ORIGINAL (e-filed)

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff/Appellee. vs. Edward Dana Curtis. Defendant/Appellant.	Supreme Court No. 200700249 District Court No. 09-07-K-0158

APPELLEE'S BRIEF

APPEAL FROM THE CRIMINAL JUDGMENT AND COMMITMENT ENTERED ON AUGUST 16, 2007 IN EAST-CENTRAL DISTRICT COURT, CASS COUNTY STATE OF NORTH DAKOTA,
THE HONORABLE BURT L. RISKEDAHL, PRESIDING

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[¶5] II. Whether a reasonable fact finder viewing the evidence in the light most favorable to the State could have concluded there was sufficient evidence to support the Defendant's conviction for Harassment in violation of North Dakota Century Code § 12.1-17-07(1)(a).

[¶6] STATEMENT OF THE CASE

[¶7] On August 16. 2007 a jury found the Defendant guilty of the crime of Harassment in violation of North Dakota Century Code § 12.1-17-07(1)(a). (Appendix of the Appellant "App." at 11A.) The district court subsequently entered a criminal judgment and sentence on August 16, 2007. (App. at 11a.) The Defendant appeals to this Court asserting the conduct for which he was convicted was protected by the First Amendment to the United States Constitution. Because the Defendant's conduct threatened another person, it was not constitutionally protected. The Defendant also asserts there was insufficient evidence to support his conviction. There was ample evidence presented at the jury trial in this matter to sustain a conviction. The State seeks affirmation of the district court's judgment.

[¶8] STATEMENT OF FACTS

[¶9] On November 22, 2006, the Appellant, Edward Dana Curtis, herein referred to as the Defendant, sent a fax to Jeanette Boechler, which threatened to inflict injury upon her if she did not pay him 20 million dollars. (App. at 4-10.) The Defendant specifically addressed the fax to Jeanette Boechler. (App. at 4.) The fax stated:

> ...[y]ou might be a wall trophy for a screwed victim. It is 100% in your court on when or how I get paid but it will be cash and in your best interest, BEFORE CHRISTMAS. This system has destroyed your 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 the state or it can go another way until you people are trophy mounts on your victims walls.

(App. at 4.) It further stated "... [I] have absolutely no care how this ends for you but this is your warning. IT WILL END," and it ended "... [A]nything happens to me or my associates will come back 50X to you." (App. at 4.)

[¶10] Ms. Boechler has been a practicing attorney for 28 years. (Transcript of Proceeding "Tr." at 39-40.) Ms. Boechler handles asbestos litigation and manages her own firm. (Tr. at 39:12-20.) Ms. Boechler did not have any prior knowledge of or contact with the Defendant. She felt threatened for herself and her office employees upon receipt of the fax. (Tr. at 43-46.) Ms. Boechler subsequently called the police and locked all the doors to her business until law enforcement arrived. (Tr. at 45:2-24.) When Law Enforcement Officer Oberholtzer arrived at the Boechler Law Office, he found the building doors locked and all the employees gathered in the main reception area. (Tr. at 23:2-9.)

[¶11] After the initial investigation, Ms. Boechler asked if they could be provided a photo of the Defendant because of their concern and fear over the situation. (Tr. at 24:21-25.) Officer Oberholtzer then contacted the Defendant on the phone. (Tr. at 25:10-11.) During the phone conversation the Defendant indicated he had sent the fax and he could see how the fax could be perceived as threatening. (Tr. at 25:16-18.) Officer Oberholtzer then told the Defendant not to contact Ms. Boechler because Ms. Boechler was frightened and threatened and did not want any more faxes from the Defendant. (Tr. at 26:9-18.)

[¶12] On January 11, 2007, the Defendant sent another fax to Ms. Boechler. (Tr. at 27:8-16.) The Defendant directed this fax only to Jeanotte Boechler. (App. 11.) The Defendant indicated "you will be held personally accounted for it." (App. 11.) The Defendant further indicated "it is you who will not see the future unless you listen to me right NOW. I do not care what happens to you." (App. 11.) "When the $$ system fails. YOU WILL be under the pile. Keep standing. YOU only prove WHO YOU are! I am playing with you now. Drop your illusion and pay me or keep standing and face justice. (App. 11.) The Defendant ended with, "YOU picked this fight and YOU will lose. How bad is 100% up to YOU. I JUST NEED THE DATE." (App. 11.) Ms. Boechler was also frightened and harassed by the second fax. (Tr. at 47:1-8.)

[¶13] The Defendant was charged with the crime of harassment and at trial the Defendant indicated he was not ashamed of what he did. (Tr. at 47:24-25.) The Defendant sent the faxes because he was "trying to rattle [their] cages, every single judge and lawyer. (Tr. at 59:24-25.) The Defendant indicated the faxes were

"rhetorical but then again they weren't." (Tr. at 60:23.) The Defendant intended to alarm every lawyer. (Tr. at 73:15.) During his testimony, the Defendant indicated "I want to rattle cages because if we can't do peaceful revolution, what's left?" (Tr. at 62: 3-4.) The Defendant also testified Ms. Boechler owed the money he was requesting to the people. (Tr. at 67:25.) The Defendant further testified he sent the fax to poke and prod attorneys. (Tr. at 69:3-4.) The Defendant admitted his actions alarmed Ms. Boechler. (Tr. at 69:16-18.) The Defendant admitted he sent the fax to frighten people. (Tr. at 70:21-25 & 71:1-3.)

[¶14] **LAW AND ARGUMENT**

[¶15] I. **The conduct of the Defendant intentionally faxing unsolicited, unwanted, and threatening materials for the sole purpose of harassing a reluctant listener, private citizen is not constitutionally protected speech.**

[¶16] When free speech arguments are made, the standard of review mandates a de novo review of the record to see if the charged conduct consists only of constitutionally protected speech. Houston v. Hill, 482 U.S. 451, 458 n.6 (1987) (independently scrutinizing the record to see if the charged conduct is protected)(citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 n.50, (1982)). As the Supreme Court recently emphasized, a reviewing court has a constitutional duty to independently examine the record as a whole to assure the "judgment does not constitute a forbidden intrusion on the field of free expression." See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 568 (1995) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 285, (1964)).

[¶17] Freedom of speech is not absolute or unlimited. For example, a man may not slander or libel another; he may not publicly blaspheme the Deity in some jurisdictions; he may not engage in loud speaking through sound trucks during certain hours or in certain parts of a city; he may not incite a riot or threaten or harass another and he may not advocate the commission of crimes. Freedom of speech gives no right of intimidation or coercion and no right to damage or injure, or threaten to damage or injure another's person, business or property. Wortex Mill, Inc. v. Textile Workers of America, 85 A.2d 851, 854 (Penn. 1952). Courts have been clear to distinguish harassing actions and/or threats as not constitutionally protected

expressions if their character, intent, and circumstances are circumscribed. See State v. Haugen, 392 N.W.2d 799 (N.D. 1986); Wurtz v. Rislui, 719 F.2d 1438, 1441 (9th Cir. 1983); Landry v. Daley, 280 F.Supp. 938, 961 (N.D. Ill. 1968), rev'd on other grounds sub. nom. Boyle v. Landry, 401 U.S. 77, 91 (1971); State v. Robertson, 649 P.2d 569, 588 (1982). It is "well settled that threats of violence are ... unprotected speech." United States v. J.H.H., 22 F.3d 821, 825 (8th Cir. 1994). See R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) ("threats of violence are outside the First Amendment"). Whether the words used in the communication constitute a threat is a question of fact for the jury. E.g., Martin v. United States, 691 F.2d 1235, 1240 (8th Cir. 1982); United States v. Carrier, 672 F.2d 300, 306 (2d Cir.), cert. denied, 457 U.S. 1139 (1982).

[¶18] Ms. Boechler was a reluctant listener. She was aggressively and repeatedly contacted by the Defendant through facsimile. "[T]he right to be let alone" is "the most comprehensive of rights and the right most valued" by American citizens. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). A reluctant listener has a significant privacy interest under the First Amendment. Cohen v. California, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is ... dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner"). There is no constitutional right to aggressively confront an unwilling listener in an intimidating manner.

[¶19] The Defendant's first argument is pursuant to Watts and Barcley, the fax sent to Ms. Boechler on November 22, 2006, was a communication protected by the First Amendment. See Watts v. United States, 394 U.S. 705 (1969); United States v. Barcley, 452 F.2d 930 (8th Cir. 1971). This argument is without merit.

[¶20] The Defendant's reliance upon Watts is misplaced. In Watts the defendant was a speaker at an anti-war demonstration who said "(i)f they ever make me carry a rifle the first man I want to get in my sights is [the President]." 394 U.S. at 706. The United States Supreme Court set aside Watt's conviction for knowingly and willfully making a threat to inflict bodily harm upon the President in violation of 18 U.S.C. § 871(a), characterizing the defendant's statement as crude "political hyperbole" and not a threat within the meaning of the statute. Id. at 708. The facts in the present case in no way raise similar issues of free speech and political expression. Although the Defendant's fax bitterly denounced the legal system and stressed Ms. Boechler's mind had been destroyed, the fax also contained explicit threats and demanded payment of twenty million dollars. This criticism of the legal system and Ms. Boechler, as an agent of said system, at most raised an issue of fact for the jury as to the threatening nature of the letter, a fact which the jury resolved against the Defendant. See also U.S. v. Lincoln, 589 F.2d 379 (8th Cir. 1979) (threatening statements, even when combined with free expressions, were not a communication protected by the First Amendment).

[¶21] In Watts the threat was made during a public rally on the Washington Monument grounds. The statute at issue in Watts made it a violation to knowingly or willfully make any threat to take the life of or inflict bodily harm upon the President

of the United States. In comparing this case to Watts, a similar approach should be used to that of the approach used by Justice Vande Walle in his concurring opinion in State v. Haugen, 392 N.W.2d 799, 806 (N.D. 1986). As in Haugen, it is difficult to compare "a situation in which the President of the United States, who undoubtedly receives literally hundreds if not thousands of unfavorable comments each year, who most probably was unaware that this particular comment was made, and who is protected by trained security people" with a small law firm business owner and attorney and her staff "to whom the law provides no particular security protection." Haugen, at 806. Unlike the facts in Watts, The Defendant sent his threat directly to Ms. Boechler's place of employment. Likewise, in Watts the President did not testify he was threatened by the remark, whereas in this instance there is testimony Ms. Boechler and her staff did feel threatened, alarmed, and harassed by the fax they received from the Defendant. Justice Vande Walle goes on to point out:

> "[h]ad the facts in *Watts* been that a letter was directed to the President indicating that the defendant wanted 'to get in my sights ... L.B.J.' the outcome of that case might have been entirely different, because it was a statement made directly to the President and not in the context of a political demonstration."

Id.

[¶22] Similarly, the Defendant's reliance on Barcley is misplaced. In Barcley, the defendant's conviction was overturned after being convicted by a jury of communicating threats by mail. The defendant had written to appellate counsel stating his dissatisfaction with counsel's representation, making derogatory remarks about counsel's parentage and stating counsel would be the first to go followed by the prosecutor. Barcley, 452 F.2d at 931. The facts presented herein are distinguishable

from those presented in Barcley. In Barcley, Judge Bright required the government to furnish additional evidence the language constituted a threat because the alleged threat was ambiguous and raised the question of First Amendment protection. Barcley, 452 F.2d at 932.

[¶23] In the present case, the language was not ambiguous. This Court should review the Defendant's own testimony if any questions of ambiguity arise. The Defendant admitted it was sent to alarm (Tr. at 61:15) and rattle Ms. Boechler's cage. (Tr. at 67:16-19.) The Defendant alluded to violence when he testified in the following manner: "I wanted to rattle cages because if we can't do a peaceful revolution, what's left?" (Tr. at 62:3-4.) The Defendant admitted he sent the fax to "humiliate" (Tr. at 69:1-2) and "poke and prod" (Tr. at 69:3-5) at Ms. Boechler. When asked if he knew the fax would frighten Ms. Boechler, the Defendant clearly responded she deserved to be frightened. (Tr. at 71:1-3.) And the Defendant continued his harassing conduct by faxing Ms. Boechler a second threatening fax after he was told by Officer Oberholtzer Ms. Boechler felt threatened. (Tr. at 26-27.)

[¶24] The fax was not a communication from a dissatisfied client to his court-appointed attorney as was the case in Barcley, and, unlike the defense attorney and prosecutor in Barcley who testified they did not feel threatened after receipt of the letter. Ms. Boechler was threatened, harassed and fearful which was consistent with the desired effect of the Defendant. Ms. Boechler and her employees took Defendant's letter very seriously, calling the police after closing and locking the doors to their business.

[¶25] Next, the Defendant urges this Court to undergo a "true threat" analysis using an objective test. The Defendant using the reasoning in United States v. Dinwiddie and Doe v. Pulaski County Special School Dist., argues the viewpoint of an objective recipient is dispositive to a determination of a "true threat." United States v. Dinwiddie, 76 F.3d 913 (8th Cir.); Doe v. Pulaski County Special School Dist., 306 F.3d 616, 622 (8th Cir. 2002). This Court should defer to the jury determination, and reject the notion a "true threat" analysis is necessary on the facts of this particular case.

[¶26] Although there may be some political value associated with threatening words in certain circumstances, the state has an overriding interest in "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." R.A.V., 505 U.S. at 388. This Court is being asked to determine "[w]hat is a threat ... from what is constitutionally protected speech." Watts, 394 U.S. at 707. As argued above, the reasoning and result of the Watts Court should be distinguished from the case at bar. Whether the words used in the fax constitute a threat is a question of fact for the jury. E.g., Martin, 691 F.2d at 1240; Carrier, 672 F.2d at 306. A threat is a readily understandable term that is used in everyday speech. Dinwiddie, 76 F.3d at 923. This Court should defer to the jury the determination whether certain language used in the fax sent by Defendant to Ms. Boechler constituted a threat. The jury made the determination Defendant did threaten Ms. Boechler.

[¶27] If the Court does a "true threat" analysis it would come to the determination the fax sent to Ms. Boechler did contain true threats. There has not

been a scrupulous definition of a true threat that consistently differentiates an unprotected threat from protected speech. Thus, courts have been left to ascertain for themselves when a statement triggers the state's interest in preventing the disruption, fear and possibility of violence associated with a threat.

[¶28] The federal courts of appeals that have announced a test to distinguish true threats from protected speech fall into two camps. See United States v. Fulmer, 108 F.3d 1486, 1490-91 (1st Cir. 1997) (describing the differing circuit approaches to ascertaining a true threat). Courts that have decided the issue have adopted an objective test which focuses on whether a reasonable person would interpret the purported threat as a serious expression of intent to cause a present or future harm. See id. The various courts disagree, however, in their determination of whose viewpoint the statement should be interpreted. Some ask whether a reasonable person standing in the shoes of the speaker would foresee the recipient would perceive the statement as a threat, whereas others ask how a reasonable person standing in the recipient's shoes would view the alleged threat. Compare Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 2002) (en banc), with United States v. Malik, 16 F.3d 45, 49 (2d Cir.), cert. denied, 513 U.S. 968, (1994). The Eighth Circuit has used the latter test in recent opinions. See Pulaski County Special School Dist., 306 F.3d 616 (describing how either test results in the same outcome).

[¶29] From whichever viewpoint this Court considers, the facts of this case indicate a threat was made. If the Court considers the reasonable recipient, then Ms. Boechler is a reasonable person, trained in the law and a capable attorney. (Tr. at 39-

40.) She and her staff felt threatened, harassed, and alarmed by the Defendant's fax sent directly to the Boechler Law Firm. Likewise, Officer Oberholtzer, a reasonable person, a ten year veteran to the Fargo Police Department, and a person well familiar with the Defendant (Tr. at 20:1-3) testified the threats made by the Defendant alarmed him. (Tr. at 24:11-18.)

[¶30] If the Court considers the viewpoint of a reasonable person standing in the shoes of the speaker then it should look to the Defendant's own admissions. The Defendant indicated he had sent the fax and he could see how the fax could be perceived as threatening. (Tr. at 25:16-18.) He also alluded to a violent outcome if Ms. Boechler failed to deliver the twenty million dollars he demanded. (Tr. at 62: 3-4.) "Written words or phrases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published. * * * [W]hen [language is] employed by members of our society in context with an extortion demand its necessary implications are precisely clear." United States v. Prochaska, 222 F.2d 1, 2-3 (7th Cir. 1955).

[¶31] Given the circumstances, and reviewing the evidence, it is clear the Defendant intentionally faxed threatening materials for the sole purpose of harassing a reluctant listener. This conduct is not constitutionally protected speech.

[¶32] **II. A reasonable fact finder viewing the evidence in the light most favorable to the State could have concluded there was sufficient evidence to support the Defendant's conviction for Harassment in violation of North Dakota Century Code § 12.1-17-07(1)(a).**

[¶33] Under N.D.R.Crim.P. 29, the court shall enter a judgment of acquittal if the evidence is not sufficient to sustain a conviction. This Court has explained:

> A conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find the defendant guilty beyond a reasonable doubt. In considering a sufficiency of the evidence claim, we do not weigh conflicting evidence, or judge the credibility of witnesses. A verdict based on circumstantial evidence carries the same presumption of correctness as other verdicts. A conviction may be justified on circumstantial evidence alone if the circumstantial evidence has such probative force as to enable the trier of fact to find the defendant guilty beyond a reasonable doubt. Moreover, a jury may find a defendant guilty even though evidence exists which, if believed, could lead to a not guilty verdict.

State v. Bertram, 2006 ND 10, ¶ 5, 708 N.W.2d 913 (citation omitted).

[¶34] A person is guilty of harassment if the person, "with intent to frighten or harass another, communicated in writing or by telephone a threat to inflict injury on any person, to any person's reputation, or to any property." N.D.C.C. § 12.1-17-07(1)(a). The issue in the instant case was whether the Defendant intentionally communicated a threat to Ms. Boechler.

[¶35] There was competent evidence from which the jury could find beyond a reasonable doubt the Defendant intentionally communicated a threat by fax to Ms. Boechler. In fact the evidence is not conflicting. The Defendant admitted he sent both faxes to Ms. Boechler. The Defendant admitted he did it to frighten Ms. Boechler. The Defendant admitted he could see how the fax could be perceived as threatening. During his testimony at the trial, the Defendant alluded to violence occurring. (Tr. at 62:3-4.) Ms. Boechler was harassed, alarmed and frightened. Her staff and family were harassed, alarmed and frightened. After learning Ms. Boechler was frightened, the Defendant sent Ms. Boechler another threatening fax.

[¶36] Given the circumstances and reviewing the evidence in the light most favorable to the State with the benefit of all inferences reasonably to be drawn in its favor, a rational fact finder could have found the Defendant guilty beyond a reasonable doubt. The district court appropriately denied the Defendant's motion for judgment of acquittal.

[¶37] CONCLUSION

[¶38] The State respectfully requests the Court affirm the district court judgment.

Respectfully submitted this 17th day of December, 2007

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[¶39] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail on this 17th day of December, 2007, upon Daniel James Borgen at dborgen@nd.gov:

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Cherie L. Clark