COLORADO COURT OF APPEALS **2016COA186**

Court of Appeals No. 14CA1800
Arapahoe County District Court No. 13JD868
Honorable Theresa Slade, Judge

The People of the State of Colorado,

Petitioner-Appellee,

In the Interest of R.D.,

Juvenile-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE HAWTHORNE
Webb and Navarro, JJ., concur

Announced December 29, 2016

Cynthia H. Coffman, Attorney General, Joseph G. Michaels, Assistant Attorney General, Denver, Colorado, for Petitioner-Appellee

Douglas K. Wilson, Colorado State Public Defender, Elizabeth Porter-Merrill, Deputy State Public Defender, Denver, Colorado, for Juvenile-Appellant

¶ 1 R.D., a juvenile, appeals the district court's adjudication of delinquency. We reverse and remand with directions to vacate the adjudication of juvenile delinquency and dismiss the proceeding.

I. Background

¶ 2 This case arises out of an argument between students from Littleton High School and Thomas Jefferson High School on the social networking website Twitter.[1] The argument began after a student from Thomas Jefferson High School posted a Tweet expressing support for Arapahoe High School after a shooting had occurred there. A student from Littleton High School Tweeted that students from Thomas Jefferson High School did not care about the shooting, leading to an argument between students from both schools.

---

[1] When a user posts a Tweet, it can be viewed on the user's Twitter homepage. A user can mention another person in a Tweet by using "@" followed by the person's username. The person is then notified that he or she has been mentioned in a Tweet. Posting a Tweet that mentions another person is different from sending a direct message on Twitter. A Tweet that mentions another person can be viewed on the sender's Twitter homepage, while a direct message can only be seen by the recipient. *Using Twitter*, Twitter, https://perma.cc/KW8C-V49K.

¶ 3 As the argument progressed, R.D., a student at Littleton High School, joined the conversation. R.D. directed multiple Tweets at A.C., a student from Thomas Jefferson High School.[2] These Tweets included:

- "[i]f I see your bitch ass outside of school you catching a bullet bitch";
- "you a bitch, ill come to Tgay and kill you nigga";
- "all you fuck niggas will get your ass beat real shit"; and
- "you think this shit a game, I'm not playing."

R.D. also Tweeted a picture of a gun with the message "this all I'm saying. We don't want another incident like Arapahoe. My 9 never on vacation."

¶ 4 A.C. directed multiple Tweets at R.D. in response. These Tweets included:

- "I'll see u tomorrow fuck boy";
- "you are all talk so go the fuck to bed come up to TJ and get slept";
- "shoot then pussy"; and

[2] R.D. mentioned A.C. by beginning his Tweets with "@iTweetYouShutUp" (A.C.'s username).

- "you ain't never shot no one so sit down and get off google images bruh."

¶ 5 The People filed a petition in delinquency charging R.D. with conduct that if committed by an adult would constitute harassment by communication under section 18-9-111(1)(e), C.R.S. 2013.[3] At a bench trial, A.C. and another student testified that they believed R.D.'s statements were threats. The district court adjudicated R.D. a juvenile delinquent based on conduct that would constitute harassment if committed by an adult.

II. As-Applied Constitutional Challenge

---

[3] Section 18-9-111(1)(e), C.R.S. 2013, which has since been amended, stated that

> [a] person commits harassment if, with intent to harass, annoy, or alarm another person, he or she . . . [i]nitiates communication with a person, anonymously or otherwise, by telephone, telephone network, data network, text message, instant message, computer, computer network, or computer system in a manner intended to harass or threaten bodily injury or property damage, or makes any comment, request, suggestion, or proposal by telephone, computer, computer network, or computer system that is obscene.

¶ 6 R.D. argues that the application of section 18-9-111(1)(e) to his conduct violated his First Amendment right to free speech. The People respond that R.D.'s statements were not protected by the First Amendment because they were true threats and fighting words. We conclude that because R.D.'s statements were neither true threats nor fighting words, the statute as applied violated his right to free speech.

A. Standard of Review

¶ 7 We review the constitutionality of a statute as applied de novo. *Hinojos-Mendoza v. People*, 169 P.3d 662, 668 (Colo. 2007); *People v. Stanley*, 170 P.3d 782, 787 (Colo. App. 2007). A statute is presumed to be constitutional, and the party challenging the statute has the burden of proving unconstitutionality beyond a reasonable doubt. *People v. Janousek*, 871 P.2d 1189, 1195 (Colo. 1994). Where a statute is not facially unconstitutional, a challenger must show that the statute is unconstitutional as applied to his or her conduct. *People v. Baer*, 973 P.2d 1225, 1231 (Colo. 1999).

B. First Amendment

¶ 8 The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the

freedom of speech." Colorado's counterpart to the First Amendment, article II, section 10 of the Colorado Constitution, provides that "[n]o law shall be passed impairing the freedom of speech."

¶ 9 While the First Amendment protects the right to free speech, its protection is not absolute. *Stanley*, 170 P.3d at 786 (citing *Virginia v. Black*, 538 U.S. 343, 358 (2003)). Some categories of speech, such as true threats and fighting words, are unprotected by the First Amendment and, thus, may be regulated by the government. *Id.* (citing *Black*, 538 U.S. at 359); *see also People in the Interest of K.W.*, 2012 COA 151, ¶ 30 (citing *Cohen v. California*, 403 U.S. 15, 20 (1971)). Because R.D. does not assert that he is entitled to greater protection under the Colorado Constitution, we address only the First Amendment.

C. True Threat

¶ 10 A threat is a statement of purpose or intent to cause injury or harm to the person, property, or rights of another, by committing an unlawful act. *People v. McIntier*, 134 P.3d 467, 472 (Colo. App. 2005) (citing *People v. Hickman*, 988 P.2d 628, 637 (Colo. 1999)). But the critical inquiry is "whether the statements, viewed in the

context in which they were spoken or written, constitute a 'true threat.'" *Id.* (quoting *Janousek*, 871 P.2d at 1198 (Mullarkey, J., specially concurring)). A true threat is not merely talk or jest, and it is evaluated "by whether those who hear or read the threat reasonably consider that an actual threat has been made." *Id.* (quoting *Janousek*, 871 P.2d at 1198 (Mullarkey, J., specially concurring)).

> While whether a statement is a true threat is a question of fact to be determined by the fact finder, where First Amendment concerns are implicated, the court has an obligation to make an independent review of the record to assure that the judgment does not impermissibly intrude on the field of free expression.

People v. Chase, 2013 COA 27, ¶ 70 (citations omitted). In determining this, we first consider the plain import of the words used. *Stanley*, 170 P.3d at 790 (citing *Janousek*, 871 P.2d at 1195). Then we look to the context in which the statements were made. *Id.* (citing *McIntier*, 134 P.3d at 472). Among other contextual factors, we may consider (1) to whom the statement is communicated; (2) the manner in which the statement is communicated; and (3) the

subjective reaction of the person whom the statement concerns. *Id.* (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)).

¶ 11 After independently reviewing the record, we conclude that R.D.'s Tweets did not constitute true threats because they were not "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 786 (quoting *Black*, 538 U.S. at 359). While the language of R.D.'s Tweets was violent and explicit, the context in which the statements were made mitigated their tone in three ways. *Id.* (citing *McIntier*, 134 P.3d at 472).

¶ 12 The first contextual factor we consider is to whom the statements were communicated. R.D. Tweeted "you don't even know me. Mf I don't even know were tf your lame bitch ass school is." This Tweet showed that he did not know A.C. personally and did not know where Thomas Jefferson High School was located. *See Chase*, ¶ 73 (stating that defendant personally knowing the victims and knowing where they lived supported the conclusion that his e-mails were true threats). And, R.D. never referred to A.C. by name. He addressed him only by his Twitter username of "iTweetYouShutUp." *See id.* (finding that defendant expressly

referred to the named victims in his e-mails supported the conclusion that the e-mails were true threats).

¶ 13 Next we consider the manner in which the statements were communicated. R.D. posted his messages to Twitter, a public forum. While he did use "@" to direct his messages toward A.C., the messages could be viewed on R.D.'s Twitter homepage and were not sent to A.C. in a private message. So, Tweets can be differentiated from e-mails and other social media messages, which are sent directly — and usually privately — to a person or specified group of people. *See id.* at ¶ 74 (e-mails sent to named victims can constitute a true threat).

¶ 14 Finally, we consider the subjective reaction of the person whom the statements concern. When R.D. indicated that he did not know where Thomas Jefferson High School was located, A.C. responded by Tweeting the school's address: "3950 S. Holly street. I'll see u tomorrow fuck boy." A.C. subsequently Tweeted "you are all talk so go the fuck to bed come up to TJ and get slept" and "shoot then pussy." And, when R.D. Tweeted a picture of a gun, A.C. responded "you ain't never shot no one so sit down and get off google images bruh." A.C.'s Tweets demonstrate that he did not

appear threatened by R.D.'s Tweets and that he did not take precautionary measures to protect himself from R.D. *See id.* at ¶ 73 (stating that victims having taken specific precautionary measures to protect themselves from defendant supported the conclusion that his e-mails were true threats).

¶ 15 While A.C. later testified that he believed R.D.'s Tweets were threats against him, the critical inquiry in true threat analysis is "whether the statements, viewed in the context in which they were spoken or written, constitute a 'true threat.'" *McIntier*, 134 P.3d at 472 (quoting *Janousek*, 871 P.2d at 1198 (Mullarkey, J., specially concurring)). A.C.'s reaction to R.D.'s Tweets shows that he did not view the statements as true threats when they were received.

¶ 16 In sum, based on the context in which R.D.'s statements were made, we conclude that the Tweets did not constitute true threats.

D. Fighting Words

¶ 17 Fighting words are "personal abusive epithets that when directed to the ordinary citizen are inherently likely to provoke a violent reaction." *K.W.*, ¶ 30 (citing *Cohen*, 403 U.S. at 20). In determining whether a statement constitutes fighting words, again we must consider "[t]he context or circumstances in which the

language is used." *Id.* (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978)).

¶ 18 After independently reviewing the record, we conclude that R.D.'s Tweets did not constitute fighting words. Fighting words, by their definition, can occur only when the speaker is in close physical proximity to the recipient. Statements that are made from a distance cannot "incite an immediate breach of the peace" because a remote recipient would necessarily have a cooling off period before he or she could confront the speaker. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Even a brief cooling off period ensures that statements will not "incite an *immediate* breach of the peace." *Id.* (emphasis added).

¶ 19 While this issue has not been specifically addressed in Colorado, a number of states have concluded that "[t]he potential to elicit an immediate violent response exists only where the communication occurs face-to-face or in close physical proximity." *City of Billings v. Nelson*, 322 P.3d 1039, 1045 (Mont. 2014); *see also Citizen Publ'g Co. v. Miller*, 115 P.3d 107, 113 (Ariz. 2005) ("This case does not fall within the fighting words exception to the First Amendment. The statements at issue were made in a letter to

the editor, not in a face-to-face confrontation with the target of the remarks."); *State v. Drahota*, 788 N.W.2d 796, 804 (Neb. 2010) ("[E]ven if a fact finder could conclude that in a face-to-face confrontation, [defendant's] speech would have provoked an immediate retaliation, [the recipient] could not have immediately retaliated. [He] did not know who sent the e-mails, let alone where to find the author."); *but see Davidson v. Seneca Crossing Section II Homeowner's Ass'n*, 979 A.2d 260, 283 (Md. Ct. Spec. App. 2009) (upholding a permanent injunction prohibiting the sending of e-mails and letters based on the fighting words doctrine, where the enjoined party also engaged in verbal attacks and made vulgar gestures in the presence of the parties requesting the injunction).

¶ 20 We consider these cases well reasoned and follow them here. So, because R.D. was not in close physical proximity to A.C. at the time of the incident, his Tweets could not have constituted fighting words.

¶ 21 Because we have concluded that R.D.'s Tweets were not true threats or fighting words, applying section 18-9-111(1)(e), C.R.S. 2013, to R.D.'s conduct violated his First Amendment rights. For

these reasons, we further conclude that the statute is unconstitutional as applied.

III. Conclusion

¶ 22 We reverse the district court's judgment and remand with directions to vacate the adjudication of juvenile delinquency and dismiss the proceeding.

JUDGE WEBB and JUDGE NAVARRO concur.