COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1901-CR **Cir. Ct. No. 2011CF79**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES D. HILLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed*.

Before Lundsten, P.J., Higginbotham and Kloppenburg, JJ.

¶1 LUNDSTEN, P.J. James Hills was convicted of stalking and extortion. The primary evidence of these crimes was contained in letters and other communications directed at government officials, including the alleged stalking and extortion victim, an assistant city attorney who prosecuted Hills for disorderly

conduct. On appeal, Hills makes four arguments: 1) the trial evidence was insufficient to support his conviction for stalking; 2) the trial evidence was insufficient to support his conviction for extortion; 3) his convictions violate the First Amendment because the statements that support his convictions are constitutionally protected speech; and 4) the circuit court erroneously denied Hills' requested jury instructions incorporating his First Amendment theory of defense.[1] We reject all four arguments, and affirm the circuit court.

Background

¶2 In November 2009, a Madison police officer issued James Hills a citation for disorderly conduct. An assistant city attorney (hereafter "the ACA") prosecuted Hills. A court trial before a municipal court judge was held on March 4, 2010. The disorderly conduct charge involved an accusation that Hills pushed or shoved two children. According to Hills, one of these children and that child's mother lied about Hills' behavior. The judge found Hills guilty of disorderly conduct and fined him $429.

¶3 As the evidence we summarize below shows, Hills repeatedly expressed his belief that the ACA knowingly used perjured testimony against him to obtain forfeiture money from Hills for the City. Letters admitted in evidence show that a secondary reason Hills was angry with the ACA was his belief that she had, after the disorderly conduct trial, unethically contacted a university professor

[1] Hills' appellate brief purports to raise a fifth issue, whether Hills' statements could "as a matter of law ... form the basis for a charge of extortion." In his reply brief, Hills complains that the State has ignored this distinct "matter of law" extortion argument. Like the State, we do not separately address this issue. We discern nothing in his short two-paragraph argument that is not covered by our sufficiency of the evidence and "true threats" discussions.

who supervised Hills and expressed to that professor what the ACA thought Hills needed therapeutically.

¶4 Evidence of Hills' numerous and lengthy letters and other communications was presented at trial. The summary below focuses on those parts of the communications that are most squarely at issue here.

¶5 On March 5, 2010, the morning after Hills was convicted of disorderly conduct, he called the District Attorney's office in an attempt to speak with the ACA.[2] Hills spoke with a "front staff" person who told Hills that the ACA no longer worked at the District Attorney's office. The employee testified that Hills sounded "very angry" and "very agitated" and that he got "louder and louder." The ACA was informed of this call.

¶6 Later that same day, Hills called the City Attorney's office. The receptionist who spoke with Hills testified that Hills complained about his case and wanted to speak with the ACA. The receptionist testified: "[I]t wasn't a conversation because I could barely get a word in. It was more like a tirade, expressing a lot of anger toward the [ACA] and toward the court." She further testified that Hills called the ACA incompetent and dishonest, and he used "a lot of profanity." She said he was "loud and angry" and, when she asked him not to swear and not to yell, he continued to do so. The receptionist sent the ACA an e-mail that read: "Defendant James Hills just called .... He sounded hostile and was swearing—in fact, he sounded quite contentious."

[2] The ACA had previously worked at the District Attorney's office. Hills testified that a website might have been out of date and that is why he first called the District Attorney's office.

¶7 In March 2010, Hills filed a grievance with the Office of Lawyer Regulation (OLR) against the ACA,[3] and the OLR rejected the grievance. On June 7, 2010, Hills sent a letter, with a copy to the ACA, requesting a review of the decision that the ACA's conduct "was not unethical." Hills wrote that he remained "angry and upset that I was falsely accused" and treated unfairly by the arresting officer and the judges, but "mostly" by the ACA. Hills stated that the ACA interfered with Hills' health "progress" by calling Hills' supervisor after the disorderly conduct trial and giving a "ridiculous 'therapeutic' recommendation." In addition, Hills wrote:

- "Although [the ACA] is accused of unethical conduct by me and I view her as nothing more than a homely, incompetent, ignorant, deceptive, underhanded, sinful, useless, highly-paid, corrupt dunce-of-a-public servant, [the ACA] is smart enough to know that nothing will be done."
- "[T]he Office of Lawyer Regulation policies and procedures are unethical ...."
- "I have no doubt that [the ACA] probably lied."
- "In my opinion, the Dane County Court System has continued with the corruptness that I witnessed in the 1980s."
- "I am aware that the legal system is a failure ...."
- "[T]he majority of agencies on the federal, state and local level continue to fail as the result of incompetent, lazy, dishonest, corrupt employees."

[3] It is unclear when Hills filed the grievance with the OLR. We discern no reason why it matters for purposes of this appeal precisely when the grievance was filed. For that matter, the dates we use in this section relating to documents are the dates they are dated or postmarked. The specific dates that the documents were sent and received are not important.

- "It is so damn heinous that that [woman and her child who testified at the disorderly conduct trial], [the arresting police officer], the judges involved in this, and [the ACA] apparently are getting away with their immoral, unethical, disgusting, dishonest conduct when they should be facing disciplinary and/or criminal charges, terminated from their positions, incarcerated, placed in stocks and whipped and then hung until dead."

- "I will continue to take whatever action I deem necessary to expose this matter and the unethical misconduct of the public servants involved."

¶8 On June 16, 2010, Hills sent a letter to the Madison Chief of Police primarily complaining about the arresting officer, but also referring to "the stupidity of both judges and [the ACA]." Hills urged the police chief to fire the officer or to assign him to "a dangerous area where he could be shot—say, in those parts [of] town where the people are permitted to carry guns and sell drugs and nothing is done about it." Hills indicated that he anticipated "retaliation" from the officer and other police officers, and was writing this letter in case anything happened to him.

¶9 More than four months later, and nearly eight months after the disorderly conduct trial, Hills wrote a letter to the ACA. In the October 29, 2010 letter, Hills complained about his wrongful conviction and the "kangaroo court" that convicted him. Hills asserted that the City and the ACA "stole" $429 from him. The letter includes the following:

- "Hey dumb ass ...."

- "[You] and the rest of the corrupt assholes think you are going to get away with it. I have contacted various individuals and agencies ... and will continue to go higher until you face justice—and you <u>will</u> face justice."

- "I suggest you get off your fat, lazy, corrupt ass and begin to correct what you did to me."
- "[Y]ou are nothing more than an incompetent, corrupt, dishonest, deceitful, worthless piece of shit."
- "As I informed you previously, this is not going away. So get off your filthy lazy ass and begin to correct what you did."
- "I will continue to write letters causing you more embarrassment and humiliation—you deserve it."
- "Got it dumb ass?"

(Emphasis in original.) Hills concluded the letter by stating that, because he did not think the ACA would act, he would be contacting the Attorney General the following week.

¶10 On November 10, 2010, Hills sent a letter to then-Governor James Doyle and Attorney General J.B. Van Hollen. Hills requested their assistance with respect to his wrongful conviction and "extremely unfair treatment." The six-page letter recites Hills' views on his disorderly conduct trial and the mistreatment of him by the police, two judges, and the ACA.

¶11 On November 12, 2010, Hills sent a second letter to the ACA. Hills addressed the letter to "The Very Incompetent [ACA]." Hills wrote, in part:

- "Hi **Idiot**! Well, time for another letter for you—a nice way to start your Monday!"
- "[H]ow long you have been a dishonest, corrupt, incompetent, stupid ass."
- "I would imagine that you are so stupid you don't know you're stupid."

- "What's it like to wake up and go to work and screw innocent people over and let the guilty go free? Do you enjoy it?"
- "What is [it] like to knowingly allow a person to lie in order to win a case so that the City of Madison can get some free money?"
- "I suggest you get off your fat, lazy, corrupt ass and begin to correct what you did to me."
- "[A]s you know, you are nothing more than an incompetent, corrupt, dishonest, deceitful, worthless piece of shit."
- "If you are interested in receiving a copy of the letter [to the governor and attorney general], ... I will provide you with one. I might even consider letting you know who received blind carbon copies [because it] might be nice to know who knows about your stupidity and dishonesty as you walk the halls of the courthouse."
- "As I informed you previously, this is not going away. So get off your filthy lazy ass and begin to correct what you did."
- "You obviously have no conscience. I wonder how you would feel had you been subjected to this horseshit."
- "Alternatively, maybe you could do society a favor and hang yourself."
- "Again, this is not going away. Keep that in mind stupid."

(Emphasis in original.)

¶12 On November 15, 2010, Hills sent a letter to the ACA's supervisor the Madison City Attorney, and a copy of that letter to the ACA. In this letter, Hills again asserted that he was subjected to "extremely unfair, dishonest, deceitful, unethical treatment" by the ACA. He complained that he had sought help from various individuals and agencies, but could not obtain relief. Hills

asked the city attorney to take action, including firing the ACA. The letter contains the following statements:

- "Obviously, [the ACA] was not interested in justice—only in stealing $429 for the City of Madison."
- "I want this matter corrected. It was as if I was raped considering [the conduct of a witness in the disorderly conduct matter], and the corruptness, stupidity, incompetence and indifference displayed by [the arresting officer, the ACA, the municipal judge, a circuit court judge, and an OLR official]."
- "I am very angry and my patience is wearing thin."
- "All of the individuals involved chose to conduct their duties and responsibilities dishonestly—there is no question about that—and they need to be held accountable."
- "Should you decide that you will take no action, I would appreciate being so informed. I will then know that you, too, don't care."

¶13 On December 16, 2010, Hills attempted to contact the ACA by telephone and left a voice-mail message for her. The transcript of the voice mail reads:

> Yes ..., this is James Hills. I am the person that you wrongfully prosecuted last year.
>
> Umm … As you know I am getting very pissed off and you will need to correct this. Otherwise, it's going to have to be dealt with another way.
>
> Umm … I suggest you get off your lazy ass and correct this 'cuz I am one upset person.
>
> I'm not writing anymore letters to you.
>
> You are going to correct this.
>
> Thank you very much. You have a lovely Christmas.

¶14 On January 10, 2011, Hills sent a third letter to the ACA. Hills began the letter by complaining about the disorderly conduct prosecution and the ACA's misconduct in applying one set of rules to him and a different set of rules to the primary witness that testified against him. He accused the ACA of coaching the adult witness and coaching and pressuring the child who testified against him. He asserted that he had consulted with several attorneys who agreed that he should never have been prosecuted and that the ACA's conduct was "disgusting and appalling." Hills recounted his failed attempts to obtain relief from the OLR and several public officials who chose to "stick their head in the sand." The following sentences appear in the last four paragraphs of Hills' letter:

- "This will be your final opportunity to begin to correct this injustice."
- "I am advising you to contact [the municipal judge] and inform him that I was wrongfully convicted and that corrective action is necessary."
- "The $429 will be returned and you will write a letter of apology to me."
- "Should you fail to do so, it would appear that the only alternative is for me to take matters into my own hands to bring you to justice much the same as you did to me although I would be justified in doing so."
- "You should get educated on what happens to individuals who are wrongfully prosecuted and convicted. Many do not recover and remain extremely angry."
- "Your actions amount to nothing more than a rape and a theft. I now know how rape victims and those wrongfully imprisoned feel."
- "You may not be aware that citizens throughout this country are sick of filthy public servants like you."

(Emphasis in original.)

¶15 The jury found Hills guilty of stalking and extortion. The court imposed concurrent one-and-one-half-year terms of initial incarceration, followed by concurrent one-and-one-half-year terms of extended supervision. The sentence was imposed and stayed, and Hills was placed on two concurrent three-year terms of probation.

Discussion

I. Whether The Evidence Was Sufficient To Support Hills' Convictions

¶16 Hills argues that the State did not present sufficient evidence at trial to support his convictions. The high hurdle Hills must clear was explained in ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990):

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id. at 507 (citations omitted). Thus, the question here is whether the evidence, viewed in a light most favorable to Hills' convictions, is so lacking in probative value and force that no reasonable fact finder could have found Hills guilty.

A. Sufficiency Of The Evidence Of Stalking

¶17 The elements of stalking, as they apply here, are as follows:

1. Hills intentionally engaged in a course of conduct directed at the ACA.

2. Hills' course of conduct would have caused a reasonable person to suffer serious emotional distress or to fear bodily injury or death to herself or to a member of her family.

3. Hills' acts caused the ACA to suffer serious emotional distress or induced in her fear of bodily injury or death to herself or to a member of her family.

4. Hills knew or should have known that at least one of his acts constituting the course of conduct would cause the ACA to suffer serious emotional distress or place her in reasonable fear of bodily injury or death to herself or to a member of her family.

See WIS JI—CRIMINAL 1284. Hills concedes that elements one and three were satisfied, but he asserts that "there was no evidence to support a finding on elements two and four."

¶18 Elements two and four of stalking are directed at whether a reasonable person in the positions of Hills and the ACA would consider Hills' course of conduct to be distress- or fear-inducing. With respect to both elements, the evidence summarized in the background section above supports a finding that a reasonable person in the ACA's position would believe that:

- Hills intended to harass the ACA (e.g., "Hi **Idiot**! Well, time for another letter for you—a nice way to start your Monday!").

- Hills believed the wrong done to him was of an extremely high magnitude (e.g., "It was as if I was raped," "Your actions amount to ... a rape," "I now know how rape victims and those wrongfully imprisoned feel.").

- Hills was extremely angry and, over time, his anger did not diminish (e.g., "Again, this is not going away. Keep that in mind stupid," "You should get educated on what happens to individuals who are wrongfully prosecuted and convicted. Many do not recover and remain extremely angry.").

- Hills viewed the ACA as unattractive (e.g., "homely," "fat"), stupid (e.g., "dunce-of-a-public servant"), and worthless (e.g., "worthless piece of shit").

- Hills believed the ACA was corrupt (e.g., "sinful," "corrupt ass," "You may not be aware that citizens throughout this country are sick of filthy public servants like you.") and that the ACA would harm others with her power (e.g., "What's it like to wake up and go to work and screw innocent people over and let the guilty go free?") and knew she could get away with it (e.g., "[The ACA] is smart enough to know that nothing will be done.").

- Hills thought the world would be better off without the ACA (e.g., "you could do society a favor and hang yourself," "[the ACA and others] should be ... placed in stocks and whipped and then hung until dead").

This same evidence supporting a finding that a reasonable person in the ACA's position would experience distress or fear also supports a finding that a person in Hills' position knew or should have known that he would induce distress or fear.

¶19 Hills argues that his messages to the ACA were "obviously hyperbole," and it is "absurd to think that an experienced prosecutor would interpret either as a threat of violence." The apparent assumption here is that Hills' behavior was not uncommon among persons that are charged and convicted in forfeiture actions. But there is no evidence to back up this assumption. To the contrary, a reasonable jury viewing the evidence, and applying common sense, could have found that Hills' response was extreme and would have suggested to

an experienced prosecutor that the prosecutor had become the focal point for the ire of a dangerously unstable person.

¶20 Hills asserts that his trial testimony stating that he did not intend to threaten the ACA, did not intend that she be harmed, and did not think his actions would scare her was "uncontroverted." However, just because Hills was the only person who could give a firsthand account of his thinking does not mean that it was uncontested that he did not intend that the ACA be harmed or to think that his actions would scare her. More importantly, the evidence above amply shows that Hills made several statements that were sufficient to support a jury finding that Hills *should have known* that his conduct would cause the ACA serious distress or fear.

¶21 The evidence was easily sufficient to support Hills' stalking conviction.

B. Sufficiency Of The Evidence Of Extortion

¶22 The elements of extortion, as they apply here, are as follows:

1. Hills threatened to injure the person of the ACA.
2. Hills acted with intent to extort money or compel the ACA to do an act against her will.

See WIS JI—CRIMINAL 1473B.

¶23 Hills contends that there is "no evidence" supporting his conviction of extortion because his "threat" in his January 2011 letter could only reasonably be read as a threat to pursue relief through the courts. More specifically, Hills points to his sentence: "Should you fail to [return my $429], it would appear that the only alternative is for me to take matters into my own hands to bring you to

justice much the same as you did to me although I would be justified in doing so." Hills argues that this is plainly a threat "to fight what he believed to be the injustice done to him and ... that he was looking for someone to assist him [to] seek justice through the courts."

¶24 The problem with Hills' argument is that it divorces the sentence he quotes from other language in the letter and the larger context. That larger context is Hills' repeatedly expressed belief that neither the courts nor any other official entity would bring the ACA to justice. Hills failed to get relief from the OLR and called the agency "unethical." He characterized the municipal court as a "kangaroo court." He stated that the "Dane County Court System has continued with the corruptness that I witnessed in the 1980s." And, Hills broadly stated that he was "aware that the legal system is a failure" and that "the majority of agencies on the federal, state and local level continue to fail as the result of incompetent, lazy, dishonest, corrupt employees."

¶25 In his last letter telling the ACA that this was her "final opportunity to begin to correct this injustice" and that the "$429 will be returned and you will write a letter of apology to me," Hills again made clear that he did not expect relief from the system, that is, the OLR or several public officials who chose to "stick their head in the sand."

¶26 Thus, when Hills wrote that his "only alternative" was "to take matters into [his] own hands" and bring the ACA "to justice much the same as you did to me," there were two very reasonable inferences: 1) that "justice much the same as you did to me" meant an injustice, and 2) that Hills did not believe this would come about by working through the courts. Indeed, the phrase "take

matters into my own hands" would have been an odd way of referring to redress in the courts.

¶27 Accordingly, viewing the evidence in a light most favorable to the verdict, as we must, the evidence was sufficient to support a jury finding that Hills threatened the ACA with intent to extort money or compel her to do an act against her will.

II. Whether Hills' Statements Were Not As A Matter Of Law "True Threats," But Were Instead Protected Speech Under The First Amendment

¶28 Before trial, Hills filed a motion to dismiss, asserting that his statements, as a matter of law, were protected by the First Amendment. The circuit court concluded that a fact finder could determine that Hills threatened the ACA and that the court could not conclude, as a matter of law, that Hills' statements did not constitute unprotected "true threats," as that term is used in First Amendment jurisprudence. Hills contends that this conclusion was error.

¶29 Although evidence might be sufficient to support a conviction under a criminal statute, a court may, nonetheless, conclude that the statement is protected speech. *See* ***State v. Perkins***, 2001 WI 46, ¶48, 243 Wis. 2d 141, 626 N.W.2d 762. Hills argues that his statements directed at the ACA were constitutionally protected attempts to petition various government officials to correct what he believed to be an injustice. Hills cites ***McDonald v. Smith***, 472 U.S. 479, 486-87 (1985), for the proposition that legitimate petitioning activities may include caustic and sharp comments and that substantial latitude should be accorded to such efforts to avoid impermissibly chilling protected speech. Hills acknowledges that "true threats" are not protected, but contends that his statements, as a matter of law, were not "true threats."

¶30 In ***Perkins***, our supreme court summarized the "true threat" test:

> A true threat is determined using an objective reasonable person standard. A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered.

Perkins, 243 Wis. 2d 141, ¶29 (footnotes omitted). The totality of the circumstances includes whether the threat was conditional, whether the maker of the statements had directed similar statements at the victim previously, and whether the victim had reason to believe that the maker had a propensity for violence. ***Id.***, ¶31.

¶31 According to Hills, his language was crass, offensive, and misguided, but he did not make any "true threats." Hills points to published cases that, in his view, involved clearer, or at least comparable, threats that were deemed protected speech. We do not find the comparisons persuasive—each is easily distinguished on its facts. For example, Hills points to ***State v. Douglas D.***, 2001 WI 47, 243 Wis. 2d 204, 626 N.W.2d 725, in which the court held that an eighth grader's creative writing assignment, in which he described his teacher's head being cut off, was speech protected by the First Amendment and not a "true threat." ***Id.***, ¶¶37-39. But the facts in that case are far different from the facts here. The student's story was an isolated instance and was in response to a directive that he write a creative story, and there was no evidence the teacher believed the student had a propensity for violence. ***Id.*** Hills' comparisons with cases in which threats were found to be "true threats" are similarly unhelpful because the factual circumstances in those cases were also substantially different.

¶32 Putting aside comparisons to published decisions, Hills focuses on the facts here and asserts that no reasonable person in the position of the ACA would have perceived Hills' statements as "true threats." We disagree.

¶33 First, the jury could reasonably infer from the evidence that the ACA had reason to believe that Hills had a propensity for violence. After all, she had prosecuted him for shoving a child, and Hills' various letters and messages made clear that Hills was an angry and unreasonable person.

¶34 Second, the threatening tone of Hills' messages was repeated over time. His last two letters showed that he was extremely angry at the ACA and that he was both frustrated with the legal system and confident that it would not bring the ACA to justice.

¶35 Third, Hills' expressed anger is out of proportion to the wrong he alleges was committed against him. He compared it, for example, to being raped. Hills plainly stated in his last letter that, if the ACA did not comply with his demands, he would not "recover" and would never relent. The very fact that Hills was obsessed with the alleged wrong and refused to let it go suggests to a reasonable person that Hills might take action out of proportion to the alleged wrong.

¶36 Finally, although Hills did not ever directly state that he planned to personally physically harm the ACA, his statements nonetheless carried that message. He described the ACA as "sinful" and a "worthless piece of shit"—a person the world would be better off without.

¶37 Hills argues that his statements about harm to the ACA are obviously hyperbole because they describe acts that are plainly unrealistic, such as

placing her "in stocks," whipping her, and hanging her until she is dead. But it is precisely the over-the-top nature of such comments that suggests to a reasonable person that Hills was willing to engage in some type of harmful action.

¶38 In sum, Hills had a constitutional right to complain that he was mistreated by the ACA and falsely convicted. He was free to use strong and even coarse language to express his belief that the ACA was incompetent and corrupt. But he was not free to use language that, objectively viewed, was a "serious expression of a purpose to inflict harm." *See* ***Perkins***, 243 Wis. 2d 141, ¶29. Like the circuit court, we cannot say, as a matter of law, that his comments were not "true threats."

III. Whether The Circuit Court Erroneously Denied Hills' Requested Jury Instructions

¶39 Hills contends that the circuit court erroneously denied his request for jury instructions incorporating his theory of defense based on the First Amendment. Hills argues that he was entitled to the proposed instructions based on the test set forth in ***State v. Coleman***, 206 Wis. 2d 199, 556 N.W.2d 701 (1996):

> [A] criminal defendant is entitled to a jury instruction on a theory of defense if: (1) the defense relates to a legal theory of a defense, as opposed to an interpretation of evidence; (2) the request is timely made; (3) the defense is not adequately covered by other instructions; and (4) the defense is supported by sufficient evidence.

Id. at 212-13 (citations omitted).

¶40 According to Hills, his proposed instructions cover a defense that was "not adequately covered by other instructions." Thus, in Hills' view, additions to the standard instructions for both stalking and extortion were needed.

As to both, he requested the following language be added to the list of elements the State must prove:

> The defendant was not exercising his rights under the State and Federal Constitutions to freedom of speech and to petition his government for redress of grievances. The First Amendment to the United States Constitution as guaranteed to all citizens through the Fourteenth Amendment of the United States Constitution grants to all persons the right to exercise free speech and the right to petition the government for redress of grievances.
>
> Moreover, Article I Section III of the Wisconsin Constitution provides that "every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press." Article I Section IV of the Wisconsin Constitution provides that, "the right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."
>
> The burden is upon the state to prove beyond a reasonable doubt that the defendant's actions, as you so find, were not made in the exercise of his constitutional rights.

According to Hills, these additions were necessary because none of the other jury instructions given discussed First Amendment rights, and the absence of Hills' proposed instructions "meant that the jury never truly considered [Hills' First Amendment] theory of defense."

¶41 We agree with the State that there are two problems with Hills' jury instruction argument. First, Hills' proposed instructions are incomplete because they do not define a "true threat." To properly put the First Amendment issue before the jury, it would not have been enough, as Hills proposed, to merely explain generally the right to free speech and to petition the government. Such an instruction would have needed to additionally define an unprotected "true threat."

¶42 Second, Hills' argument that he might have been wrongly convicted because the jury was not apprised of his First Amendment rights does not include an explanation as to how that might occur if the elements of stalking and extortion were proven. As the State correctly explains, both charges required proof of an unprotected "true threat."

¶43 To prove stalking, the State had to prove beyond a reasonable doubt that Hills' intentional course of conduct would have caused a reasonable person to suffer serious emotional distress or to fear bodily injury or death to herself or to a member of her family. This language, of course, aptly describes a "true threat" that does not enjoy constitutional protection.

¶44 To prove extortion, the State was similarly required to prove that the conduct was a "true threat." The jury was instructed that it needed to find, beyond a reasonable doubt, that Hills actually threatened injury to the person of the ACA.

¶45 Because Hills does not explain, and we cannot discern, how the State could have both met its burden of proof on the two criminal charges and at the same time violated Hills' First Amendment rights, we reject Hills' argument that the circuit court's decision to reject his proffered jury instructions was error or had any possible effect on the outcome.

Conclusion

¶46 For the reasons above, we affirm the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.