No.

IN THE

SUPREME COURT OF THE UNITED STATES

RORY JOHN SWENSON, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May speech that does not contain any expression of an intent to commit an act of unlawful violence be criminalized as a "true threat" unprotected by the First Amendment simply because the listener finds the speech disturbing ?

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The petitioner, Rory John Swenson, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the Illinois Supreme Court is reported at *People v. Swenson,* 2020 IL 124688. A copy of the opinion is attached as Appendix A.

JURISDICTION

On June 18, 2020, the Illinois Supreme Court issued an opinion. No petition for rehearing was filed. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

"No State shall...deprive any person of life, liberty, or property, without due process of law...."

Section 5/26-1(a)(1) of the Illinois Criminal Code [720 ILCS 5/26-1(a)(1) (2015)] provides:

"(a) A person commits disorderly conduct when he or she knowingly:

(1) Does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace;"

STATEMENT OF THE CASE

The petitioner, Rory Swenson, was charged with attempted disorderly conduct, a Class A misdemeanor, for attempting to transmit a threat against persons at Keith Country Day School. (C. 11-13) The information also charged Swenson with telephone harassment, a Class B misdemeanor, for calling the director of admissions at Keith School, and disorderly conduct, a Class C misdemeanor, for acting unreasonably during a phone call with the director of admissions which alarmed and disturbed her and caused a breach of the peace. (C. 11-13)

Mr. Swenson waived his right to a jury trial. (C. 33) A bench trial was held on October 4, 2016. (R. 54-135)

At that trial, the State called Michael Clark, an officer with the City of Rockford, Illinois. (R. 59) Ofc. Clark testified that, on December 7, 2015, he was dispatched to a home on Flintridge Court in Rockford to speak to Rory Swenson about a phone call he had made to Keith Country Day School. (R. 60) Ofc. Clark was given the phone number that had made the call to the school. (R. 63) When Ofc. Clark was outside of the Flintridge address, he called that number. (R. 63) There was no answer but, about one minute later, Mr. Swenson came outside to speak to Ofc. Clark. (R. 63) Ofc. Clark patted Mr. Swenson down and found no weapons on him. (R. 64) Mr. Swenson admitted that he had called Keith School and stated he had called only to ask about security at the school. (R. 64) Ofc. Clark asked Mr. Swenson to sit in his squad car and he complied. (R. 64) Ofc. Clark later informed Mr. Swenson that he was under arrest. (R. 64) Mr. Swenson was cooperative with Ofc. Clark throughout the interaction. (R. 66) After he arrested Mr. Swenson, Ofc. Clark went into Mr. Swenson's apartment to retrieve Mr.

Swenson's seven-year-old son. (R. 67) While inside the apartment, Ofc. Clark did not see any weapons. (R. 68)

Monica Krysztopa testified that she handles admissions at Keith Country Day School in Rockford. (R. 71) On December 7, 2015, she received a voicemail on her office phone from a man named Rory who stated he was interested in enrolling his son in the school. (R. 72) The man left a number to call him back. (R. 72) Ms. Krysztopa called the man back and spoke to him about enrolling his son at Keith School. (R. 73) The man identified himself as Rory Swenson. (R. 75) He stated his son was in second grade and was attending public school. (R. 76)

Mr. Swenson then asked a series of questions about school security and school shootings. (R. 76) He wanted to know how prepared the school would be if he or anyone else arrived on campus with a gun. (R. 76) Mr. Swenson asked numerous questions, including whether the school has bulletproof glass, where faculty members would stand if there is a lockdown, if they are armed, and how they would defend themselves. (R. 76) He mentioned the recent shooting in San Bernadino and asked Ms. Krysztopa if Keith School was prepared if something like that happened on their campus that day. (R. 78) He then asked Ms. Krysztopa if she was prepared to have the "sacrificial blood" of the lambs of her school on her hands if something bad were to happen. (R. 78) Ms. Krysztopa testified she took that statement as asking if she was prepared to have it on her soul if something happened. (R. 78)

Although Mr. Swenson spoke about guns during the call, Ms. Krysztopa testified he never stated he had a gun. (R. 81) Mr. Swenson did mention the woods around campus and that he had previously gone to school there. (R. 81) At that point, Ms.

Krysztopa was nervous the person she was speaking to might be on campus and she sent a message to the head of the school saying someone was talking about guns on campus, and asked them to call 9-1-1. (R. 83) The school then went on a "soft lockdown," which meant that the students all had to go into classrooms and be counted. (R. 83) The school was dismissed 15 minutes early that day. (R. 83)

Ms. Krysztopa took notes on her phone call with Mr. Swenson, as she did for all admissions calls. (R. 85) After refreshing her recollection with her notes, Ms. Krysztopa recalled that the defendant asked an odd question; after talking about when children are shot and they lay their heads on their pillows, Mr. Swenson asked what that does for the school and how do we protect them from that. (R.86) He then asked Ms. Kryztopa if she would "sniff the pillow of their innocence." (R. 86) Ms. Krysztopa was alarmed and disturbed by the phone call. (R. 88) However, she acknowledged that Mr. Swenson never stated he was on campus, that he had a gun, or that he was coming to campus with a gun. (R. 90-92) Ms. Krysztopa testified that Mr. Swenson did not make a threat against the school. (R. 94)

After presenting these witnesses, the State rested. (R. 103) The defense made a motion for a directed finding. (R. 103) The trial court granted the defense motion as to Count 2, telephone harassment, on the basis that the conversation took place when Ms. Krysztopa called Mr. Swenson back and Mr. Swenson did not make that phone call. (R. 106) The court denied the motion as to the attempted disorderly conduct and disorderly conduct charges. (R. 106)

Rory Swenson then testified that he has an eight-year-old son named Jonathan and, in December 2015, he was looking into private schools to which to transfer his son

because he was concerned with the lack of security in Rockford public schools. (R. 108) He called Keith Country Day School to inquire about this and received a call back. (R. 109) He did ask questions about the security at Keith, but he did not threaten anyone and he never said that he would bring a gun to campus. (R. 111-112) Mr. Swenson testified that he does not have a firearm owner's identification card and he does not own any firearms. (R. 111-112)

Mr. Swenson acknowledged that he asked if the teachers at Keith School carried firearms. (R. 118) He said he asked this question because Keith is a private school and he thought they may have increased security measures. (R. 118) He also stated he told Ms. Krysztopa that if the school fired some teachers and hired off-duty police officers, the school could reduce casualties in the event of a school shooting. (R. 119) Mr. Swenson denied that he asked Ms. Krysztopa if she was prepared to have "sacrificial blood" on her hands; rather, he was talking to her about his investigation as to why there are not more guns in school and that is when he said: "if the liberal left wants to make me their sacrificial lamb so be it. Then the blood is on their hands next time there is a school shooting in regards to civil ramifications."(R. 120)

The trial court found that there was no attempt on the part of Mr. Swenson to relay a threat to the school, school property, the teachers, or other students at Keith School and therefore, Mr. Swenson was not guilty of attempted disorderly conduct for attempting to transmit a threat against a school. (R. 132) The trial court further found that while there was no threat, Mr. Swenson's statements were unreasonable and found him guilty of disorderly conduct under 720 ILCS 5/26-1(a)(1). (R. 132)

The case proceeded to sentencing immediately after the trial was completed. (R.

135) Mr. Swenson was sentenced to 12 months probation and four days in jail with credit for jail time he had already served. (C. 46, R. 141-143)

Mr. Swenson filed a motion for a new trial on October 28, 2016. (C. 49) That motion alleged that the State failed to prove him guilty beyond a reasonable doubt and that the verdict in the case was contrary to the law. (C. 49) Following the denial of the motion, Mr. Swenson appealed. (C. 52)

On appeal, Mr. Swenson argued that he was not proven guilty of disorderly conduct beyond a reasonable doubt because the State failed to prove he acted knowingly to cause a breach of the peace. *People v. Swenson,* 2019 IL App (2d) 160960, ¶¶ 17-19. Specifically, Mr. Swenson argued that, because he engaged in a telephone conversation with Ms. Krysztopa in which he merely inquired about security at the school, and did not raise his voice or make threats, there was no evidence he knew or should have known his conduct would cause a breach of the peace. *Swenson,* 2019 IL App (2d) 160960 ¶¶ at 19-23. The appellate court found that, because Mr. Swenson's comments were "morbid" and "innappropriate" to the goal of learning about the school's security, he should have known his conversation would disturb Ms. Krysztopa and cause a breach of the peace. *Swenson,* 2019 IL App (2d) 160960 ¶ 24.

Mr. Swenson further argued on appeal that, because his only conduct was speech which was not lewd, profane, obscene, libelous, or threatening and was not "fighting words," his conduct was protected by the First Amendment, such that the disorderly conduct statute cannot be read as criminalizing it. *Swenson,* 2019 IL App (2d) 160960 ¶ 24. The appellate court found that, although Mr. Swenson could reasonably inquire about school security, because his manner of inquiry was not reasonable in that it was

"disturbing" and "morbid," his conduct was not constitutionally protected. *Swenson,* 2019 IL App (2d) 160960 ¶ 27.

The Illinois Supreme Court granted Mr. Swenson's petition for leave to appeal. On appeal to the Illinois Supreme Court, Mr. Swenson argued that his statements and questions during the telephone conversation constituted speech which was protected by the First Amendment. *People v. Swenson,* 2020 IL 124688, ¶ 16. A five-justice majority of the Illinois Supreme Court disagreed. *Swenson,* 2020 IL 124688 at ¶ 30. The court found that because Mr. Swenson pointed out "inadequacies in the security measures [the school] had taken had taken by presenting graphic hypothetical scenarios," his speech constituted a "true threat" as defined by this Court in *Virginia v. Black,* 538 US 343, 359-60 (2003). *Swenson,* 2020 IL 124688 at ¶ 30.

The majority also found that to make a "true threat" a defendant must act with either "specific intent or a knowing mental state." *Swenson,* 2020 IL 124688 at ¶ 30. Based on this Court's decision in *Elonis v. United States,* 575 US 723 (2015), the majority stated it needed to consider the effect on the listener in evaluating whether a statement was a "true threat.". *Swenson,* 2020 IL 124688 at ¶ 30. The court found that Mr. Swenson's questions regarding school security alarmed and disturbed Ms. Krysztopa and "the only way she would have been alarmed and disturbed is if she perceived [Mr. Swenson's] questions and statements as a threat to the school's safety." *Swenson,* 2020 IL 124688 at ¶ 31. Therefore, the majority found that the speech fell under the category of "true threats" which are unprotected under the First Amendment. *Swenson,* 2020 IL 124688 at ¶ 32.

Two justices dissented from this opinion. The dissent pointed out that the

majority ignored both the context of Mr. Swenson's communication, which was an inquiry about enrolling his son in the school, as well as the content of his speech, which was all hypothetical in nature. *Swenson,* 2020 IL 124688 at ¶ 47. Further, the dissent noted that the testimony of Ms. Krysztopa herself refuted that Mr. Swenson's conversation contained any threats. *Swenson,* 2020 IL 124688 at ¶ 46. The dissent opined that "the majority has allowed the State to use the disorderly conduct statute to criminalize [Mr. Swenson's] speech because [the school administrator] was alarmed or disturbed by his speech" and that, in doing so, "the majority has effectively eliminated the well-settled requirement that a 'true threat' include a serious expression of an intent to commit an act of unlawful violence." *Swenson,* 2020 IL 124688 at ¶ 52 citing *Black*, 538 U.S. at 359.

REASONS FOR GRANTING CERTIORARI

Rory Swenson was charged with disorderly conduct based on an allegation he made statements and asked questions during a phone call which alarmed and disturbed Ms. Krysztopa, director of admissions at Keith Country Day School in Rockford, Illinois, and caused a breach of the peace. (C. 11-13) Despite the trial court's finding that Mr. Swenson made no threats during that phone call, he was convicted on the basis that the content of his conversation was "unreasonable." (R. 132) Likewise, the Second District of the Illinois Appellate Court upheld Mr. Swenson's conviction without finding that his statements in the phone conversation constituted threats or any other unprotected type of speech because, the court said, although his concerns about school security may have been reasonable, his manner of inquiry was not. *People v. Swenson,* 2019 IL App (2d) 160960 ¶ 27.

After reviewing the case, the Illinois Supreme Court, contrary to both the trial and appellate courts, held that Mr. Swenson's questions and statements during the phone call did constitute a "true threat" as defined by this Court in *Virginia v. Black,* 538 U.S. 343, 359-60 (2003), because by pointing out inadequacies in the school's security and posing questions Mr. Swenson "communicated to the listener a 'serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.'" *People v. Swenson,* 2020 IL 124688, ¶ 30, quoting *Black* 538 U.S. at 359. The court reached that conclusion despite its own recognition that Ms. Krysztopa testified Mr. Swenson did not make any immediate threats during their conversation. *Swenson,* 2020 IL 124688 at ¶ 9. Further, the Illinois Supreme Court found that, pursuant to this Court's holding in *Elonis v. United States,* 575 U.S. 723

(2015), it needed to consider the effect of the speech on the listener. *Swenson,* 2020 IL 124688 at ¶ 27. The court then found there was sufficient evidence that Mr. Swenson knew his conversation would be taken as a threat simply because he was calling a school during the school day and Ms. Krysztopa was frightened by his statements. *Swenson,* 2020 IL 124688 at ¶ ¶ 30-31.

This Court should review the Illinois Supreme Court's opinion because it interprets Illinois' disorderly conduct statute in a manner that criminalizes speech in direct contravention of this Court's jurisprudence with respect to the First Amendment to the United States Constitution. U.S. Const. Amend I; *Virginia v. Black,* 538 U.S. 343, 358-59 (2003); *R.A.V. v. City of St. Paul,* 505 U.S. 377, 391 (1992). Illinois has expanded the recognized definition of "true threats" to include any speech that is disturbing to the listener. Further, the Illinois Supreme Court's opinion erroneously creates a negligence standard where criminal liability for a statement is based only on the effect on the listener without reference to the defendant's mental state. For both these reasons, this Court should grant review.

I. The Illinois Supreme Court has expanded the definition of "true threats," a narrow category of speech unprotected by the First Amendment, to criminalize non-threatening speech that disturbs the listener. This Court should grant review to protect the First Amendment rights of Illinois citizens and reaffirm its holding from *Virginia v. Black,* that "true threats" are limited to those statements where the "speaker means to communicate a serious expression of an intent to commit an act of unlawful violence."

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union,* 535 U.S. 564, 573 (2002)(internal quotation marks omitted). Because Illinois' disorderly conduct statute is being used in

this case to punish conduct which is purely speech, the statute must be interpreted in accordance with the First Amendment to the United States Constitution. U.S. Const. Amends. I, XIV; *Cohen v. California,* 403 U.S. 15, 18 (1971).

The First Amendment, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I; U.S. Const. Amend. XIV; *R.A.V.,* 505 U.S. at 377. This Court has interpreted the First Amendment as prohibiting criminalizing all but six categories of speech. *Virginia v. Black,* 538 U.S. at 359; *Beauharnais v. Illinois,* 343 U.S. 250, 255-56 (1952). The only categories of speech that can be criminalized consistent with the First Amendment are speech that is lewd, profane, obscene, libelous, fighting words, or a true threat. *Black,* 538 U.S. at 359; *Beauharnais,* 343 U.S. at 255-56.

This Court has held 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." *Black,* 538 U.S. at 359 (2003). Political hyperbole does not fall into the category of "true threats." *Watts v. United States,* 394 U.S. 705, 708 (1969).

Despite recognizing that the testimony of the school administrator in this case was that Mr. Swenson made no threats to her or the school, the Illinois Supreme Court found that Mr. Swenson's questions and statements during the phone call constituted a "true threat" as defined by this Court in *Black. Swenson,* 2020 IL 124688 at ¶¶ 9, 30. Specifically, the majority opinion found that because Mr. Swenson pointed out "inadequacies in the security measures [the school] had taken had taken by presenting graphic hypothetical scenarios," his speech communicated a "serious expression of an

intent to commit an act of unlawful violence to a particular individual or group of individuals." *Swenson,* 2020 IL 124688 at ¶ 30, quoting *Black,* 538 U.S. at 359-60. This finding is directly contradicted by its own factual recitation that acknowledges Mr. Swenson made no threats but only asked questions and posed hypothetical scenarios about school safety. *Swenson,* 2020 IL 124688 at ¶ 20. The Illinois Supreme Court used the language of this Court in *Black* while completely ignoring its meaning.

Here, there was no "serious expression of an intent to commit an act of unlawful violence." The trial court specifically found that Mr. Swenson did not make any threats and did not intend to threaten the school. *Swenson,* 2020 IL 124688 at ¶ 30. Based on the evidence presented, the trial court was correct. Mr. Swenson's conversation with Ms. Krysztopa was not threatening. Indeed, Krysztopa herself recognized in her testimony that Mr. Swenson was not making any threats. (R. 90-92, 94); *Swenson,* 2020 IL 124688 at ¶ 9. Yet, Mr. Swenson was convicted of disorderly conduct because he had a conversation with Ms. Krysztopa about the security at Keith School during which he inquired about the security protocols at the school and made statements about appropriate measures to prevent school shootings. (C.13; R. 76-92) Although the idea of a school shooting may be upsetting, it is clear from all the evidence that Mr. Swenson was making an inquiry about the school's policies and potential response to a school shooting to inform his decision as to whether to enroll his son there and was expressing displeasure that the school did not have stricter security measures or armed guards to protect the children.

As the dissent in this case recognized, a "review of Krysztopa's testimony demonstrates that defendant never said that he intended to do anything at all."

Swenson, 2020 IL 124688 at ¶ 48 (Neville, J., dissenting). Further, the dissent recognized that Mr. Swenson, "a single father of a school-age child, expressed his concerns about school safety and the security protocols in place in public schools that were, in his view, inadequate to protect the students." *Swenson,* 2020 IL 124688 at ¶ 48. Finally, "[w]hile [Mr. Swenson's] questions and comments may be seen as excessive and troubling, they do not contain the requisite elements of a true threat." *Swenson,* 2020 IL 124688 at ¶ 49.

In its opinion, the majority does not identify any statement made by Mr. Swenson that threatened an act of violence against Ms. Krysztopa or the school. Rather, the majority concluded that because Mr. Swenson "pointed out what he perceived to be inadequacies in the security measures [the school] had taken," his statements "communicated to [Ms. Krysztopa] a 'serious expression of an intent to commit unlawful violence to a particular individual or group of individuals.'" *Swenson,* 2020 IL 124688 at ¶30, quoting *Black,* 538 US at 359-60. The court found that Mr. Swenson made a true threat, because he "conveyed his opinion about the insufficiency of [the school's security] measures by frightening Krysztopa." *Swenson,* 2020 IL 124688 at ¶30.

In reaching its conclusion, the Illinois Supreme Court has expanded the definition of a "true threat" from a "serious expression of an intent to commit an act of unlawful violence" to any discussion about a sensitive subject that alarms and disturbs someone. The court's focus on the effect on the listener as the primary factor in interpreting a threat disregards this Court's holding in *Black* and results in a holding that contravenes the First Amendment. In *Black*, this Court found that the intent to threaten was essential to separating protected from unprotected speech. *Black*, 538 U.S.

at 365. This Court emphasized that intent to threaten is necessary because the very same act "may mean that a person is engaging in constitutionally proscribable intimidation [or] only that the person is engaged in core political speech." *Black*, 538 U.S. at 365. Here, the fact that Mr. Swenson was expressing his opinions and concerns about the security at a school where he wished to enroll his son makes it clear he was not making a "true threat" but was in fact engaging in speech protected by the First Amendment.

The Illinois Supreme Court's opinion in this case stands in direct contradiction to this Court's jurisprudence concerning the "true threats" exception to First Amendment protection. Under that opinion, any citizen of Illinois can be convicted of disorderly conduct simply for engaging in a conversation that disturbs the other party. As the dissent, observed, "[a]bsent a serious expression of an intent to commit an act of unlawful violence, however, even the most passionate speech cannot be criminalized as a true threat without violating the [F]irst [A]mendment." *Swenson,* 2020 IL 124688 at ¶51, citing *Black* 538 U.S. 359. This Court should grant review to reaffirm its holding in *Black* and clarify that states cannot criminalize speech merely because it makes its listener uncomfortable.

II. Additionally, this Court should grant review because the Illinois Supreme Court's holding allows for a criminal conviction based only on communications made with a negligent state of mind, a standard which offends the First Amendment.

As this Court observed, "'[h]aving [criminal] liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—'reduces culpability on the all-important element of the crime to

negligence.'" *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2011 (2015), quoting *United States v. Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012)(abrogated on other grounds). Despite there being no evidence that Mr. Swenson had any knowledge that his conversation would be taken as a threat in this case, the Illinois Supreme Court erroneously found that evidence of Ms. Krysztopa's reaction to the conversation alone was sufficient to impose criminal liability for Mr. Swenson's speech. The Illinois Supreme Court's holding reduces the mental state to negligence, which is inconsistent both with the "knowing" standard needed for criminal liability and the First Amendment protection of speech.

In *Elonis*, this Court addressed whether the federal ban on making threatening communications, 18 U.S.C § 875(c), included a requirement that the defendant be aware of the threatening nature of the communication and whether, if it did not, the First Amendment nevertheless required such knowledge. *Elonis,* 135 S. Ct. at 2004. In that case, because the statute was silent as to the required mental state, the district court instructed the jury that the defendant had to "intentionally make the statement." *Elonis,* 135 S. Ct. at 2004-07. However, it also instructed the jury that the defendant did not have to intend or know that the communications would be understood by the recipient as threats. *Elonis,* 135 S. Ct. at 2004-07. Instead, the jury was instructed it should convict if it found the statements were such that "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual." *Elonis,* 135 S. Ct. at 2007.

On review, this Court found that the trial court had read a too-weak *mens rea*

into the statute. 135 S. Ct. at 2008-12. The speaker's knowledge that he made the communication was not enough. *Elonis,* 135 S. Ct. at 2011. Where the instruction relied on what a "reasonable person" would foresee as to how the statement would be interpreted by its audience, it set out a mental state of negligence. *Elonis,* 135 S. Ct. at 2011. This Court held that a negligent mental state was an unacceptable option, insufficient "to separate wrongful conduct from otherwise innocent conduct." *Elonis,* 135 S. Ct. at 2010-11.

Your Honors found that, in order for a defendant to be criminally liable for his statements under the statute in question, there must be proof either that he made the communication with the intent to threaten or knew that it would be viewed as a threat. *Elonis* 135 S.Ct. at 2012. Based on the finding that this knowing mental state was required for criminal liability under the statute, this Court found that it did not need to address any First Amendment issues that might arise if the statute were read to allow for liability based on a negligent mental state. *Elonis*, 135 S. Ct. at 2012.

Elonis did not make an express constitutional holding. This Court avoided any First Amendment question by reading a "knowing" mental state into the statute. *Elonis*, 135 S. Ct. at 2012 Nevertheless, *Elonis* provides clear guidance as to the kind of mental state that is required under a penal statute in order to avoid conflict with the First Amendment. *Elonis*, 135 S. Ct. at 2012. This Court expressly found that a mental state of negligence was insufficient for criminal liability under the statute. *Elonis,* 135 S. Ct. at 2011. Further, this Court found proof of either intent to threaten or knowledge the communication would be viewed as a threat obviated any First Amendment concerns. *Elonis*, 135 S. Ct. at 2012.

Here, the Illinois statute at issue did require knowing conduct. 725 ILCS 5/26-1(a)(1)(2015). However, despite recognizing that a "specific intent or a knowing mental state" was required in this case, the Illinois Supreme Court effectively found that a defendant may be convicted of the crime of disorderly conduct based only on the effect his words had on the listener. Despite labeling it a knowing mental state, the Illinois Supreme Court's opinion established a negligence standard which is insufficient for criminal liability and in conflict with the First Amendment.

The Illinois Supreme Court recognized in its opinion that in order to make a true threat, Mr. Swenson must have acted with either a "specific intent or a knowing mental state," which means that he had to be "subjectively aware of the threatening nature of the speech." *Swenson,* 2020 IL 124688 at ¶ 27. The court then stated that while liability for speech cannot be based solely on its effect on the listener, the effect on the listener must be considered. *Swenson,* 2020 IL 124688 at ¶ 27, citing *Elonis v. United* States, 135 S. Ct. at 2011-12. However, despite recognizing that criminal liability for speech cannot be based solely on the effect of that speech on the listener, the court then found that Mr. Swenson's phone conversation was a true threat based only on what it perceived as Ms. Krysztopa's reaction to the conversation.

Here, there was no evidence that Mr. Swenson had any intent to threaten or knew that his statements would be viewed as a threat. In fact, Ms. Krysztopa testified that Mr. Swenson did not make a threat against the school and the trial court found that Mr. Swenson did not intend to threaten the school. *Swenson,* 2020 IL 124688 at ¶29. As acknowledged by the Illinois Supreme Court's opinion, during the telephone conversation Mr. Swenson only asked questions and posed hypothetical scenarios about

school safety. *Swenson,* 2020 IL 124688 at ¶20.

Despite the lack of evidence that showed Mr. Swenson knew his questions and statements would be viewed as a threat, the Illinois Supreme Court found that Mr. Swenson was "subjectively aware of the threatening nature of his speech." *Swenson,* 2020 IL 124688 at ¶ 32. In support of that position, the court asserted the "statements are objectively threatening given the circumstances in which they were made." *Swenson,* 2020 IL 124688 at ¶31. The court opined that because the statements were made to Ms. Krysztopa during the school day in an era when school shootings are a concern, those circumstances made the questions and statements threatening. *Swenson,* 2020 IL 124688 at ¶31. However, this reasoning reduces a knowing mental to a negligent mental state, a mental state which *Elonis* recognized to be incompatible with the First Amendment.

In *Elonis,* the government claimed that the mental state would be satisfied if the defendant knew the words used in and the circumstances surrounding his communication. *Elonis,* 135 S. Ct. at 2011. This Court found that by focusing on the "circumstances known" to the defendant the government was still proposing a negligence standard. *Elonis,* 135 S. Ct. at 2011. Requiring only that the defendant know the contents and context of his communication, and that a reasonable person would have recognized that communication as a genuine threat, reduced criminal liability to a negligence standard. *Elonis,* 135 S. Ct. at 2011. This Court found that such a negligence standard was insufficient because, "wrongdoing must be conscious to be criminal." *Elonis,* 135 S. Ct. at 2011, quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952).

In its opinion, the Illinois Supreme Court erroneously used a negligence standard to establish criminal liability by focusing only on what a reasonable person in Ms. Krysztopa's position would think of Mr. Swenson's statements and questions. Although Ms. Krysztopa testified that Mr. Swenson did not make any threats (R. 94), the majority's opinion emphasized that she was alarmed and disturbed by his statements and questions. *Swenson,* 2020 IL 124688 at ¶ 31. The court stated that "the only way [Krysztopa] would have been alarmed and disturbed is if she perceived [Mr. Swenson's] statements and questions as a threat to the school's safety." *Swenson,* 2020 IL 124688 at ¶ 31. In so holding, the court disregarded both the evidence relating to Mr. Swenson's knowledge and Ms. Krysztopa's actual testimony as to how she perceived the statements to allow for a conviction based on negligence. The majority cemented its belief that Mr. Swenson could be held criminally liable for negligently making statements perceived by others (or more specifically, by the Illinois Supreme Court itself) to be threatening, by stating that Mr. Swenson "knowingly engaged in a series of questions and statements that....he knew or *should have known* would cause alarm to a school administrator." *Swenson,* 2020 IL 124688 at ¶40. (*emphasis* added). "Knew or should have known" is a negligence standard.

It is clear that, despite recognizing that this Court's holding in *Elonis* means liability cannot be based solely on the effect of speech on the listener, the Illinois Supreme Court is allowing for just that. This impermissibly reduces criminal liabilty to a negligence standard. This Court should grant review to prevent criminal convictions based on negligent communications and hold that such a standard is inconsistent with the First Amendment protection of speech.

As the dissent in this case recognized, "the [F]irst [A]mendment broadly protects the rights of all citizens to engage in meaningful discussion and debate on important societal issues, such as the question of whether a school is adequately protecting its students from the dangers of a potential mass shooting." *Swenson,* 2020 IL 124688 at ¶40. In this case, Illinois has expanded the meaning of "true threats" to allow for a criminal conviction based on a non-threatening conversation about a sensitive topic merely because it disturbed the listener. This Court should grant *certorari* in order to protect the First Amendment rights of Illinois citizens and confirm that applying a negligence standard to pure speech contravene the First Amendment.

CONCLUSION

For the foregoing reasons, petitioner, Rory John Swenson, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

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APPENDIX

A

Rec 6/18/2020

2020 IL 124688

IN THE

SUPREME COURT

OF

THE STATE OF ILLINOIS

(Docket No. 124688)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v.
RORY SWENSON, Appellant.

Opinion filed June 18, 2020.

JUSTICE GARMAN delivered the judgment of the court, with opinion.

Chief Justice Anne M. Burke and Justices Karmeier, Theis, and Michael J. Burke concurred in the judgment and opinion.

Justice Neville dissented, with opinion, joined by Justice Kilbride.

OPINION

¶ 1 Defendant Rory Swenson was convicted of disorderly conduct in the circuit court of Winnebago County after a telephone conversation with the advancement director of a private school. In that call, he asked about the school's security measures and spoke extensively about shootings and violence. The conversation

caused a soft lockdown at the school and a police response. We are called on to decide whether defendant's speech was protected by the first amendment to the United States Constitution.

¶ 2 BACKGROUND

¶ 3 On December 7, 2015, defendant placed a call to Keith Country Day School (Keith), a private school in Winnebago County. He left a message for the director of advancement. When she called him back, he asked questions and gave statements about school security, mass shootings, and gun violence. These questions and statements disturbed and alarmed the director, who texted another administrator to call the police and lock down the school. Defendant was arrested and eventually charged with attempted disorderly conduct (720 ILCS 5/8-4(a), 26-1(a)(3.5) (West 2014)), phone harassment (*id.* § 26.5-2(a)(2)), and disorderly conduct (*id.* § 26-1(a)(1)). The case proceeded to a bench trial.

¶ 4 The State called two witnesses. The first was the police officer who was dispatched to defendant's home to investigate the call. He testified that he called defendant, who did not answer but came outside within a minute of the officer's call. He said that defendant admitted calling the school to ask about security. He testified that he arrested defendant for disorderly conduct and placed him in the back of his police cruiser. He agreed that defendant was at all times cooperative and that defendant had also told him that he was trying to get information about the school because he was considering transferring his son there. He stated that, after he arrested defendant, defendant asked him to go into his apartment to get defendant's seven-year-old son, who was inside. He testified that defendant told him, after he asked, that he had no guns in the apartment and that he did not see any in plain view when he entered.

¶ 5 The director of advancement, Monica Krysztopa, testified that she handles admissions, fundamental needs, and alumni relations at Keith. She stated that she had been at the school for a year and a half and that she fielded calls from parents looking to enroll their children at Keith. She testified that she returned to her office to a message from a man named Rory who asked her to return his call regarding admissions at Keith. She called the number left in the voicemail, and the individual who answered identified himself as defendant. Defendant stated that he had a son

that he would be interested in enrolling at Keith. She stated that defendant then "immediately went into a battery of questions about the protocol at our school for handling things that were related to guns and shooting." She testified that he asked such questions as whether the secretary's desk had bulletproof windows and how prepared she would be "if he or anyone *** arrived on our campus with guns." She testified that he also "mentioned *** in passing that the United States was full of socialists and KGB members." He asked if the school followed truancy laws.

¶ 6 Krysztopa stated that defendant mentioned the mass shooting in San Bernardino, which she testified was a week prior to the call. She testified that defendant asked her if she knew the number of shootings or the success rate of shooters once they were on campus. She said that he told her that it would be important for the school to know the success rate when an armed individual was on campus. She stated that he asked her, "[I]s Keith prepared? You know San Bernardino had happened the week prior and were we prepared for that, that day had it happened at our school that day." The statement that stood out most to her was when he asked her if she "was prepared to have the sacrificial blood of the lambs of our school on our, on my hands, if this were to happen and what would I do?" She interpreted that question as asking her if she was prepared to have that blood on her soul or on her person. When asked to say exactly what defendant said about entering the school with a gun himself, as closely as she could, she testified that "[h]e said if he were to show up at the campus with a gun what would be the protocol of our school?" He asked, according to Krysztopa, whether the school gave teachers "PEZ dispensers to defend themselves" and what the students would think "of seeing a gun pointed in their teacher[']s face."

¶ 7 According to Krysztopa, he continued by asking "if teachers were prepared to have a gun in their face" and whether they carried guns. "[H]e talked about a number of guns and their success rate in kill." She stated that he asked her "how long it would take the police to get to Keith School should there be a shooting." Her "impression was, to be perfectly honest, that he was on our campus." She testified that she got that impression based on two specific questions: "the one about me being prepared to have the blood of the sacrificial lambs on my hands that day and if we were prepared to handl[e] something like San Bernardino that day. And he spoke of the woods around the campus." After refreshing her recollection with her notes, Krysztopa testified that defendant

"was talking about when you shoot and kill children and you're looking them in the eye and their innocence and the pillows of laying their heads down at night and then you have a shooter who shoots them in the face, you know, what does that do for me as a school? How do we protect them from that?"

She thought that he "wanted to know if [she] would sniff the pillow of their innocence after they've been dead." At the end of the conversation, Krysztopa said that defendant asked if the conversation was being recorded. She said that she "was trying to be light" and told him that "we have copiers that don't even work in our school. I'm not recording this." She said that he "went on and said, again, asking about our protocol, how we handle shooters *** and I was talking with him [when] he did say he had to go, the conversation was done and he hung up."

¶ 8 Krysztopa testified that, during the conversation, she texted the head of the school, telling her "[t]here's someone talking about guns and the safety of the school, call 911." Someone called 911, and the school went into a soft lockdown, which she described as a situation in which students were put into closed classrooms with an adult present to account for each student and determine a count of the entire student body. She stated that this was the only time the school had entered a soft lockdown in the year and a half that she worked there. With an officer dispatched to defendant's home and two officers on campus, she testified that, because it was close to dismissal time, they dismissed the students. Fifteen minutes after dismissal, the school sent a letter to parents informing them that a threat had been made without going into detail about the threat. She later clarified that she initiated the police contact for two reasons: (1) because she thought defendant was on the campus, which she posited would mean there was an active shooter on campus, and (2) because she did not know why defendant shared with her that he had been kicked out of Keith as a child, which led her to think that he was an active shooter on campus.

¶ 9 On cross-examination, Krysztopa agreed that the voicemail stated that defendant was interested in talking about admissions and potentially transferring his son to Keith. When she called him, he told her that his son was in second grade and that he was looking to transfer him from Rockford Public Schools. She testified that he mentioned "that he was concerned about the security protocols in the public schools." She did not know any other intention for the call than defendant's

intention to transfer his son from the public school to a private school. She said that defendant never told her that he had guns nor did he say he was coming to the school with guns; rather, she agreed, "[h]e asked what would happen if someone came to the school with a gun." She stated that defendant did not make an immediate threat.

¶ 10 At the close of the State's case, defendant moved for a directed verdict on all counts. The trial court granted that motion as to the phone harassment charge but not the disorderly conduct or attempted disorderly conduct counts.

¶ 11 Defendant testified that his son was seven years old at the time of the call and that he was enrolled in second grade at a public school. He testified that he was concerned with security in the public school system and considered enrolling his son in "what [he] believed would be a privatized institution of learning where they weren't bound by budgeting restrictions used as an excuse not to protect our children." Keith was the first on his list, followed by two religious schools. He stated that he called Keith and received a call back from Krysztopa. He continued that he "asked [about] two things": "financial aid because I'm a single parent" and "the security protocol." Information about these two things, he said, was the purpose of his call. Regarding the security protocol, he asked if Krysztopa could even talk to him about it over the phone; "[i]f need be, when I come to fill out the financial aid information, I can talk to you about it then is exactly what I said to her." He said that he told Krysztopa that his intent was to enroll his son in the school and that he included that statement in the voicemail message. He stated that he "absolutely" did not threaten anyone and that he "absolutely" did not say that he was going to bring a gun to the school. He testified that he did not have a Firearm Owner's Identification card or own any weapons and that he told this to the responding officer. He also testified that he allowed the officer into his home.

¶ 12 On cross-examination, defendant testified that he asked about the school's programs, such as whether they "still taught foreign languages for young children" and "[i]f they still had the art room." He said that he asked about the curriculum but not about the students' schedules. He said that "if there was a security protocol issue with me talking to her over the phone that I would be more than willing to come in and talk with her when I fill out the financial aid papers for the financial aspect of enrolling my son in the school." He admitted that he asked whether

teachers carry guns, but he denied asking whether he would be shot and killed if he came into the school and started shooting. He also denied asking what a child's life was worth and answering himself that a child's life was worth $67,000. Rather, he testified, he explained that "if they would fire a teacher for a $67,000 salary cap and hire an off-duty police officer that they would be able to protect children with a response time which would lower the casualty rate by 73 to 86 percent should there be an active shooter scenario at any school." He again denied asking what would happen if he were to enter the school with a gun. In response to a question asking whether he said that it would take two to four minutes for police to arrive at the school, he explained that "general protocol for my son's school that a two- to four-minute-response time was inadequate for what I thought should be my job as a parent to protect my son at school when I am not there to be able to do that." He also denied asking Krysztopa if she was ready to see the blood of the sacrificial lamb, claiming that he said "if the liberal left wants to make me their sacrificial lamb so be it. Then the blood is on their hands next time there is a school shooting in regards to civil ramifications." He also explained that his concern with his son's current school was that "nothing more than a piece of quarter inch glass separates our children *** from an active shooting scenario." After agreeing that Keith was the first school that he called, he stated that he also called the two religious schools in the time between leaving a message at Keith and receiving the call back. Defendant testified that, when the police arrived, he went outside to "see what was going on" and, when asked by the officer, explained that he "called to enroll my son in a school and [Krysztopa] took [defendant's] political affiliation and spun it out of context."

¶ 13 After closing argument, the trial court found all three witnesses to be credible. It found that, where defendant's and Krysztopa's testimony conflicted, hers was more credible. Regarding the attempted disorderly conduct, the court found that defendant did not make a threat and acquitted him of that charge. Regarding the disorderly conduct charge, the court again stated that it did not think that defendant was threatening the school but found that he acted in an unreasonable manner. The court found that Krysztopa was alarmed and disturbed and that defendant should have known that she would be disturbed. The judge expressly found that the unreasonableness was in the nature of the questions defendant asked. He further found that defendant knowingly acted unreasonably and convicted him of disorderly conduct. Defendant was sentenced to two days in jail with credit for two

days served, a term of probation, and a fine. The appellate court affirmed. 2019 IL App (2d) 160960, ¶ 29. We granted leave to appeal. Ill. S. Ct. R. 315 (eff. July 1, 2018).

¶ 14 ANALYSIS

¶ 15 Defendant was convicted of disorderly conduct. "A person commits disorderly conduct when he or she knowingly: (1) Does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace[.]" 720 ILCS 5/26-1(a)(1) (West 2014).

¶ 16 Defendant asserts that the only conduct in which he engaged was speech. He argues that his speech was protected by the first amendment to the United States Constitution, that the courts below misunderstood the requisite mental state, and that the appellate court incorrectly applied this court's decision in *People v. Raby*, 40 Ill. 2d 392 (1968). We first address defendant's contentions of first amendment protection.

¶ 17 *First Amendment Protection*

¶ 18 "The first amendment, which applies to the states through the fourteenth amendment, precludes the enactment of laws 'abridging the freedom of speech.' " *People v. Relerford*, 2017 IL 121094, ¶ 31 (quoting U.S. Const., amends. I, XIV). Because of this restriction, the " 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' " *United States v. Alvarez*, 567 U.S. 709, 716 (2012) (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)).

¶ 19 The constitutionality of a statute presents a legal question that we review *de novo*. *People ex rel. Hartrich v. 2010 Harley-Davidson*, 2018 IL 121636, ¶ 13. The trial court's underlying credibility and factual findings, however, are reversed only if they are against the manifest weight of the evidence. *Id.* Defendant does not claim that the statute is facially unconstitutional but instead makes an as-applied challenge, which "asserts that the particular acts which gave rise to the litigation fall outside what a properly drawn regulation could cover." *Vuagniaux v.*

Department of Professional Regulation, 208 Ill. 2d 173, 191 (2003). In an as-applied challenge, the challenging party "protests against how an enactment was applied in the particular context in which the [party] acted or proposed to act, and the facts surrounding the [party's] particular circumstances become relevant." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 306 (2008).

¶ 20 We first consider whether defendant's discussion with Krysztopa constituted speech or expression as contemplated by the first amendment. Although defendant ostensibly called to inquire about enrolling his son at Keith, he asked rhetorical questions such as whether Krysztopa would sniff the pillows of schoolchildren's innocence if they were shot. He told the responding officer that Krysztopa "took [his] political affiliation and spun it out of context." Although we do not doubt that defendant indeed called to gather information and potentially enroll his son at the school sometime in the future, he also intended some of his questions and statements to express his sentiments about the state of school security in general, at Keith, or both.

¶ 21 Moreover, we agree that defendant did not engage in any conduct other than speech. In *Raby*, this court held that "[u]nder no circumstances would the [disorderly conduct] statute 'allow persons to be punished merely for peacefully expressing unpopular views.' " *Raby*, 40 Ill. 2d at 397 (quoting *Cox v. Louisiana*, 379 U.S. 536, 551 (1965)). Our appellate court has cited this statement to support what it calls "the long-standing principle that speech alone cannot form the basis for a disorderly conduct charge." *People v. Rokicki*, 307 Ill. App. 3d 645, 652 (1999). Another panel stated the holding more accurately: "[i]n *Raby*, our supreme court rejected the proposition that the disorderly conduct statute punishes speech protected by the first amendment." *People v. Nitz*, 285 Ill. App. 3d 364, 369 (1996). Because the only action in which defendant engaged was speech and because the disorderly conduct statute cannot criminalize protected speech, defendant's conviction can stand only if his speech was unprotected.

¶ 22 Our first step is to determine whether the statute, as applied to defendant, is a content-based speech restriction. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. ___, ___, 135 S. Ct. 2218, 2227 (2015). A statute restricting speech is content based if "it is the content

of the speech that determines whether it is within or without the statute's blunt prohibition." *Carey v. Brown*, 447 U.S. 455, 462 (1980); see also *People v. Jones*, 188 Ill. 2d 352, 358 (1999) (citing *Carey*, 447 U.S. at 462). There is no question that it was the content of defendant's speech that alarmed and disturbed Krysztopa. He could have asked about school lunches, classes, asbestos pipes, tuition, the school day, or just about any other subject, and she would not have become alarmed and disturbed. It was the topic of guns, violence, and school safety—the content of his speech—that led to the alleged breach of the peace.

¶ 23 "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at ___, 135 S. Ct. at 2226 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)). There exist, however, " 'certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.' " *Beauharnais v. Illinois*, 343 U.S. 250, 255-56 (1952) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). Content-based restrictions on these categories of speech do not fall within the protection of the first amendment and have been upheld. *People v. Ashley*, 2020 IL 123989, ¶ 31 (citing *United States v. Stevens*, 559 U.S. 460, 468 (2010)). Of the handful of exceptions, only two could potentially apply here: the "true threats" exception (*Virginia v. Black* 538 U.S. 343, 359 (2003); *Ashley*, 2020 IL 123989, ¶ 31) and the "fighting words" exception (*Beauharnais*, 343 U.S. at 256).

¶ 24 *The True Threats Exception to First Amendment Protection*

¶ 25 The "accepted categories of unprotected speech include true threats, which may be banned without infringing on first amendment protections." *Ashley*, 2020 IL 123989, ¶ 31. " '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." *Black*, 538 U.S. at 359; *Ashley*, 2020 IL 123989, ¶ 33. " 'The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." ' " *Ashley*,

2020 IL 123989, ¶ 33 (quoting *Black*, 538 U.S. at 359-60, quoting *R.A.V.*, 505 U.S. at 388).

¶ 26 We first note that the trial court acquitted defendant of attempting to threaten the school or its employees. That charge is not before us. In convicting him of disorderly conduct, the court stated again that it knew "[he] wouldn't threaten them." In cases in which "the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated," however, "the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." (Internal quotation marks omitted.) *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964); see also *Miller v. California*, 413 U.S. 15, 25 (1973) ("[T]he First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984) ("The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. *** It reflects a deeply held conviction that judges—and particularly Members of [the Supreme Court]—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution."). We thus independently examine the record and assess the testimony to determine whether a first amendment exception applies.

¶ 27 The parties, noting the split among other jurisdictions, disagree as to the mental state requirement for conveying a true threat. After submission of their briefs and oral argument, however, we have resolved that issue in Illinois. We recently held that, to make a true threat, a defendant must act with either a "specific intent or a knowing mental state." *Ashley*, 2020 IL 123989, ¶ 55. Thus, the accused does not have to act with specific intent to threaten the victim (*id.* ¶ 50) but "must be subjectively aware of the threatening nature of the speech" (*id.* ¶ 56). Although criminal liability cannot be predicated solely on the effect on the listener, the effect is something the court must consider. *Id.* ¶ 67 (citing *Elonis v. United States*, 575 U.S. at ___, 135 S. Ct. at 2011-12). Given the recency of that opinion, we need not repeat its reasoning.

¶ 28 Krysztopa testified that defendant asked her if she was "prepared to have the blood of the sacrificial lambs on [her] hands *that day*." (Emphasis added.) He asked "if teachers were prepared to have a gun in their face." He asked her "how long it would take the police to get to Keith School should there be a shooting." He expressed familiarity with the school campus and asked how prepared she would be "if *he* or anyone *** arrived on our campus with guns." (Emphasis added.) Although defendant disputes that he made some of these statements, the trial court found Krysztopa to be the more credible witness. Notably, although we independently review the record to assess the applicability of exceptions to first amendment protection (*Sullivan*, 376 U.S. at 285), the trial court's decision to accept testimony remains entitled to great deference (*Hartrich*, 2018 IL 121636, ¶ 13; *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004); *People v. Phelps*, 211 Ill. 2d 1, 7 (2005) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

¶ 29 Regarding defendant's mental state, the trial court found that he did not specifically intend to threaten the school when it acquitted him of attempted disorderly conduct. The court's admonishment to defendant in convicting him of disorderly conduct, however, makes clear that it found that he was subjectively aware of the threatening nature of his speech: "You don't expect that she's going to be alarmed and disturbed? You would be alarmed and disturbed. I submit that you would be alarmed and disturbed if your child was there and you knew there was such a call."

¶ 30 We agree. Defendant pointed out what he perceived to be inadequacies in the security measures Keith had taken by presenting graphic hypothetical scenarios that, by design, communicated to the listener "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359; *Ashley*, 2020 IL 123989, ¶ 33. Whether defendant intended to carry out the acts is irrelevant; he meant to intimidate Krysztopa by impressing upon her " ' "the possibility that the threatened violence will occur." ' " *Ashley*, 2020 IL 123989, ¶ 33 (quoting *Black*, 538 U.S. at 359-60 (quoting *R.A.V.*, 505 U.S. at 388)). Indeed, defendant's intention in presenting these scenarios to Krysztopa was to alert her that they could happen in spite of the measures Keith had taken. He conveyed his opinion about the insufficiency of these measures by frightening Krysztopa.

¶ 31 Regarding the effect on the listener, the trial court found that Krysztopa was alarmed and disturbed. In this situation, the only way she would have been alarmed and disturbed is if she perceived defendant's questions and statements as a threat to the school's safety. These statements are objectively threatening, given the circumstances in which they were made—to a school administrator in her official capacity at a school full of students and teachers five days after a highly publicized mass shooting and during an era in which school administrators must be concerned with individuals who pose such threats. Krysztopa was reasonable in perceiving these statements and questions as a threat.

¶ 32 In sum, defendant's questions and statements were objectively threatening in the circumstances in which they were given. Defendant was subjectively aware of the threatening nature of his speech. Krysztopa reasonably perceived defendant's questions and statements as a threat. We find that his speech constituted a true threat unprotected by the first amendment.

¶ 33 Because we find that defendant's speech fell within the "true threats" exception, we need not address the parties' contentions regarding other exceptions to first amendment speech protection. We next turn to the sufficiency of the evidence presented.

¶ 34 *Sufficiency of the Evidence*

¶ 35 "When considering a challenge to a criminal conviction based upon the sufficiency of the evidence, this court will not retry the defendant." *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Rather, a reviewing court will set aside a conviction only where the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Where the defendant challenges the sufficiency of the evidence used to convict him, the reviewing court must determine, considering the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements met beyond a reasonable doubt. *Smith*, 185 Ill. 2d at 541. All reasonable inferences are drawn in favor of a finding of guilt. *Cunningham*, 212 Ill. 2d at 280.

¶ 36 The trier of fact determines the credibility of the witnesses, decides what weight to give their testimony, resolves conflicts in the evidence, and draws reasonable inferences from that evidence. *Phelps*, 211 Ill. 2d at 7 (citing *Jackson*, 443 U.S. at 319). Credibility determinations are entitled to great weight. *Smith*, 185 Ill. 2d at 542. "In cases where the evidence is close ***, where findings of fact must be determined from the credibility of the witnesses, a court of review will defer to the trial court's factual findings unless they are against the manifest weight of the evidence." *Kalata v. Anheuser-Busch Cos.*, 144 Ill. 2d 425, 433 (1991); see also *Hartrich*, 2018 IL 121636, ¶ 13 (citing *Kalata*, 144 Ill. 2d at 433). "[T]he testimony of just one credible witness is sufficient for conviction." *City of Chicago v. Morris*, 47 Ill. 2d 226, 230 (1970).

¶ 37 The State needed to prove that defendant knowingly engaged in an act in such an unreasonable manner as to alarm or disturb another and to provoke a breach of the peace. See 720 ILCS 5/26-1(a)(1) (West 2014). " '[T]he gist of the offense is not so much that a certain overt type of behavior was accomplished, as it is that the offender knowingly engaged in some activity in an unreasonable manner which he knew or should have known would tend to disturb, alarm or provoke others.' " *Raby*, 40 Ill. 2d at 397 (quoting Ill. Ann. Stat., ch. 38, ¶ 26-1, Drafting Committee Comments (Smith-Hurd 1967)). "The 'type of conduct alone is not determinative, but rather culpability is equally dependent upon the surrounding circumstances.' " *In re B.C.*, 176 Ill. 2d 536, 552 (1997) (quoting 720 ILCS 5/26-1, Committee Comments-1961, at 337 (Smith-Hurd 1993)).

¶ 38 As we described above, defendant assailed Krysztopa with a battery of morbid and morose questions and statements about killing schoolchildren and sticking guns in teachers' faces until the police arrived at his home. Although defendant disputes that he made some of these statements, the trial court found Krysztopa to be the more credible witness. Where the only witnesses to the substance of a conversation are the two parties to that conversation and the trial court found one more credible than the other, we decline to find that the court's credibility finding was against the manifest weight of the evidence, especially where that witness had taken contemporaneous notes and the trial court expressly noted that it observed "her demeanor while testifying."

¶ 39 The trial court found the elements of disorderly conduct met. It found the nature of the questions defendant asked to be unreasonable, that Krysztopa was alarmed and disturbed, that she reasonably felt that way, and that defendant's questions and statements provoked a breach of the peace by way of the lockdown and police response. It found that defendant acted knowingly.

¶ 40 We agree. Defendant knowingly engaged in the series of questions and statements that form the basis for the conviction in an unreasonable manner that he knew or should have known would cause alarm to a school administrator. He unreasonably subjected Krysztopa, in her official capacity as a school administrator, to a rapid-fire succession of graphic questions and statements about such things as shooting schoolchildren and sticking guns in teachers' faces, understandably alarming and disturbing her. His questions and statements directly resulted in a breach of the peace by way of a school lockdown and police response. We find that a rational trier of fact could conclude beyond a reasonable doubt that defendant committed the offense of disorderly conduct. We do not find the evidence so improbable or unsatisfactory that it creates a reasonable doubt about his guilt. We thus find the evidence sufficient and affirm defendant's conviction.

¶ 41 CONCLUSION

¶ 42 We find that a rational trier of fact could conclude that the elements of disorderly conduct were proven beyond a reasonable doubt and that the evidence was not so improbable or unsatisfactory as to create a doubt about defendant's guilt. We further find that defendant's questions and statements constituted a true threat such that his speech was not protected by the first amendment to the United States Constitution. The statute was thus constitutional as applied to defendant's conduct.

¶ 43 Affirmed.

¶ 44 JUSTICE NEVILLE, dissenting:

¶ 45 I agree with the court's recitation of the law governing the analysis of whether speech is exempt from first amendment protection because it falls within the "true

threat" exception. I disagree, however, with the application of those controlling principles to the facts presented in this case. Accordingly, I respectfully dissent.

¶ 46 As this court unanimously recognized in *People v. Ashley*, the true threat exception encompasses " '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.' " 2020 IL 123989, ¶ 33 (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)). When defendant's speech is analyzed in accordance with these strictures, it is clear to me that his communication with Krysztopa does not constitute a true threat.

¶ 47 First, as Krysztopa's own testimony establishes, defendant expressly stated that his reason for calling was to inquire about enrolling his son at the school and to explore its security protocols and approach to potentially violent situations. There is no evidence to the contrary or even suggesting that he called for any other purpose. When considered in the context of a parent's inquiry about the transfer and enrollment of his or her child, questions regarding school safety and security measures are not inherently unreasonable. In addition, Krysztopa's testimony confirms that virtually all of defendant's communications regarding the possible enrollment of his son at the school and its safety procedures were expressed in the form of questions—posing hypothetical situations and requesting answers as to how such situations would be handled in order to protect the safety of all students. The context of defendant's communication—an inquiry about school enrollment—and the hypothetical nature of many of his questions regarding student safety are critical in assessing whether his speech constitutes a true threat. See *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (recognizing that, in distinguishing a threat from constitutionally protected speech, the context of the speech, its conditional nature, and the reaction of the listeners are determining factors). In my view, these factors are not properly considered by the court's opinion.

¶ 48 Second, though I agree that the effect on the listener must be considered (see *supra* ¶ 30 (citing *Ashley*, 2020 IL 123989, ¶ 67); *supra* ¶ 31), I disagree with the court's conclusion that defendant's questions and statements to Krysztopa were "objectively threatening" (*supra* ¶ 31). If that were the case, Krysztopa's perception of defendant's communication would be irrelevant. And even more important is the fact that Krysztopa's own description of defendant's communication refutes the

conclusion that it was a true threat. Her undisputed testimony confirms that defendant did not make an immediate threat, and he never said he had a gun or that he was coming to the school with a gun. Indeed, review of Krysztopa's testimony demonstrates that defendant never said that he intended to do anything at all. Rather, defendant, a single father of a school-age child, expressed his concerns about school safety and the security protocols in place in public schools that were, in his view, inadequate to protect the students.

¶ 49 While defendant's questions and comments may be seen as excessive and troubling, they do not contain the requisite elements of a true threat. Here, the court's opinion equates defendant's questions and statements about school shootings and safety measures with a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. Compare *Ashley*, 2020 IL 123989, ¶ 33, with *supra* ¶ 30. My colleagues in the majority agree with the circuit court's characterization of defendant's communications as unreasonable, alarming, and disturbing and, on that basis, find them to qualify as true threats. But many types of communications may be unreasonable, alarming, and disturbing without being true threats. What is missing in this case is evidence of the critical element—a serious expression of intent to commit an act of unlawful violence.

¶ 50 A single communication with an advancement director about the possible transfer of his son and the school's safety protocols served as the catalyst for the prosecution. That communication—and the lack of any actual threat of violence—is in stark contrast to the facts presented in *Ashley*. In that case, the defendant sent numerous text messages specifically directed at the victim that included threats of physical harm or death as well as a picture of a gun. *Ashley*, 2020 IL 123989, ¶¶ 9, 99. For example, the defendant in *Ashley* sent the victim text messages stating " 'I love you too much to see u dead dummy. But [I] guarantee u this. I can make u suffer. If [I] want to. *** You rite start to think more before u talk that s*** will get u hurt or killed ***. *** I hope whoever you got it when I got guns' " *Id.* ¶ 9. He also telephoned the victim and specifically threatened to "come over and kill" her, and everyone else who was present at her apartment, with a gun. *Id.* ¶¶ 5, 100. Here, none of defendant's questions or comments pertaining to hypothetical situations involving possible school shootings are even remotely comparable to the threatening speech that was at issue in *Ashley*. Unfortunately, the majority does not

acknowledge the substantial evidence of threatening speech presented in *Ashley*, let alone explain how defendant's speech meets the standard applied in *Ashley*.

¶ 51 While Krysztopa's apprehension and reaction to defendant's speech may be perfectly understandable, this case considers only whether the State can criminalize defendant's pure speech as a "true threat." Notably, this court and the United States Supreme Court have narrowly construed the true threat exception to first amendment protection for pure speech. *Black*, 538 U.S. at 359; *Ashley*, 2020 IL 123989, ¶ 33. And for good reason—the first amendment broadly protects the rights of all citizens to engage in meaningful discussion and debate on important societal issues, such as the question of whether a school is adequately protecting its students from the dangers of a potential mass shooting. Many of the complicated problems facing our society have the potential to result in serious debate and, at times, emotional rhetoric. Absent a serious expression of an intent to commit an act of unlawful violence, however, even the most passionate speech cannot be criminalized as a true threat without violating the first amendment. *Black*, 538 U.S. at 359; *Ashley*, 2020 IL 123989, ¶ 33; see also *Watts v. United States*, 394 U.S. 705, 707 (1969) (*per curiam*) (explaining that a statute that "makes criminal a form of pure speech must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.").

¶ 52 Nonetheless, the majority has allowed the State to use the disorderly conduct statute to criminalize defendant's speech because Krysztopa was alarmed or disturbed by his speech. In other words, the majority has effectively eliminated the well-settled requirement that a "true threat" include a serious expression of an intent to commit an act of unlawful violence. *Black*, 538 U.S. at 359; *Ashley*, 2020 IL 123989, ¶ 33. The majority's watered-down interpretation of a "true threat" has never been endorsed by the United States Supreme Court and, until today's decision, not by this court either.

¶ 53 Instead, we have long recognized that the disorderly conduct statute should not be used to punish persons " 'merely for peacefully expressing unpopular views.' " *People v. Raby*, 40 Ill. 2d 392, 397 (1968) (quoting *Cox v. Louisiana*, 379 U.S. 536, 551 (1965)). The result reached in the majority's opinion, however, criminalizes defendant's speech because certain of his questions or statements were viewed by

Krysztopa as alarming or disturbing. It is worth emphasizing that, according to Krysztopa's undisputed testimony, defendant did not make any threats to her, and he did not state that he had a gun or intended to come to the school. The majority's analysis ignores the bare facts set forth in Krysztopa's testimony. Contrary to the court's unfounded conclusion, Krysztopa did not perceive defendant's communication as a threat.

¶ 54 Based on the evidence in the record, defendant's questions and statements may be both alarming and disturbing, but they are not true threats because they do not contain a serious expression of an intent to commit an act of unlawful violence. See *Black*, 538 U.S. at 359; *Ashley*, 2020 IL 123989, ¶ 33. Because defendant's statements do not qualify as a true threat, they do not fall into the exception and are not excluded from first amendment protection. Since his comments are protected speech, they cannot be prosecuted under the disorderly conduct statute. I would find the disorderly conduct statute to be unconstitutional as applied to defendant.

¶ 55 Consequently, I respectfully dissent.

¶ 56 JUSTICE KILBRIDE joins in this dissent.

APPENDIX

B

2019 IL App (2d) 160960
No. 2-16-0960
Opinion filed February 28, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 15-CF-2814
RORY JOHN SWENSON,	)	Honorable Fernando L. Engelsma,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court, with opinion.
Justices McLaren and Jorgensen concurred in the judgment and opinion.

OPINION

¶ 1 In the direct appeal of his disorderly-conduct conviction, defendant, Rory John Swenson, argues that the State failed to prove him guilty beyond a reasonable doubt and, further, that his conduct was protected by the first amendment. We affirm.

¶ 2 I. BACKGROUND

¶ 3 On February 8, 2016, defendant was charged by information with one count of attempted disorderly conduct (attempt to convey a threat) (720 ILCS 5/8-4(a), 26-1(a)(3.5) (West 2014)), one count of phone harassment (*id.* § 26.5-2(a)(2)), and one count of disorderly conduct (*id.* § 26-1(a)(1)). The charges stemmed from a phone call that defendant made on December 7,

2015, to the Keith Country Day School (the school) and a conversation that he had with a school employee.

¶ 4 The following evidence was presented at defendant's bench trial. Monica Krysztopa testified that she was the director of advancement at the school. On December 7, 2015, defendant called the school and left a voice-mail message indicating that he wanted to discuss admissions at the school. He provided a phone number and asked that his call be returned. Shortly thereafter, Krysztopa returned defendant's call and spoke with him. Defendant told Krysztopa that he was interested in enrolling his second-grade son at the school, and according to Krysztopa, he "immediately went into a battery of questions about the protocol at [the] school for handling things that were related to guns and shooting." He also told Krysztopa that he had previously attended the school but had been kicked out. Krysztopa testified:

> "[H]e basically wanted to know how prepared I would be if he or anyone who arrived on our campus with guns? And do we have bullet proof windows at our secretary's desk? Are our doors bullet proof? Where do our faculty members stand when we do a lockdown when there is an intruder in our building? Where do they stand in position in a classroom? Do we arm our faculty? How would our faculty defend themselves against an armed intruder? There were multiple questions."

Defendant also mentioned that "the United States was full of socialists and KGB members." He asked about truancy laws. He also asked if she "knew the number of *** school shootings that had taken place in the United States and if [she] knew the success rate of shooters once they were on campus." Defendant brought up the San Bernardino shooting, which had happened one week earlier. Krysztopa testified that defendant stated: "Is [the school] prepared if that would happen in your campus today?" Krysztopa testified: "He asked me if I was prepared to have the

sacrificial blood of the lambs of our school on our, on my hands, if this were to happen and what would I do?" Defendant asked, "if he were to show up at the campus with a gun what would be the protocol of [the] school?" Defendant also asked if the students were given "PEZ dispensers to defend themselves." He asked if the teachers carried guns, and he talked about "a number of guns and their success rate in kill." He asked how long it would take police to get to the school in the event of a shooting. At one point, defendant "was talking about when you shoot and kill children and you're looking them in the eye and their innocence and the pillows of laying their heads down at night and then you have a shooter who shoots them in the face, you know, what does that do for [her] as a school?" He asked her if she would "sniff the pillow." She stated that she thought he wanted to know "if [she] would sniff the pillow of their innocence after they've been dead."

¶ 5 Krysztopa testified that, based on her conversation with defendant, she believed that defendant was on the school campus, particularly due to his comment about whether she was "prepared to have the blood of the sacrificial lambs on [her] hands that day and if [they] were prepared to handling [*sic*] something like San Bernardino that day." In addition, defendant had stated that he was familiar with the woods around the school campus because he had gone to school there. Krysztopa described the campus as "very large" with "a lot of trees and wooded areas behind a neighborhood."

¶ 6 Krysztopa testified that she texted the head of the school. She told her that someone was talking about guns and the safety of the school, and she told her to call 911. The head of the school called 911 and placed the school on a "soft lockdown." After an officer had been dispatched to defendant's home and two officers were present at the school, the children were dismissed.

¶ 7 Krysztopa testified that her conversation with defendant lasted 15 to 20 minutes. Defendant ended the conversation by saying that "he had to go." During the conversation, Krysztopa took notes. Krysztopa identified her notes as State exhibit No. 2, and she used them to refresh her recollection while testifying. Krysztopa testified that the conversation left her "very shook up."

¶ 8 On cross-examination, Krysztopa testified that defendant told her that his son was currently enrolled in public school and that he was looking to move him to her school. He mentioned that he was concerned about the lack of security at his son's current school. He never told her that he had a gun; he asked what would happen if someone went to the school with a gun. He asked her if she knew the success rate of a "hitter" who showed up at school with a gun, and he told her that it was 80%. The school went into a soft lockdown because she believed that defendant was on campus. But defendant never said that he was on campus.

¶ 9 Rockford police officer Michael Clark testified that, on December 7, 2015, at about 2:30 p.m., he was dispatched to defendant's apartment to investigate a report of a threatening phone call that had been made to the school. When he arrived, he telephoned defendant using a phone number that had been given to him by the dispatchers. No one answered the call, but about a minute later, defendant exited the building and approached Clark. Clark patted down defendant and told him that he was there to investigate a threatening phone call that had been made to the school. Defendant admitted that he had made the call. He told Clark that he had called to find out about security at the school. He also told Clark that he had asked if the school had armed security guards and bulletproof glass. Clark placed defendant in the back of his squad car. Defendant was not placed in handcuffs. At 3:20 p.m., after receiving a phone call from police officer Mace, Clark arrested defendant.

¶ 10 On cross-examination, Clark testified that defendant cooperated with him at all times. Defendant told him that he was considering transferring his son to the school and that he wanted to know about the school's security. When defendant was arrested, he asked Clark to get his son from his apartment. Clark asked defendant if there were any weapons in the apartment, and defendant told him that there were not. Clark went into the apartment to get defendant's son. He did not see any weapons in plain view.

¶ 11 At the close of the State's evidence, defendant moved for a directed finding. The trial court granted the motion as to the charge of phone harassment because it was Krysztopa who called defendant. The trial court denied the motion with respect to the remaining charges.

¶ 12 Defendant testified that in December 2015 his son was seven years old and attended a Rockford public elementary school. At that time, defendant was interested in enrolling him in a "privatized institution of learning where they weren't bound by budgeting restrictions used as the excuse not to protect our children." He left a voice-mail message with the school. He testified that his intent in making the call was to enroll his son in the school. When Krysztopa called him back, he told her why he wanted to enroll him in the school. According to defendant, he asked first about financial aid and then about security. He testified:

> "And then my other question was what is the security protocol, even about me talking to you over the phone, about security protocols? If need be, when I come in to fill out the financial aid information, I can talk to you about it then is exactly what I said to her."

Defendant testified that he never threatened anyone at the school. He never said that he was bringing a weapon to the school. He did not have a firearm owner's identification card, nor did he own any weapons.

¶ 13 In making its ruling, the court stated as follows. First, with respect to the credibility of the witnesses, the court found Clark and Krysztopa to be credible. The court further found that defendant's testimony, in parts, was also credible. To the extent that defendant's testimony conflicted with Krysztopa's, the court found Krysztopa's testimony to be more credible. Next, with respect to the charge of attempted disorderly conduct, in that defendant attempted to convey a threat, the court found defendant not guilty. With respect to the charge of disorderly conduct, however, the court found defendant guilty. The court found that defendant knowingly committed an unreasonable act given the statements that he made to Krysztopa and that Krysztopa was alarmed and disturbed. The court stated:

> "Would you as a parent have the right to know some things about the school? Yes, but not in this fashion. The hallmark of this ruling here is reasonableness. We try to look at things reasonably and this was just an unreasonable act. Would a reasonable person be alarmed and disturbed? Yes. A reasonable person would be alarmed and disturbed. And I so find.
>
> I find that the act was done knowingly. Even if it wasn't done knowingly in the sense of making a threat to the school but if the act was done knowingly and was the act an unreasonable act? Yes. The conversation is outlined by a credible witness Krysztopa and was unreasonable. It went too far for that.
>
> So it is disorderly conduct."

¶ 14 The trial court imposed a sentence of 12 months' probation. Following the denial of his motion for a new trial, defendant timely appealed.

¶ 15 II. ANALYSIS

¶ 16 Defendant first argues that he was not proved guilty of disorderly conduct beyond a reasonable doubt, because the State failed to prove that he acted knowingly.

¶ 17 A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When we review a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact is responsible for resolving conflicts in the testimony, weighing the evidence, and determining what inferences to draw, and a reviewing court ordinarily will not substitute its judgment on these matters for that of the trier of fact. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 18 Defendant was charged with violating section 26-1(a)(1) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/26-1(a)(1) (West 2014)), which provides as follows:

> "(a) A person commits disorderly conduct when he or she knowingly:
>
> (1) Does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace[.]"

To prove defendant guilty beyond a reasonable doubt of disorderly conduct, the State had to prove that defendant "knowingly" committed an act in an unreasonable manner that he "knew or should have known" would tend to alarm or disturb another so as to cause a breach of the peace. *People v. Raby*, 40 Ill. 2d 392, 397 (1968).

¶ 19 Defendant argues that the State failed to prove that he acted knowingly. More specifically, defendant argues that the State was required to prove that he was consciously aware

that his conduct was practically certain to alarm or disturb another and cause a breach of the peace. We disagree.

¶ 20 In support of his argument, defendant relies on *People v. Kotlinski*, 2011 IL App (2d) 101251. *Kotlinski* involved section 31-1(a) of the Criminal Code, which provided that "[a] person who *knowingly resists or obstructs* the performance by one known to the person to be a peace officer *** of any authorized act within his official capacity commits a Class A misdemeanor." (Emphasis added.) 720 ILCS 5/31-1(a) (West 2008). Relying on the statutory definition of knowingly,[1] this court found that the evidence had to establish that the defendant was consciously aware that his conduct was practically certain to obstruct. *Kotlinski*, 2011 IL App (2d) 101251, ¶ 54.

¶ 21 However, unlike the statute at issue in the present case, the statute at issue in *Kotlinski* made clear that the word "knowingly" modified the words "resists or obstructs." Here, to accept defendant's interpretation of the statute, we would have to find that the word "knowingly" in the introductory clause of section 26-1(a)(1) modifies every element in the clause "[d]oes any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." 720 ILCS 5/26-1(a)(1) (West 2014). But, in *Raby*, our supreme court made clear that such an interpretation was not intended. There, the court addressed a claim that the provision reached conduct with first-amendment protection. It looked to the committee comments to determine the provision's breadth, quoting them as follows:

---

[1] A person acts knowingly or with knowledge of "[t]he result of his or conduct, described by the statute defining the offense, when he or she is consciously aware that that result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b) (West 2014).

> " 'Section 26-1(a) is a general provision intended to encompass all of the usual types of "disorderly conduct" and "disturbing the peace." Activity of this sort is so varied and contingent upon surrounding circumstances as to almost defy definition. *** In addition, the task of defining disorderly conduct is further complicated by the fact that the type of conduct alone is not determinative, but rather culpability is equally dependent upon the surrounding circumstances. *** These considerations have led the Committee to abandon any attempt to enumerate "types" of disorderly conduct. Instead, another approach has been taken. As defined by the Code, the gist of the offense is not so much that a certain overt type of behavior was accomplished, as it is *that the offender knowingly engaged in some activity in an unreasonable manner which he knew or should have known would tend to disturb, alarm or provoke others.* The emphasis is on the unreasonableness of his conduct and its tendency to disturb.' " (Emphasis added.) *Raby*, 40 Ill. 2d at 396-97 (quoting Ill. Ann. Stat., ch. 38, ¶ 26-1, Committee Comments (Smith-Hurd 1964)).

Thus, although the *scienter* requirement for the doing of the act in an unreasonable manner is one of knowingness, the *scienter* requirement for " 'tend to disturb, alarm or provoke' " is " 'knew or should have known.' " *Id.* at 397; see *People v. Albert*, 243 Ill. App. 3d 23, 27 (1993) (because the defendant "performed her shouting knowingly and also knew or should have known that such noise likely would disturb people such as the complainant," she could properly be found guilty of disorderly conduct).

¶ 22 Given the supreme court's clear statement, the question is whether the evidence was sufficient to establish beyond a reasonable doubt that defendant knowingly committed an

unreasonable act that he knew or should have known would tend to alarm or disturb another so as to provoke a breach of the peace. In making this determination, we note the following:

> "The types of conduct included within the scope of the offense of disorderly conduct almost defy definition. [Citation.] As a highly fact-specific inquiry, it embraces a wide variety of conduct serving to destroy or menace the public order and tranquility. [Citation.] [C]ulpability *** revolves not only around the type of conduct, but is equally dependent upon the surrounding circumstances. [Citation.] Generally, to breach the peace, a defendant's conduct must threaten another or have an effect on the surrounding crowd. [Citation.] However, a breach of the peace can occur without overt threats or profane and abusive language. [Citation.] In addition, it need not occur in public." (Internal quotation marks omitted.) *People v. Pence*, 2018 IL App (2d) 151102, ¶ 17.

¶ 23 Here, viewed in the light most favorable to the State, the evidence allowed the trial court to infer that defendant had the requisite mental state. Although inquiring generally about a school's security protocol is not unreasonable in itself, the nature of defendant's questions and comments, considered in their totality, clearly exceeded the bounds of reasonableness. For instance, although defendant never stated that he was on the campus, he let Krysztopa know that he was familiar with the campus. Defendant conveyed a detailed knowledge of guns and school shootings, and he asked what would happen "if *he* were to show up at the campus with a gun." (Emphasis added.) Defendant reminded Krysztopa about the recent San Bernardino shooting and asked, "Is [the school] prepared if that would happen in your campus *today*?" (Emphasis added.) Defendant also asked how long it would take police to get to the school in the event of a shooting. He asked whether there were bulletproof windows at the secretary's desk and whether the doors were bulletproof. He asked where faculty members stood in the event of a lockdown

and whether they were armed. Defendant warned Krysztopa that "the United States was full of socialists and KGB members." Defendant also made disturbing comments about shooting children. Krysztopa testified that defendant talked "about when you shoot and kill children and you're looking them in the eye." He asked her "if [she] would sniff the pillow of their innocence after they've been dead." He also asked her "if [she] was prepared to have the sacrificial blood of the lambs of [the] school *** on [her] hands." Thus, although defendant claims that he "was only inquiring about the security at the school in relation to his concerns for his son's safety," his comments as a whole were broader, morbid, and clearly inappropriate to his purported objective.

¶ 24 Viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have found that defendant knowingly acted unreasonably and knew or should have known that his act would alarm or disturb Krysztopa so as to breach the peace.

¶ 25 Defendant next argues that, because his words were not lewd, profane, obscene, libelous, "fighting words," or "true threats," they were protected by the first amendment, such that the disorderly-conduct statute cannot be read as criminalizing them. We disagree. Words that are expressed "in such an unreasonable manner as to provoke, make or aid in making a breach of peace [do] not come within the protections of the first amendment." *City of Chicago v. Morris*, 47 Ill. 2d 226, 230-31 (1970). Indeed, as Justice Holmes famously observed, one cannot falsely yell "fire" in a crowded theater. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

¶ 26 In *Morris*, our supreme court relied on *United States v. Woodard*, 376 F.2d 136 (7th Cir. 1967). There, the defendants were convicted of disorderly conduct. *Id.* at 138-39. One of the defendants, Ranier Seelig, was convicted for jumping to his feet during a congressional hearing and shouting, " 'Being an American citizen, I don't have to sit here and listen to these lies.' " *Id.* at 139. He was warned to keep quiet. *Id.* When he continued his shouting, he was removed

from the building. *Id.* The Seventh Circuit rejected Seelig's argument that his conduct was protected by the first amendment. *Id.* at 142-43. The court stated:

> "First amendment rights are 'not absolute at all times and under all circumstances.' [Citation.] Conceding that the defendant Seelig was attempting to voice a protest against the *** proceedings, Seelig had no constitutional right to voice his protest in the manner he adopted. The first amendment does not guarantee the right of a spectator to shout during a legislative hearing so as to disrupt the orderly processes of the proceeding." *Id.* at 142.

¶ 27 Here, defendant, like Seelig, argues that his conduct was protected by the first amendment in that he merely "had a conversation with Krysztopa about the security at Keith School." This is flagrantly disingenuous. As noted, defendant did not merely engage in a civil conversation concerning a matter of public interest. Nor was he "peacefully expressing unpopular views." (Internal quotation marks omitted.) *Raby*, 40 Ill. 2d at 397. Rather, he subjected Krysztopa to a lengthy interrogation that was disturbing, morbid, and well beyond a reasonable concern for school security, causing a police response and a school lockdown. As in *Woodard*, although defendant's concern might have been reasonable, his manner of expressing it was not, and he provoked a breach of the peace. See *Pence*, 2018 IL App (2d) 151102, ¶ 17 ("a breach of the peace can occur without overt threats or profane and abusive language" (internal quotation marks omitted)). It thus was not constitutionally protected.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for

this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 30 Affirmed.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

RORY JOHN SWENSON, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

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Mr. Rory John Swenson, 4863 Flintridge Ct, Rockford, IL 61107

The undersigned, a member of the Bar of this Court, in compliance with Rules 29 and 33.2, on August 28, 2020, mailed the original and ten copies of the Motion for Leave to Proceed *In Forma Pauperis* and Petition for Writ of Certiorari to the Clerk of the above Court and submitted an electronic copy using the Court's electronic filing system. On that same date, the undersigned served one copy of the same documents on opposing counsel and on petitioner by depositing them in the United States mail, postage prepaid and addressed as above. An electronic version was also served by email to opposing counsel. All parties required to be served have been served.

Respectfully submitted,

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

RORY JOHN SWENSON, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

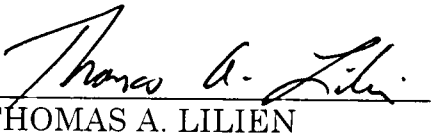
On Petition For Writ Of Certiorari

To The Supreme Court Of Illinois

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner requests leave to proceed *in forma pauperis*. The Petitioner has previously been granted leave to proceed *in forma pauperis* in the court below. Counsel was appointed to represent petitioner in the court below pursuant to 725 ILCS 105/10(a).

Respectfully submitted,



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