

17CA1465 Peo v Counterman 06-13-2024

COLORADO COURT OF APPEALS

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Court of Appeals No. 17CA1465  
Arapahoe County District Court No. 16CR2633  
Honorable F. Stephen Collins, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Billy Raymond Counterman,

Defendant-Appellant.

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JUDGMENT REVERSED AND CASE  
REMANDED WITH DIRECTIONS

Division II  
Opinion by JUDGE WELLING  
Román, C.J., and Brown, J., concur

Prior Opinion Announced July 22, 2021, Vacated in  
Supreme Court of the United States No. 22-138

**NOT PUBLISHED PURSUANT TO C.A.R. 35(e)**  
Announced June 13, 2024

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¶ 1 In 2014, a jury found defendant, Billy Raymond Counterman, guilty of stalking (serious emotional distress) after sending hundreds of Facebook messages to C.W. The trial court sentenced him to four and a half years in prison.<sup>1</sup>

¶ 2 On appeal, this division affirmed Counterman’s conviction and sentence, concluding, in relevant part, that Counterman’s messages were true threats. *People v. Counterman*, 2021 COA 97, ¶ 53 (*Counterman I*), *vacated*, 600 U.S. 66 (2023) (*Counterman II*). Applying an objective test set forth in *People in Interest of R.D.*, 2020 CO 44, *abrogated by Counterman II*, we determined that because Counterman’s messages to C.W. constituted true threats, the statements were unprotected by the First Amendment of the United States and Colorado Constitutions. *Id.* at ¶¶ 29-30, 53. The Colorado Supreme Court denied certiorari.

¶ 3 The United States Supreme Court vacated our decision, concluding that in true-threat cases, the First Amendment requires the People to demonstrate that the defendant had some subjective

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<sup>1</sup> The factual background of this case is set forth more fully in *People v. Counterman*, 2021 COA 97 (*Counterman I*), *vacated*, 600 U.S. 66 (2023) (*Counterman II*), and *Counterman II*.

understanding of the threatening nature of his statements.

*Counterman II*, 600 U.S. at 78. Specifically, the Court determined that recklessness is the appropriate mens rea to sustain a criminal conviction for statements constituting a true threat and that the application of an objective test, which only required demonstrating that a reasonable person would have understood Counterman's messages to be threats, violated Counterman's First Amendment rights. *Id.* at 80-82.

¶ 4 Upon a request for supplemental briefing, Counterman maintains that the Supreme Court's mandate requires reversal and that the case be remanded for a new trial. The People, however, contend that, mandate notwithstanding, this court should affirm the trial court's judgment on alternate grounds based on (1) Counterman's alleged non-speech stalking conduct, which the People say satisfied the statute without implicating the First Amendment concerns animating *Counterman II*; (2) the overwhelming evidence satisfying a heightened recklessness standard; and (3) the absence of a requirement to give a true threats instruction at the time of trial and that the failure to give one wasn't plain error.

¶ 5 We address, and reject, each of the People’s contentions.

I. Stalking Conduct Other than Speech

¶ 6 The People first contend that Counterman’s conduct, other than his Facebook messages, was sufficient to support his conviction. Section 18-3-602(1)(c), C.R.S. 2023, defines stalking as an individual “[r]epeatedly follow[ing], approach[ing], contact[ing], plac[ing] under surveillance, or mak[ing] any form of communication with another person . . . that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress.” (Emphasis added.) The People argue that, based on this definition, Counterman’s *conduct* alone satisfies the statute because, as he stated in multiple messages, he was physically watching and following her in real life.<sup>2</sup> The People maintain that because the jury heard evidence of and was instructed on all components of stalking — including repeated following, approaching, and placing under surveillance, which don’t

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<sup>2</sup> The People point to specific messages to support their argument that Counterman had repeatedly followed, approached, and/or placed C.W. under surveillance, including his message stating, “Was that you in the white Jeep?” and “Five years on Facebook. Only a *couple* physical sightings.” (Emphasis added.)

implicate the First Amendment — there is an adequate basis for this court to affirm his conviction. We disagree.

¶ 7 The People’s argument in this regard misapprehends the importance of the constitutional infirmity that the Supreme Court found in *Counterman II*. It’s not simply the risk that Counterman was convicted without having committed any conduct that could be properly prohibited by the stalking statute; it’s that Counterman may have been convicted for engaging in speech that is *protected* by the First Amendment. The fact that evidence was also presented (and instructions given) that would have permitted the jury to convict Counterman of stalking based on conduct that doesn’t implicate the First Amendment does nothing to ameliorate the risk that that the jury’s guilty verdict was based on Counterman engaging in speech protected by the First Amendment.

¶ 8 This is especially true where, as here, the primary — if not exclusive — theory of criminal culpability advanced at trial was based on Counterman’s online speech, not his real-world conduct. *Cf. McCormick v. United States*, 500 U.S. 257, 270-71 n.8 (1991) (“This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different

instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.”). Accordingly, even if the evidence of Counterman’s real-world following or surveillance of C.W. alone would be sufficient to sustain a conviction, it does not provide us with an alternate basis for affirming his conviction.

## II. Evidence of Recklessness

¶ 9 The People next argue that there was overwhelming circumstantial evidence of Counterman’s state of mind for us to conclude that he acted recklessly; therefore, any failure to instruct the jury on recklessness was harmless beyond a reasonable doubt. We disagree.

¶ 10 We review the omission of a mens rea element from jury instructions for constitutional harmless error. *People v. Novotny*, 2014 CO 18, ¶ 20. Such errors “require reversal unless the reviewing court is ‘able to declare a belief that [the error] was harmless beyond a reasonable doubt.’” *People v. Cooley*, 2020 COA 101, ¶ 27 (quoting *Hagos v. People*, 2012 CO 63, ¶ 11).

¶ 11 The trial court instructed the jury to weigh the evidence under an objective test. *Counterman II* plainly establishes that to sustain a true-threats conviction, the First Amendment requires, at minimum, proof of recklessness<sup>3</sup> —that is, proof of the defendant’s *subjective* understanding of their statements’ threatening nature. 600 U.S. at 78, 80-82. The People argue that Counterman’s recklessness is clearly and overwhelmingly established through the content of his messages, including statements telling C.W. to “fuck off permanently” and “die,” that her failure to respond to him wasn’t “good for human relations,” and that talking about him wasn’t “pro-life su[]staining” on her part. The People also rely on C.W.’s ongoing non-engagement and repeated attempts to block him as strong evidence that Counterman “consciously disregarded a substantial risk that his communications would be viewed as threatening violence.” *Id.* at 69.

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<sup>3</sup> “A person acts recklessly, in the most common formulation, when he ‘consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another.’” *Counterman II*, 600 U.S. at 79 (quoting *Voisine v. United States*, 579 U.S. 686, 691 (2016)).

¶ 12 While this is certainly strong evidence of Counterman’s recklessness, it isn’t enough for us to disregard the instructional error as harmless beyond a reasonable doubt. This is particularly true where, as occurred at trial, Counterman was prohibited from introducing any evidence or making any argument related to his subjective intent. And not only was Counterman precluded from introducing any evidence regarding his mental state at trial, but the jury was also specifically instructed *not* to consider Counterman’s mental state in deliberations. Thus, we can’t say that the evidence was so overwhelming that it renders the constitutional error harmless beyond a reasonable doubt. *See People v. Omwanda*, 2014 COA 128, ¶ 31.

### III. Was the Claim of Instructional Error Preserved?

¶ 13 Finally, the People contend that Counterman’s failure to request instructions for recklessness or true threats didn’t amount to plain error requiring reversal because the requirement to give such an instruction wasn’t obvious at the time of trial. *See People v. Crabtree*, 2024 CO 40, ¶ 6 (“Because our time-of-trial rule [for plain error review] was not originally erroneous and continues to be sound, there is no basis to stray from principles of stare

decisis and switch to a time-of-appeal rule.”); *Hagos*, ¶ 18 (“Plain error addresses error that is both ‘obvious and substantial.’” (quoting *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005))); *Scott v. People*, 2017 CO 16, ¶ 15 (“Plain error review addresses error that is both obvious and substantial and that so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction.”). We reject this contention because we conclude that Counterman’s First Amendment challenge was adequately preserved such that we review for constitutional harmlessness, not plain error.

¶ 14 In a pretrial motion, Counterman’s counsel argued that the stalking (serious emotional distress) charge should be dismissed because, if applied to Counterman, section 18-3-602(1)(c) would criminalize his protected speech. Specifically, counsel asserted that none of Counterman’s messages to C.W. were true threats because the statements were protected speech under both the First Amendment and article II, section 10 of the Colorado Constitution. The trial court rejected Counterman’s argument, noting that, under *People v. Chase*, 2013 COA 27, and *People in Interest of R.D.*, 2016 COA 186, *rev’d*, 2020 CO 44, “if something is found not to be

a true threat, it's subject to First Amendment protection and it will not support a charge or a conviction of stalking or, I believe, harassment." But, if speech "is found to be a true threat, then it does not benefit from the First Amendment protection and it would provide a basis for a lawful charge and a lawful conviction of either stalking or harassment."

¶ 15 After applying the test articulated in *Chase*, the trial court denied Counterman's motion to dismiss, ruling that,

having considered the totality of the circumstances, I find that [Counterman's] statements rise to the level that presenting the charges to a jury to make a determination of whether [his] statements rise to the level of a true threat does not impermissibly intrude on or violate [his] First Amendment rights. I believe that [Counterman's] statements rise to the level of a true threat, although ultimately that will be a question of fact for the jury to decide.

¶ 16 After the prosecution rested, Counterman's attorney renewed the motion to dismiss the stalking charge for violating Counterman's right to free speech and moved for a judgment of acquittal. The trial court again denied Counterman's motion to dismiss and denied his motion for judgment of acquittal, ruling that the evidence elicited at trial

confirm[ed] the belief I had after the motions hearing that this would not be considered protected speech. And that having considered the totality of the circumstances, a reasonable jury could find that [Counterman's] statements rise to the level of a violation of law and that of a true threat. And, therefore, the charges should be submitted to the jury for them to be making a determination.

Under the circumstances and based on the state of the law at the time of trial, we conclude that Counterman's motions and the court's orders denying them adequately preserved Counterman's First Amendment challenge, such that we review it for constitutional harmless error.

¶ 17 And because the issue of Counterman's mens rea was contested (or at least Counterman sought to contest it), the failure to give such an instruction requires reversal. *See, e.g., People v. Peoples*, 8 P.3d 577, 579-80 (Colo. App. 2000) (reversal required under constitutional harmless error standard where jury instruction omitted an element, the issue was contested at trial, and the instructions, considered as a whole, failed to inform the jury of the missing element). Accordingly, we reverse the judgment of the trial court, and remand the case for a new trial. On retrial, the court should instruct the jury on the elements of true threats

and recklessness consistent with *Counterman II*, including by giving the special instruction set forth at COLJI-Crim. 3-6:04.5.SP (2023).<sup>4</sup>

#### IV. Disposition

¶ 18 The judgment of conviction is reversed, and the case is remanded for a new trial.

CHIEF JUDGE ROMÁN and JUDGE BROWN concur.

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<sup>4</sup> In the wake of *Counterman II*, the Model Criminal Jury Instructions Committee promulgated the following “special instruction” for the charge of stalking (serious emotional distress) when the charged conduct involves repeated communications, as it did here:

For purposes of the crime of stalking (serious emotional distress), in order to find that the defendant made any form of communication with another person that would cause a reasonable person to suffer serious emotional distress, you must find that the defendant consciously disregarded a substantial risk that [his] [her] communications would be viewed as threatening violence.

COLJI-Crim. 3-6:04.5.SP (2023).