

ORIGINAL (e-filed)

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)

) Supreme Court No. 200700249

Plaintiff/Appellee,)

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

vs.)

) Cass Co. No. 07-K-00158

DEC 27 2007

Edward Dana Curtis,)

STATE OF NORTH DAKOTA

)
Defendant/Appellant.)

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

REPLY BRIEF OF THE APPELLANT

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State v. Haugen, 392 N.W.2d 799 (N.D. 1986). ¶8

INTRODUCTION

¶1 Appellant, Mr. Curtis, offers the following Reply Brief on certain points raised in the Appellee's Brief. Some, but not all, of the arguments already raised by Appellee are discussed in this brief.

REBUTTAL ARGUMENT

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

¶2 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. The State argues, "Ms. Boechler was a reluctant listener. She was aggressively and repeatedly contacted by the Defendant through facsimile." Appellee Brief ¶18.

¶3 With regard to the argument that Mr. Curtis displayed aggressive behavior, it is undisputed Mr. Curtis has never had any personal contact with Ms. Boechler nor has Mr. Curtis attempted to contact Ms. Boechler by telephone. Mr. Curtis' only contact with Ms.Boechler has occurred via facsimile. Certainly one faxed memo cannot be construed as "aggressive" contact. Although a second fax was admitted into evidence, this fax is not alleged as the offense. The only purpose the second fax could have been admitted was to support the "state of mind" of Mr. Curtis.

¶4 The State further argues that, "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." [Appellee Brief ¶20] and that "The Defendant admitted it was sent to alarm (Tr. at 61:15) and rattle Ms. Boechler's cage. (Tr. at 67:16-19) [Appellee Brief ¶23. What Defendant testified to

¶5 Mr. Curtis' memo speaks to all Fargo attorneys, not just Ms. Boechler. Mr. Curtis testified, "I mean, because I'm like trying to rattle their cages, every single judge and lawyer..." App. 71. There is not one reference to Ms. Boechler, or any other attorney for that matter, within the memo.

¶6 The State seems to be arguing that political speech that "rattles cages" is not protected speech. The very nature of political speech is made to "rattle cages". If political speech is only protected when it conforms to what is considered the norms, there is no political speech that is protected. 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.]. As this Court has previously explained, "[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)).

¶7 The State argues, "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.)" Appellee Brief ¶23. When reading the testimony of Mr. Curtis at appendix 74, the allusion of violence argued by the State is taken out of context. Mr. Curtis further testified (14 lines below 62:3-4), "I didn't say I was going to put heads on the wall. It said in the fax that when people wake up and see what is going on with our country and what they have done to us, people are going to take - - I mean, people just getting out of prison when people - - when you all can't afford to support these people in

prison and we've got more people in prison than any other country in the world right now." App. 74.

¶8 Mr. Curtis' memo states that if this is not resolved he will "go to the jury". App. 4. This clearly shows that if the peaceful revolution fails, Mr. Curtis will sue. A threat to sue is not a crime in North Dakota. See State v. Haugen, 392 N.W.2d 799 (N.D. 1986).

¶9 The State argues, "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." Appellee Brief ¶25.

¶10 Because a first amendment issue has been raised this Court should consider the Eighth Circuit opinion on the "true threat" analyses highly persuasive and defense would argue that North Dakota should adopt the "true threat" test adopted in Doe v. Pulaski County Special School Dist., 306 F.3d 616 (8th Cir. 2002). The "true threat" analysis has been adopted by every Federal Court that has addressed this issue. United States v. Fulmer, 108 F.3d 1486, 1490-91(1st Cir. 1997). Although the "true threat" analysis cited in Doe v. Pulaski County Special School Dist., 306 F.3d 616 (8th Cir. 2002) is persuasive, it is the test that been adopted by our circuit in analyzing whether a "true threat" has been made and should not be simply ignored as the State argues. The "true threat" analysis has been adopted by the Federal Courts in determining what constitutes a "true threat" and should not be disregarded by this Court.

¶11 As a matter of law, Mr. Curtis' fax cannot truly be construed as constituting a "true 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.

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

¶12 The State next argues that, "The Defendant admitted he sent both faxes to Ms. Boechler. The Defendant admitted he did it to frighten Ms. Boechler." Appellee Brief ¶35. In reviewing Mr. Curtis' testimony, Mr. Curtis testified that he sent this email to wake up attorneys (App. 77 & 81) and get them thinking – rattle the cages of attorneys. Mr. Curtis testified that, "I wanted to alarm every lawyer. I mean. but not threaten. No threat whatsoever..." App. 73.

¶13 Mr. Curtis never testified his intention was to frighten Ms. Boechler. On cross-examination, Mr. Curtis did testified that "You deserve to be frightened. I mean, you're a foreign agent for the government. All lawyers are. They're not American citizens. You renounce your citizenship...." App. 83. However, when the speech 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).

¶14 The fax sent out by Mr. Curtis, when taken in its entirety, does not emulate a "true threat" on Ms. Boechler and is protected speech under the 1st amendment.

CONCLUSION

¶15 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 27th day of December, 2007.

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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 27th day of December, 2007, she served true copies of the following documents:

Reply Brief of the Appellant

And that said copies were served upon:

Cherie Clark
Cass Assistant State's Attorney
ClarkC@casscountynd.gov

By email.

Dated this 27th day of December, 2007.

Holly Bicker

Subscribe and sworn to before me this 27th day of
December, 2007.

Notary Public