STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0294

State of Minnesota,
Respondent,

vs.

Joseph Frank Rezac,
Appellant.

Filed February 18, 2020
Affirmed
Bratvold, Judge
Dissenting, Worke, Judge

Stearns County District Court
File No. 73-CR-18-1984

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

BRATVOLD, Judge

In this direct appeal from a judgment of conviction of threatening to commit a crime of violence, appellant seeks reversal, arguing that the evidence is insufficient to support his

conviction, and that the district court erred by refusing to suppress evidence that law enforcement obtained without a warrant from a social-networking website and wireless service provider. We first analyze whether the record has sufficient evidence to support appellant's conviction and conclude that it does. On the suppression issue, we assume that a search occurred because that was the state's position in district court. We then determine that the state established exigent circumstances supporting a warrantless search. Thus, we affirm.

FACTS

On March 6, 2018, at 2:40 p.m., a staff member at MeetMe.com (MeetMe) forwarded to the St. Cloud Police Department an internet post from a user in St. Cloud, who was later identified as appellant Joseph Frank Rezac. In the post forwarded by MeetMe, Rezac wrote seven sentences in the early morning of March 6, 2018:

> You cannot tell me what to do. I will find a soul mate. I will seduce her then I will only show her the cruel[]ty in me so that she will leave me. As if she was forced to. I will still be bonded to her when she is gone and I shoot up a mall killing at least 20 people and killing myself. My last words will be, "You were my only reason to try to be a better person. You're gone now so all the reasons to be like this are back."

MeetMe later gave police a report, in which it described itself as "a social networking service on the [i]nternet and [s]martphones where visitors create personal profiles, post photographs, and socialize with each other via instant messenger, and various message board environments."

An officer later testified that MeetMe staff said they were "concerned" about the post "enough to notify" police and that they were "afraid that something was going to

happen." MeetMe staff also gave police the name on the account that created the post, Corvo Volker, along with Volker's public profile information: he is 23 years old and lives in St. Cloud.

Police sent one marked squad car to the Crossroads Mall, which is the only mall in St. Cloud, "in case something did happen." Officer Day and investigator Bluhm were asked to immediately shift from other assignments because "[t]he possible threat talked about hurting himself, hurting others. Actually, mass violence." Day and Bluhm tried "to figure out who had posted it so we could go make contact with him and hopefully stop this, if it was going to happen."

When Day was unable to find a "Corvo Volker" in city or police records or on Facebook, he contacted MeetMe for more information. Within minutes, MeetMe provided a written report that included the post and Volker's internet protocol (IP) address, which is "used to identify electronic devices that are accessing the [i]nternet." Day then accessed a public website to find the internet service provider (ISP) that owns the IP address, a wireless company. Although closed for the business day, the ISP responded to Day's request and gave him a street address in St. Cloud and Rezac's name, which was on the account.

Within about two hours of MeetMe's fax, Day, Bluhm, and two other officers went to see Rezac, who lives in a group home. Rezac agreed to meet with officers in the home's office. Rezac allowed officers to pat him down, and Day found no weapons. After Bluhm read Rezac his *Miranda* rights and asked him if he would speak with her, Rezac responded that he would "like to know what's going on, yes." Rezac admitted being on MeetMe's

website and responded "yes" when Bluhm asked if he knew "a threat that was made." Rezac then declined to say what he meant, so Bluhm read the entire post aloud. Rezac admitted he wrote the post.

Bluhm asked Rezac to "tell [her] about that," and Rezac responded:

> Um, I don't have a soul mate and I don't intend to have one. Um, if someone was going to shoot up a mall that would be a horrible thing to do. And I actually said that so it would have some punch um, it was uh, an observation against—I guess the . . . the idea that anything mattered uh, romantically um, it . . . it was a very dark uh, thing that I wrote intentionally . . . .

When Bluhm asked if he was "looking to hurt people," Rezac responded, "No. I'm actually not. Like I said that was implied on the uh, soulmate comment that if I found a soulmate. I'm not looking for a soulmate. And I'm not looking to shoot up a mall." When asked to explain what he meant by "punch," Rezac responded, "So people will notice."

The state charged Rezac with one count of threatening to commit a crime of violence under Minn. Stat. § 609.713, subd. 1 (2016). Rezac moved to dismiss, arguing that the state lacked probable cause, his speech "ruminat[ed] about finding and losing a soulmate" and so was protected under the First Amendment, and that police obtained his account information without a subpoena and in violation of his constitutional rights. The state opposed, and the district court denied the motion in a written order.

Rezac's jury trial occurred on November 20, 2018. Day and Bluhm testified to the facts summarized above, and Rezac's police statement was played for the jury.[1] Rezac

[1] MeetMe's written report and a transcript of Rezac's police statement were received into evidence.

testified on his own behalf. Initially, he explained that he lives in a group home and has autism spectrum disorder. Rezac testified that, on March 6, 2018, he used his smartphone to access MeetMe's website and join an internet discussion "about true love being able to solve any problem. And I disagreed with that concept." When asked about his post, Rezac testified that he wrote "a scenario in which true love would be a catalyst for a problem instead of the solution for one." Rezac testified that he wrote this "dark" post because "[w]hen I was about 14 years old, my grandfather actually committed suicide the day before his divorce would have been finalized. And I see that as a real life example where true love was actually very detrimental."

On cross-examination, Rezac agreed that he wrote the post, as alleged by the state, and that the post did not include anything about his grandfather. But Rezac also testified that police would not see the post as a threat "upon clarification," and he "personally" did not consider the post to be a threat. Rezac agreed that, without clarifying information, a reader of his post would not have known that he did not intend to threaten or harm anyone. Rezac added, "Which is why I gave clarification to the police."

The jury found Rezac guilty. The district court then convicted Rezac and imposed a guidelines stayed sentence of one year and one day with 260 days' credit for time served. Since the 260 days satisfied Rezac's required time in custody, Rezac asked the district court to execute his sentence and the district court granted his motion. This appeal follows.

D E C I S I O N

I. The record evidence is sufficient to support Rezac's conviction of threatening to commit a crime of violence.

Generally, when reviewing the sufficiency of the evidence, this court reviews the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to support the conviction. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). But we apply "heightened scrutiny" when a conviction is based in whole or in part on circumstantial evidence. *State v. Al–Naseer*, 788 N.W.2d 469, 473-74 (Minn. 2010); *see also State v. Smith*, 825 N.W.2d 131, 137 (Minn. App. 2012) (applying circumstantial-evidence test to sufficiency challenge on a terroristic-threats conviction), *review denied* (Minn. Mar. 19, 2013).

We scrutinize the circumstantial evidence in Rezac's case by following two steps. The first step is to "identify the circumstances proved," giving deference "to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted). In identifying the circumstances proved, we "winnow down the evidence presented at trial by resolving all questions of fact in favor of the jury's verdict, resulting in a subset of facts that constitute the circumstances proved." *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017) (quotation omitted). We "disregard evidence that is inconsistent with the jury's verdict." *Id.* at 601.

In the second step, we "examine independently the reasonableness of all inferences that might be drawn from the circumstances proved." *Al-Naseer*, 788 N.W.2d at 473-74.

We give "no deference to the fact finder's choice between reasonable inferences." *Id.* at 474. We only consider the "reasonable inferences that can be drawn from the circumstances proved, when viewed as a whole." *Harris*, 895 N.W.2d at 601. If a reasonable inference inconsistent with guilt arises, this creates a "reasonable doubt." *Al-Naseer*, 788 N.W.2d at 474. But "possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable." *State v. Stein*, 776 N.W.2d 709, 719 (Minn. 2010).

At trial, the state had to prove the elements of Rezac's charged offense beyond a reasonable doubt. *See State v. Hage*, 595 N.W.2d 200, 204 (Minn. 1999). A person is guilty of making threats of violence if he (1) "threatens, directly or indirectly," (2) to commit a crime of violence, (3) "with [the] purpose to terrorize another" or "in a reckless disregard of the risk of causing such terror." Minn. Stat. § 609.713, subd. 1; *see also State v. Schweppe*, 237 N.W.2d 609, 613 (Minn. 1975) (describing three elements).[2]

Under the first element, "the State does not have to prove that the conduct amounted to an express threat." *State v. Franks*, 765 N.W.2d 68, 75 (Minn. 2009). A threat may be direct or indirect. Minn. Stat. § 609.713, subd. 1. "[T]he question of whether a given statement is a threat turns on whether the communication in its context would have a reasonable tendency to create apprehension that its originator will act according to its

[2] The legislature recently amended the title of Minn. Stat. § 609.713 from "terroristic threats" to "threats of violence." *See* 2015 Minn. Laws ch. 21, art. 1, § 109, subd. 10, at 234. The elements of the crime have not changed. *See id.* Some of our caselaw refers to "terroristic threats" instead of "threats of violence."

tenor." *Schweppe*, 237 N.W.2d at 613 (quotation omitted). "The test of whether words or phrases are harmless or threatening is the context in which they are used." *Id.*

Under the second element, the threat must be to commit a crime of violence, and specifically satisfy the definition of "violent crime," which includes all degrees of murder. Minn. Stat. § 609.1095, subd. 1(d) (2016).

Under the third element, the state must prove the statement was made with the intent to "terrorize another" *or* "in a reckless disregard of the risk of causing such terror." Minn. Stat. § 609.713, subd. 1; *see also State v. Rund*, 896 N.W.2d 527, 534 (Minn. 2017) ("[T]he terroristic-threats statute includes more than one mens rea: either the purpose of terrorizing or a reckless disregard of the risk of terrorizing."). A defendant's words cannot be "merely flippant" or "spoken in jest." *State v. Knaeble*, 652 N.W.2d 551, 557 (Minn. App. 2002), *review denied* (Minn. Jan. 21, 2003). And they cannot be merely expressions of "transitory anger." *State v. Marchand*, 410 N.W.2d 912, 915 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987). In *State v. Bjergum*, this court held that a person "who might lack a specific intent to threaten or terrorize may nevertheless utter an objectively threatening statement recklessly, committing a terroristic-threats crime." 771 N.W.2d 53, 57 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009). A victim's reaction to the threat is circumstantial evidence of the speaker's intent. *Marchand*, 410 N.W.2d at 915; *Schweppe*, 237 N.W.2d at 614; *see also State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000) ("A state of mind generally is proved circumstantially . . . .").

We begin our analysis of Rezac's conviction by identifying the circumstances proved. Giving deference to the jury's verdict, the circumstances proved include the

following: Rezac created a post on a public website where content is read by others, forwarded, and shared. Rezac's public profile on this website stated that he lives in St. Cloud. Rezac's post included seven sentences; the fifth sentence stated, "I shoot up a mall killing at least 20 people and killing myself." MeetMe staff read Rezac's post, was concerned, and reported it to St. Cloud police. Police sent a marked squad car to the only mall in St. Cloud "in case something did happen." When police questioned Rezac about his post, he agreed he knew "a threat that was made" and admitted he intentionally wrote the "dark" post and stated his post was "an observation against . . . the idea that anything mattered, uh, romantically." Rezac told police he wrote about shooting up a mall—"a horrible thing to do"—so that his message would have "punch" so "people will notice." Rezac also agreed that, without clarifying information, a reader of his post would not know he did not intend to harm anyone.

We consider the circumstances proved in light of each element. First, the circumstances proved establish the first element because Rezac's post was a threat "in its context." *See Schweppe*, 237 N.W.2d at 613. Rezac's post says he will commit mass murder and suicide at a mall, and he told police that his post was an "observation against . . . the idea that anything mattered [ ] romantically." And Rezac's public MeetMe profile identified him as living in St. Cloud, where there is only one mall. Rezac's post also states he will commit the crime after he finds a soul mate, seduces her, and treats her so cruelly that she leaves him. Rezac's communication in its context "would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *Id.*; *see*

also State v. Murphy, 545 N.W.2d 909, 916 (Minn. 1996) (holding statute criminalizes threats of "a *future* crime of violence which would terrorize a victim").

Second, the circumstances proved establish the second element because Rezac's post described a crime of violence—a mass murder of at least 20 people. *See* Minn. Stat. § 609.1095, subd. 1(d) (listing all degrees of murder as a "violent crime").

Third, the circumstances proved establish the third element because Rezac either had the "aim, objective, or intention" of terrorizing another, *Schweppe*, 237 N.W.2d at 614, or he made an "objectively threatening statement recklessly." *Bjergum*, 771 N.W.2d at 57. The circumstances proved do not indicate that Rezac made the threats flippantly, "in jest," or in a state of "transitory anger." *See Knaeble*, 652 N.W.2d at 557; *Marchand*, 410 N.W.2d at 915. In fact, Rezac's own statements to police are that he wrote the "dark" post intentionally to combat "the idea that anything mattered [ ] romantically." MeetMe staff took the threat seriously by reporting it to police, and police did likewise by sending a squad car to the only mall in St. Cloud. The jury could reasonably infer Rezac's intent from these reactions to his post. *See Marchand*, 410 N.W.2d at 915. And Rezac's own statements to police show that he knew his message would be interpreted as a threat. He responded affirmatively when asked if he could think of a threat that was made, and said that he referred to a "horrible" mall shooting so that his post would have "punch" and people would "notice." Thus, at the very least, the circumstances proved establish that Rezac recklessly made a threatening statement. *See Bjergum*, 771 N.W.2d at 57.

Still, Rezac argues that the circumstances proved do not establish that he threatened a crime of violence because (1) his words "were contingent upon too many factors coming

to fruition" to be a "true threat," (2) "the state presented no evidence that Mr. Rezac threatened a particular victim or that his threat would have been communicated to a particular victim," and (3) he had no intent to terrorize another or recklessly disregard causing such terror. We address each of Rezac's arguments in turn.

A. Contingencies in Rezac's post

Rezac argues that, when the seven sentences are read in context, his post includes specific conditions that had to occur before he would commit mass murder and suicide; thus, his post is not a threat. We are not persuaded for two reasons. First, caselaw does not support Rezac's assumption that a conditional statement cannot be a threat, as a matter of law. Rather, the "conditional nature of the statement" is one factor in determining whether a statement is a threat. *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 1402 (1969) (holding a statement must be "taken in context" to be deemed a threat and the "expressly conditional nature of the statement and the reaction of the listeners" are relevant context).[3] But neither federal nor Minnesota caselaw has given any special status to conditional or contingent threats. The Minnesota Supreme Court has held that, to determine whether a statement is a threat, we must generally consider whether the communication in

[3] Rezac also argues that the threats-of-violence statute must only proscribe "true threats" to avoid violating the First Amendment. It is well-established that statutes criminalizing words or conduct must be directed at constitutionally unprotected speech, such as "true threats." *See Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 1548 (2003) (upholding constitutional challenge to state statute banning cross burning with intent to intimidate and noting that true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"). We discern no conflict between Minnesota threats-of-violence caselaw and federal caselaw on true threats. Because Rezac does not support his argument with additional constitutional analysis, we do not consider it further.

its *overall context* "would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *See Schweppe*, 237 N.W.2d at 613 (quotation omitted); *see also United States v. Christenson*, 653 F.3d 697, 701-02 (8th Cir. 2011) ("[A] threat may be considered a true threat even if it is premised on a contingency.") (quotation omitted).

The Minnesota Supreme Court specifically examined a different type of conditional threat when it held that an appellant's "acts of terrorism," even though not themselves crimes of violence, were sufficient to prove a threat "to commit future acts of physical violence." *Murphy*, 545 N.W.2d at 916. In doing so, the supreme court reasoned that section 609.713 is "designed to deter and punish" both "the future act threatened, as well as the underlying act constituting the threat." *Id.* (affirming terroristic-threats conviction for leaving dead animals on victims' property because it "conveys a threat to injure, kill, or commit some other future crime against the person"). This court has also affirmed threats-of-violence convictions based on contingent statements. *See, e.g., Smith*, 825 N.W.2d at 136 (affirming terroristic-threats conviction where appellant threatened to assault his cousin with a knife "if he did not comply with his demand for money"); *Marchand*, 410 N.W.2d at 915 (affirming terroristic-threats conviction where appellant threatened to run a tow-truck operator's wife "right off the road" if he ever sees her "on the road" even though the record established "he did not have a car and she was not traveling on a road" at the time of the threat). Based on this caselaw, we reject Rezac's claim that a threat contingent on "factors coming to fruition" fails to satisfy the statutory standard.

Rezac cites *C.G.M., II v. Juvenile Officer* to support his argument that there are "too many conditions precedent" for his post to be a true threat. 258 S.W.3d 879, 880 (Mo. Ct. App. 2008). We are not persuaded because the case is not analogous. In *C.G.M.*, the Missouri Court of Appeals reversed appellant's adjudication based on his question to another teenage student whether the student "wanted to help him blow up the school" if he got dynamite from his dad for his birthday. *Id.* at 883. The appellate court found the evidence insufficient as a matter of law, in part, because "a statement that a juvenile would be receiving dynamite from his parent for his birthday alone makes the listener question whether the speaker is making a serious expression to cause an incident involving danger to life." *Id.* Also, the record established that the student hearing the comment did not report it to anyone for months, and those who learned of the comment did not believe an immediate danger existed. *Id.* at 880, 883.

In contrast, Rezac's post was public and immediately read by MeetMe staff and police. Unlike in *C.G.M.*, those who read Rezac's post believed it was a credible threat and responded swiftly. Also, a subsequent Missouri Supreme Court case considered circumstances more similar to Rezac's case and found them sufficient to support a terroristic-threats adjudication. *See D.C.M. v. Pemiscot Cty. Juvenile Office*, 578 S.W.3d 776, 787 (Mo. 2019) (rejecting sufficiency challenge where those who heard appellant say he felt "like blowing the school up" immediately reported it or testified they were scared).[4]

[4] In supplemental authority submitted by letter the day before oral argument, Rezac cites two cases from other jurisdictions, neither of which is persuasive. First, in *State v. Metzinger*, the Missouri Court of Appeals affirmed that respondent's tweets referencing a "pressure cooker" were not a threat as a matter of law because they were made in the

In summary, the conditions included in Rezac's post—finding and losing a soul mate—explain that his motive for making the threat was despair or rejection. Rezac's post did not state whether he is in a romantic relationship or already has a "soul mate." It was not until he was questioned by police that Rezac clarified he does not "have a soul mate and [he does not] intend to have one." And Rezac agreed that, without clarifying information, a reader of his post would not know that he did not intend to harm anyone. We conclude that while the contingencies in Rezac's post are relevant context, the contingencies do not mean it is not a threat as a matter of law.

B. Particular victim

Rezac next argues that the state "was required to prove beyond a reasonable doubt" that he "made a threat with the purpose to terrorize an intended victim." The threats-of-violence statute criminalizes threats that are done *either* with the intent to "terrorize *another*" *or* "in reckless disregard of causing such terror." Minn. Stat. § 609.713, subd. 1 (emphasis added). The statute does not provide that "another" must be a particular victim, and Rezac cites no Minnesota caselaw adopting a "particular victim" requirement.[5]

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context of a sports rivalry and did not suggest an intent to commit violence. 456 S.W.3d 84, 97 (Mo. Ct. App. 2015). Rezac's post threatens to kill "at least 20 people" and himself. Second, *State v. Boettger* decided a different issue altogether when it struck down a criminal-threats statute as unconstitutionally overbroad. 450 P.3d 805, 813 (Kan. 2019).

[5] Rezac relies on a New Jersey terroristic-threats case for the proposition that "another" must identify an intended victim. *State v. Tindell*, 10 A.3d 1203, 1218 (N.J. Super. Ct. App. Div. 2011). The New Jersey statute at issue is very similar to Minnesota's threats-of-violence statute. *See id.* at 1217. But *Tindell* did not hold that the state must prove a defendant targeted a specific victim and instead comments that the state must "in some fashion" identify the "victim of the threat" so that the jury does not reach a "fragmented verdict." *Id.* at 1218. Assuming without deciding that Minnesota law also

Doing so would add words to the statute, which we will not do. *Cf. Murphy*, 545 N.W.2d 909, 914-15 (rejecting argument that terroristic-threats statute requires proof of spoken words because "physical acts alone" can communicate a threat and statutory language does not "limit the statute's scope to the spoken word") (emphasis omitted).

The terroristic-threats statute provides, in the alternative, that the state may prove intent by showing that a defendant made "an objectively threatening statement recklessly." *Bjergum*, 771 N.W.2d at 57. Rezac argues that "he did not recklessly risk the danger that his comment would be communicated to anyone at the mall." In support, Rezac cites *State v. Fischer*, which determined that the evidence was sufficient to show that a defendant's threats to kill his ex-wife and a family friend "would be communicated to the victims or that he recklessly risked the danger that his threats would be so communicated" because he communicated the threats to his in-laws. 354 N.W.2d 29, 34 (Minn. App. 1984), *review denied* (Minn. Dec. 20, 1984). Here, the record includes sufficient evidence that Rezac risked the danger that his post would be communicated to potential victims. The state offered evidence from which the jury could reasonably conclude that Rezac made an objectively threatening statement recklessly by placing it on a public website that was accessible to anyone with an internet connection and would reach potential victims in a mall shooting, including first responders such as local police.

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requires the state to identify a victim in "some fashion," we conclude it satisfied this burden. The record evidence shows that Rezac intended for the public to read his post about killing 20 others and committing suicide, and MeetMe staff and police read his post and responded with concern to "hopefully stop this."

We conclude that Minn. Stat. § 609.713, subd. 1, does not require the state to prove that Rezac intended to terrorize a particular victim based on the language of the statute and because the statute allows the state to satisfy its burden by proving reckless intent.

C. Intent to terrorize another or recklessly cause such terror

Rezac argues that even if the circumstances proved support a hypothesis of guilt, they "also support a rational hypothesis other than guilt." *See Al-Naseer*, 788 N.W.2d at 473-74. Rezac contends that his "intent was merely to provide an example, albeit an awkward one, of how true love does not always solve every problem, and, in fact, can create problems" and that "[h]e provided hyperbole to contradict the original post, not because he intended to terrorize anyone."

Rezac's argument is unpersuasive for two reasons. First, Rezac's alternative hypothesis relies on his own testimony. Rezac testified that his post was in response to someone else's statement about true love solving any problem. But the state disputed this with Rezac's own admissions to police that his post was an "observation" against the idea "that anything mattered [] romantically," he knew his post was a threat, and he wrote it intentionally to have "punch" so "people would notice." In short, Rezac's claim that his post was an abstract comment about true love and not a statement of rejection and despair is contrary to the jury's verdict, based on evidence that the jury rejected, and, therefore, we also reject it. *See Stein*, 776 N.W.2d at 715 (holding that circumstances proved "do not include every circumstance as to which there may be some testimony in the case, but only such circumstances as the jury finds proved by the evidence" (quotation omitted)); *see also Harris*, 895 N.W.2d at 600.

Second, even if we assume that Rezac had no intent to terrorize another, Rezac's theory is not a reasonable alternative hypothesis. The threats-of-violence statute provides that the state may satisfy its burden by proving an alternative mens rea, *i.e.*, that Rezac uttered "an objectively threatening statement recklessly." *Bjergum*, 771 N.W.2d at 57. The reaction of MeetMe staff and police was circumstantial evidence of Rezac's reckless intent. *See Marchand*, 410 N.W.2d at 915. And Rezac admitted that he knew his post was threatening "without clarification" and that he did not provide clarification until he spoke to police.

Because the circumstances proved are inconsistent with any rational hypothesis other than guilt, we conclude that the evidence was sufficient to support Rezac's conviction of threatening to commit a crime of violence.

II. The district court did not err by denying Rezac's motion to suppress evidence.

Rezac argues that the evidence law enforcement obtained from his "private accounts" with MeetMe and the wireless company was an illegal search under the Fourth Amendment because officers did not have a warrant. The state argues that there was no Fourth Amendment search because "Rezac had no reasonable expectation of privacy in information held by MeetMe or his internet service provider." The state also contends that if a search occurred, there were exigent circumstances excusing the warrant requirement.

The Fourth Amendment ensures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Generally, the Fourth Amendment requires that law enforcement obtain a warrant before conducting a search, or that an exception to the warrant requirement

applies. *See Ries v. State*, 920 N.W.2d 620, 627 (Minn. 2018). "When the question is whether the Fourth Amendment has been violated, we review [t]he district court's factual findings . . . under the clearly erroneous standard, but we review the district court's legal determinations de novo." *State v. McDonald-Richards*, 840 N.W.2d 9, 15 (Minn. 2013).

First, we briefly consider whether a search occurred. "[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 31, 121 S. Ct. 2038, 2042 (2001). "[W]hether or not a Fourth Amendment 'search' has occurred" is a threshold question. *Id.* The district court did not consider this threshold question and the state raises the issue for the first time on appeal. We generally will not consider matters not argued to and considered by the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Thus, we decline to consider whether a search occurred here; rather, we assume without deciding that a Fourth Amendment search occurred.[6]

Second, we consider whether police conducted a warrantless search in violation of the constitution. "A warrantless arrest by police in a home or similar area in which a suspect has a privacy interest is per se unreasonable unless exigent circumstances exist." *State v. Gray*, 456 N.W.2d 251, 255-56 (Minn. 1990). To justify a warrantless search that intrudes

[6] We observe, however, that the Eighth Circuit has determined that a person has "no reasonable expectation of privacy in the subscriber information" voluntarily provided to an ISP and therefore held that the Fourth Amendment does not require a warrant for police to obtain this information. *United States v. Wheelock*, 772 F.3d 825, 829 (8th Cir. 2014); *see also United State v. Perrine*, 518 F.3d 1196, 1204-05 (10th Cir. 2008) ("Every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation.").

upon a person's reasonable expectation of privacy, the state must show (1) consent or probable cause and (2) exigent circumstances. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992).

Probable cause exists when there is "a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985). Exigent circumstances include the protection of human life, *Gray*, 456 N.W.2d at 256, and are determined by looking at the totality of the circumstances. *State v. Horst*, 880 N.W.2d 24, 33-34 (Minn. 2016) (discussing *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552 (2013)). In evaluating the totality of the circumstances, courts consider several factors: "(a) whether a grave or violent offense is involved; (b) whether the suspect is reasonably believed to be armed; (c) whether there is strong probable cause connecting the suspect to the offense; (d) whether police have strong reason to believe the suspect is on the premises; (e) whether it is likely the suspect will escape if not swiftly apprehended; and (f) whether peaceable entry was made." *In re B.R.K.*, 658 N.W.2d 565, 579 (Minn. 2003) (citation omitted).[7]

"The exigent circumstances analysis requires an objective evaluation of the facts reasonably available to the officer *at the time of the search*." *State v. Stavish*, 868 N.W.2d 670, 675 (Minn. 2015) (emphasis added). A warrantless search must be "strictly circumscribed by the exigencies which justify its initiation." *Mincey v. Arizona*,

[7] The state urges us to conduct a single-factor exigency analysis to determine whether one consideration alone justified obtaining Rezac's information from MeetMe and the ISP. We understand *McNeely* to hold that a single factor *may* support an exigency, but "it does not do so categorically." 569 U.S. at 156, 133 S. Ct. at 1563.

437 U.S. 385, 393, 98 S. Ct. 2408, 2413 (1978) (quoting *Terry v. Ohio*, 392 U.S. 1, 25–26, 88 S. Ct. 1868, 1882 (1968)). A search based on exigent circumstances must be "limited to the scope of the emergency." *State v. Lemieux*, 726 N.W.2d 783, 790 (Minn. 2007).

The district court concluded that probable cause supported the search because Rezac's IP address connected him to the post, which threatened to commit a crime of violence. The district court also found that exigent circumstances excused the warrant based on the totality of the circumstances. On appeal, Rezac does not argue that officers lacked probable cause and concedes that officers were justified in "investigat[ing] the comment reported by MeetMe."

Rather, Rezac contends that no exigent circumstance existed because his post did not "suggest[] that he already had a soulmate" or had seduced one. But police did not learn whether Rezac was in a romantic relationship until *after* they interviewed him. And we must consider the facts known to officers *at the time* they obtained information from MeetMe. *See Stavish*, 868 N.W.2d at 675. The known facts established several of the totality factors including that Rezac lived in St. Cloud, he threatened mass murder and suicide at a mall, his post implied he had access to firearms, and the only mall in St. Cloud had been the site of a mass-stabbing incident eighteen months earlier.

Moreover, police testified that obtaining information by warrant from social media would "take months." Also, police limited their request to obtaining Rezac's IP address from MeetMe and his name and street address from the ISP. Once at Rezac's address, police obtained consent to enter the group home. Based on the limited nature of the intrusion, which was no more than what was required to locate Rezac, and based on the

"facts reasonably available" to the officers at the time they requested Rezac's information, we conclude that the district court did not err in determining that the search was supported by exigency under the totality of the circumstances. *Lemieux*, 726 N.W.2d at 790 (holding that a search based on exigent circumstance of emergency aid must be "limited to the scope of the emergency").

We affirm Rezac's conviction of threatening to commit a crime of violence because the evidence was sufficient to support the jury's guilty verdict. We also affirm the district court's determination that, assuming a search occurred, exigent circumstances applied to excuse the warrant requirement when police obtained Rezac's IP address, name, and street address from third parties.

Affirmed.

WORKE, Judge (dissenting)

I respectfully dissent. I would reverse Rezac's conviction outright because there is insufficient evidence showing that he is guilty of committing a threats-of-violence offense. I reach this conclusion notwithstanding the fact that evidence may have been seized in a constitutional warrantless search. I therefore decline to address Rezac's suppression argument.

As an initial matter, I acknowledge that, on appeal, Rezac did not raise the issue of whether the context surrounding his message is sufficient to support his conviction. However, it is this court's responsibility to decide cases in accordance with the law despite counsel's oversights or failure to brief an issue. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990).

It is important to first consider the nature of the social-media forum in which Rezac's message was posted. MeetMe[1] is a business headquartered in Pennsylvania. According to MeetMe's website, "[a] sense of belonging isn't optional – it completes us. Every aspect of human life is enhanced by meeting great new people – whether as a casual, fun encounter, a lasting romance, or any of the infinite ways people choose to come together." http://www.themeetgroup.com. Part of MeetMe's business involves a social-networking website that allows users to create profiles and to post on message boards. A user can anonymously speak or respond to others when posting on MeetMe's message boards. In this case, Rezac created a pseudonymous profile that identified himself as

[1] MeetMe was rebranded to The Meet Group.

"Corvo Volker," and on March 6, 2018, Corvo Volker posted a "dark" comment on a message board.[2]

The question we are presented with is whether there was sufficient evidence to prove that Rezac's comment constituted a true threat under Minn. Stat. § 609.713, subd. 1 (2016). This determination requires consideration of both the context of Rezac's comment, as well as his intent. Rezac maintains that his comment was in response to a discussion about true love being able to solve any problem. My review of the record indicates that there is no record evidence to dispute this. No evidence was presented to show what post(s) preceded Rezac's comment and, equally important, what response, if any, appeared following that of Rezac's. In fact, other than Rezac's testimony, the evidence centers on the police investigation and tactics rather than the context of the comment within the internet discussion.

The investigation leading to the charge against Rezac ensued after St. Cloud police were contacted by MeetMe's legal department.[3] MeetMe reiterated the post and informed law enforcement that the author was Corvo Volker from St. Cloud and that he was 23 years of age. When no individual could be located with that name, law enforcement requested

[2] I would point out that my position in no way condones Rezac's message, which in my view is socially unacceptable regardless of the context.

[3] The majority characterizes MeetMe's legal department as being "concerned" about Rezac's post. However, this "concern" likely stemmed primarily from MeetMe's liability, rather than concern for any specific citizens.

additional information from MeetMe. MeetMe provided the author's IP address, which eventually led officers to Rezac's street address.[4]

After Rezac was Mirandized, he readily admitted to posting the comment, explaining that it was in response to a discussion regarding love conquering all. He stated that "shoot[ing] up a mall . . . would be a horrible thing to do," and that he posted so that his comment "would have some punch . . . against . . . the idea that anything mattered . . . romantically." Rezac stated that he was not looking to hurt anyone. He also said that he was annoyed that he was wasting law enforcement's time because he is not the type of person who would commit that type of violence. Instead, he was trying to make an observation about people who do exhibit that type of behavior. The time that elapsed between officers learning about the comment and the completion of the interview with Rezac was approximately two hours. Rezac was charged, and the matter proceeded to a jury trial.

The Minnesota Supreme Court has established the meaning of a "threat" in the threats-of-violence statute: "the question of whether a given statement is a threat *turns* on whether the *communication in its context* would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *State v. Schweppe*, 237 N.W.2d 609, 613 (Minn. 1975) (emphasis added) (quotation omitted). "The test of whether words or phrases are harmless or threatening is *the context in which they are used*." *Id.*

[4] Before law enforcement's request, MeetMe did not know whether the author was actually in St. Cloud, Minnesota. More importantly, MeetMe and law enforcement had no information regarding the location of "a mall," as referenced in Rezac's comment.

(emphasis added); *see also State v. Bjergum*, 771 N.W.2d 53, 56 (Minn. App. 2009) ("[T]he statement, 'I am going to kill you' is objectively a threat to commit homicide, but the *context may establish something else*. Although the context might convey an actual intent to kill, it also may indicate anger, or frustration without an intent to kill, or even humor.") (emphasis added), *review denied* (Minn. Nov. 17, 2009).

The state had the burden to prove that Rezac's "communication in its context" would make a reasonable person believe that Rezac would shoot up a mall. *Schweppe*, 273 N.W.2d at 613. But the record here only consists of Rezac's isolated post, which begins with: "No. You cannot tell me what to do." It is unknown what Rezac is responding to; the record contains no prior post, or any response to Rezac's post. Rezac testified that he visited chat rooms and websites to discuss topics, and on March 6 he was doing just that, "looking for a discussion that [he] would find interesting." Rezac testified that he did not know anyone on the site. He testified that, to his knowledge, no one complained about or responded to his post. Rezac also testified that his comment was intended as an example of how true love could be a catalyst to a problem and that he thought about his grandfather who "committed suicide the day before his divorce. . . . as a real life example where true love was actually very detrimental."

Focusing solely on Rezac's statement, "I shoot up a mall killing at least 20 people and killing myself" ignores all of the circumstances and events that Rezac also wrote must first come to fruition before the mall occurrence could even happen. First, he had to find a soul mate; second, he had to successfully seduce her; and third, he had to treat her so cruelly that she would leave him. Only when she was gone and he was still "bonded to

her" would Rezac "shoot up a mall." A full reading of the comment shows that there are too many conditions precedent that have to come to fruition before Rezac's comment could be considered a true threat. *See, e.g.*, *In re C.G.M., II v. Juvenile Officer*, 258 S.W.3d 879, 880, 883 (Mo. Ct. App. 2008). The record before us fails to contain any of the comment's *context*. In fact, the only context for Rezac's statement comes from his Mirandized statement and testimony at trial.

The United States Supreme Court has focused on three factors that are to be considered in determining the existence of a true threat: 1) the context of the statement, 2) whether the statement is conditional, and 3) the reaction of the listeners. *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 1402 (1969); *see also D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 764 (8th Cir. 2011). The first two factors have not been demonstrated. It is unclear to the reader as to how the written context of the message supports the categorization of Rezac's statement as a true threat. Further, the myriad of Rezac's conditional factors cannot support the categorization of Rezac's statement as a true threat.

The third factor considers the reaction of a listener who is "familiar with the context of the communication." *See United States v. Floyd*, 458 F.3d 844, 849 (8th Cir. 2006). But the record shows that the only people who viewed the comment are staff at MeetMe and the responding police officers. The staff's reaction was to disclose the comment to law enforcement. Law enforcement's reaction was to detain and arrest Rezac. There was no evidence that anyone else read or responded to the message. Additionally, there was no testimony by anyone from MeetMe about any "concern" created by the comment or what

preceded or followed the comment. Without knowing how people familiar with the context of the discussion understood or reacted to Rezac's comment, the third factor also fails to support a determination that Rezac's comment constituted a true threat.

In my opinion, the state failed to provide sufficient evidence to prove that Rezac commented "with purpose to terrorize another" or "in a reckless disregard of the risk of causing such terror." *See* Minn. Stat. § 609.713, subd. 1. The state did not present evidence of any person who was terrorized. There was no evidence that anyone read the comment other than the staff at MeetMe, who were monitoring the website, or the investigating St. Cloud police officers. Because the state failed to provide any evidence of whom was to be terrorized, the jury was left to speculate. If there was no evidence that anyone was aware of or even read Rezac's comment, how can it be determined that terror may be inflicted?[5]

Social-media forums are double-edged swords. They can provide a manner to heighten awareness, or spark energetic discussions about topics that are passionate in nature. But by their very nature, social-media forums allow a speaker to remain anonymous, post hateful messages, or say things in the heat of the moment that "are ill-considered, thoughtless, hyperbolic, and often forgotten by both the speaker and the audience within moments." *See* Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I [redacted]U: Considering the Context of Online Threats*, 106 CALIF. L. REV. 1885, 1907 (2018). In addition, "[m]ost social media, however, create a record of such thoughtless speech that

[5] This question reminds one of the age-old expression: "If a tree falls in a forest and no one is around to hear it, does it make a sound?"

can take on an entirely different meaning when read or viewed later." *Id.* Further, misunderstanding can readily occur from "lack of tonal and other nonverbal cues that signal sarcasm, jests, or hyperbole in oral communications." *See id.* In my view, there is no such record of Rezac's comment in this case. Therefore, the state failed to prove that Rezac's comment constituted a threat of violence.