' conviction of harassment. Mr. Curtis respectfully requests that this Court reverse the District Court's criminal judgment enter a judgment of acquittal.

Dated this 16th day of November, 2007.

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20070249

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff, vs. Edward Curtis, Defendant.	AFFIDAVIT OF SERVICE Supreme Court No. 200700249 Cass Co. No. 07-K-158

The undersigned, being of legal age, being first duly sworn deposes and says that on the 16th day of November, 2007, she served true copies of the following documents:

Appellant's Brief
Appendix of the Appellant

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And that said copies were served upon:

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by email.

Dated this 16th day of November, 2007.

Holly Bicker

Subscribe and sworn to before me this 16th day of November, 2007.

Notary Public