Appendix "A"

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ANDRE J. TWITTY, Defendant - Appellant.
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
2021 U.S. App. LEXIS 17762
No. 20-1083
June 15, 2021, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2021 U.S. App. LEXIS 1}(D.C. No. 1:19-CR-00344-RBJ-1). (D. Colo.).United States v. Twitty, 839 Fed. Appx. 255, 2020 U.S. App. LEXIS 40419, 2020 WL 7689700 (10th Cir., Dec. 28, 2020)

Disposition:
AFFIRMED.

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Karl L. Schock, Office of the United States Attorney, District of Colorado, Denver, CO.
For ANDRE J. TWITTY, Defendant - Appellant: Randy Scott Reisch, Reisch Law Firm, Denver, CO.

Judges: Before PHILLIPS, EBEL, and CARSON, Circuit Judges.

CASE SUMMARY District court could interpret Colorado stalking statute to include mens rea requirement, and once Assimilated Crimes Act assimilated Colorado statute and adopted its elements and ranges for punishment, district court was free to interpret statute's elements in same way it would any federal statute.

OVERVIEW: HOLDINGS: [1]-Because the basis for defendant's motion for new trial, improper assimilation of Colorado's stalking statute under the Assimilated Crimes Act (ACA), was non-jurisdictional, existed pretrial, and the district court could have resolved the motion without a trial on the merits, defendant had to make his motion pretrial, and because he failed to show good cause for not doing so, the court was unable review his challenge; [2]-The district court did not err in interpreting the Colorado stalking statute to require proof that defendant intended to instill fear in the threat's recipient because federal courts could interpret statutes to include a mens rea requirement, and once the ACA assimilated the Colorado statute and adopted its elements and ranges for punishment, the district court was free to interpret the statute's elements in the same way it would any other federal statute.

OUTCOME: Judgment affirmed.

LexisNexis Headnotes

Military & Veterans Law > Military Offenses > General Article > Categories of Offenses > Noncapital Crimes & Offenses
Military & Veterans Law > Military Justice > Jurisdiction > Assimilation

18558018

State statutes assimilated by the Assimilated Crimes Act (ACA) in effect become federal statutes. That means if a defendant commits a crime on federal land or in a federal building, and that crime is not already a federal offense, the ACA acts as a gap-filler allowing the government to apply state law on federal property.

Governments > Legislation > Interpretation
Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

The appellate court reviews a timely objection to the assimilation of a statute de novo.

Military & Veterans Law > Military Offenses > General Article > Categories of Offenses > Noncapital Crimes & Offenses
Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

A challenge to an indictment is not jurisdictional. Even if a court mistakenly based jurisdiction on the Assimilated Crimes Act, rather than a provision of federal law, that error does not compel reversal because improper assimilation is analogous to a citation of the wrong statute in an indictment and does not prejudice the defendant.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Stalking > Elements
Criminal Law & Procedure > Scienter > Specific Intent

By its terms, Colorado's stalking statute does not have a mens rea requirement.

Governments > Legislation > Interpretation
Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

The appellate court reviews the interpretation and constitutionality of a state statute de novo.

Governments > Legislation > Interpretation
Criminal Law & Procedure > Scienter

The United States Supreme Court generally interprets statutes to include mens rea requirements even where, by their terms, the statutes do not contain one. Courts generally interpret criminal statutes to include broadly applicable scienter requirements, even where the statute does not contain them.

Military & Veterans Law > Military Justice > Jurisdiction > Assimilation

The Assimilated Crimes Act (ACA) adopts state law so the government may punish a crime committed on federal land in the way and to the extent that it would have been punishable if committed within the surrounding jurisdiction. In adopting these state laws, the ACA adopts only the offenses' elements and ranges for punishment. Otherwise, federal courts may interpret an assimilated statute as it would any other federal statute because the assimilated state law, in effect becomes a federal statute.

Governments > Legislation > Interpretation
Criminal Law & Procedure > Scienter

Federal courts can generally interpret a statute to include a mens rea requirement to save the constitutionality of the statute if the statute, by its terms, does not have one.

Military & Veterans Law > Military Offenses > General Article > Categories of Offenses >

Noncapital Crimes & Offenses
Governments > Legislation > Interpretation

Under the Assimilated Crimes Act, a conflicting state statute cannot redefine or enlarge an offense defined by Congress.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Jury Instructions

The appellate court reviews jury instructions de novo to determine whether, as a whole, they correctly state the law. The appellate court reverses only if it has substantial doubt that the jury was fairly guided.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Stalking > Elements

A true threat prosecution requires proof that a reasonable person would understand the communication to be a threat. Under this standard, the question is whether those who hear or read the threat reasonably consider that an actual threat has been made. The Colorado stalking statute captures this requirement by defining stalking as when a person knowingly makes a credible threat to another person, and defining a credible threat as a threat, physical action, or repeated conduct that would cause a reasonable person to be in fear for the person's safety or the safety of his or her immediate family. Colo. Rev. Stat. Ann. § 18-3-602.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Advocacy of Illegal Action
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

A listener's subjective reaction, without more, should not be dispositive of whether a statement is a true threat. The proper inquiry is whether a reasonable person would understand the communication to be a threat. Guesses about whether a particular reader or listener will react with fear to particular words is far too unpredictable a metric for First Amendment protection. So although the subjective reaction of a statement's target or foreseeable recipients will be an important clue as to whether the message is a true threat, the government does not have to prove beyond a reasonable doubt that the recipient felt threatened.

Criminal Law & Procedure > Sentencing > Mental Incapacity
Criminal Law & Procedure > Scienter

Federal criminal liability generally does not turn solely on the results of an act without considering a defendant's mental state.

Evidence > Procedural Considerations > Weight & Sufficiency
Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Sufficiency of Evidence to Convict
Evidence > Inferences & Presumptions > Inferences

The appellate court reviews the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the verdict and taking all reasonable inferences in support of the verdict.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Stalking > Elements

The Colorado stalking statute requires a credible threat and then repeated forms of communication in

connection with that singular threat. Moreover, these communications can be with the person or indirectly through others who have a continuing relationship with that person.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Stalking > Elements

The Colorado stalking statute does not require subjective fear. A listener's subjective reaction, without more, should not be dispositive of whether a statement is a true threat because whether a particular reader or listener will react with fear to particular words is far too unpredictable a metric for First Amendment protection. Instead, it defines a credible threat as one which would cause a reasonable person to be in fear for the person's safety or the safety of his or her immediate family or of someone with whom the person has or has had a continuing relationship. Colo. Rev. Stat. Ann. § 18-3-602(2)(b). An indirect threat that would cause fear in a reasonable person and that a defendant intended to instill fear in a specific victim is enough. § 18-3-602(b).

Opinion

Opinion by: Joel M. Carson III

Opinion

ORDER AND JUDGMENT*

State statutes assimilated by the Assimilated Crimes Act ("ACA") in effect become federal statutes. See United States v. Kiliz, 694 F.2d 628, 629 (9th Cir. 1982) (citing Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 64 S. Ct. 622, 88 L. Ed. 814 (1944)). That means if a Defendant commits a crime on federal land or in a federal building, and that crime is not already a federal offense, the ACA acts as a gap-filler allowing the government to apply state law on federal property. See Lewis v. United States, 523 U.S. 155, 159-66, 118 S. Ct. 1135, 140 L. Ed. 2d 271 (1998).

On the eve of his release from federal prison, Defendant Andre J. **Twitty** threatened a Bureau of Prisons ("BOP") disciplinary officer. A jury convicted Defendant for violating Colorado's stalking statute as assimilated by the ACA. Defendant appeals, arguing that the ACA did not properly assimilate Colorado's stalking statute and even if it did, the district court could not interpret the Colorado statute in the same ways it would other federal statutes. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

While serving a**{2021 U.S. App. LEXIS 2}** sentence in federal prison for making threats, Defendant threatened Shery Beicker-Gallegos. Before threatening Beicker-Gallegos, Defendant threatened the prison's warden, writing in a cop-out that he would "deal with all upon release."1 In this cop-out Defendant also referenced a former Colorado inmate who murdered the director of the Colorado Department of Corrections shortly after release. In response, a staff member drafted an incident report (also known as a "shot") charging Defendant with threatening another with bodily harm. Beicker-Gallegos-a BOP disciplinary hearing officer-presided over Defendant's disciplinary hearing on that charge. At the hearing, Defendant emphasized that upon his impending release he would shoot as many people as possible and then commit suicide. Based on Defendant's tone and body

language, Beicker-Gallegos became concerned Defendant might follow through on these threats, given his impending release. So she drafted another incident report charging Defendant with making even more threats of bodily injury.

At this point, Defendant's behavior became cyclical-he would make a threat, a staff member would charge him, and then, angered by the charge, he would**{2021 U.S. App. LEXIS 3}** make another threat. So after Beicker-Gallegos charged Defendant, he wrote a cop-out saying:

> How do you stop a man with a suicide plan . . . you can't. . . . So write another shot! Then I will send you some more and let's see who wins. . . . Dumb ass b**ch.He addressed this cop-out to Beicker-Gallegos, referring to her by name and also as a "white DHO b**ch." He also made several statements noting that he had access to guns and bombmaking materials.2 He included a copy of the incident report in the cop-out, and on it he wrote "lets play! Like I said Motivation!" He also attached ten photographs of guns and ammunition.

After a new hearing officer adjudicated Beicker-Gallegos's charge, Defendant sent a cop-out to that hearing officer. On that cop-out, Defendant wrote "Google home address" next to Beicker-Gallegos's name. He also wrote "all that matters now are my rifles and google! Now come outside and stop me! I dare you!"

Months later, BOP staff charged Defendant with making renewed threats to kill BOP staff and their children. Beicker-Gallegos adjudicated the new charge and found Defendant guilty. In response, Defendant sent another cop-out addressed to Beicker-Gallegos. He made statements expressing he did not "give a f**k" about the reports and charges. Again, he threatened to exact revenge once released and circled several BOP personnel's names writing "Google" next to them.

Defendant then sent yet another cop-out, referencing Beicker-Gallegos by name noting that he planned to "encourage all real black men to kill all white racist police and prison staff." Soon after, BOP personnel charged Defendant again for threatening another with bodily harm related to another incident. Beicker-Gallegos adjudicated that charge, again, finding Defendant guilty. Defendant responded just as he had in the past-he**{2021 U.S. App. LEXIS 5}** sent a cop-out letter to Beicker-Gallegos referencing his plan to exact revenge on white America and noting that these charges just motivated him. Beicker-Gallegos received this cop-out and filed yet another charge against Defendant for threatening another with bodily harm. In total, BOP personnel charged Defendant five times for threatening another with bodily injury.

Having seen enough, the government obtained an indictment alleging Defendant violated Colorado's stalking statute-C.R.S. § 18-3-602(1), (2) ("Colorado statute") as assimilated by the ACA. The indictment named Beicker-Gallegos as the recipient of Defendant's threat. Defendant moved to dismiss, arguing the Colorado statute was unconstitutional because the statute, by its terms, lacked a mens rea requirement. But the government had included an intent requirement in the indictment. And the district court determined that, under our jurisprudence, it should interpret the Colorado statute as having a constitutionality sufficient mens rea requirement. The case proceeded to trial where the district court, consistent with its ruling, instructed the jury that the government had to prove "defendant intended the recipient of the threat to feel threatened."**{2021 U.S. App. LEXIS 6}** The jury found Defendant guilty.

Defendant moved for a new trial six days after the jury verdict, arguing the district court lacked jurisdiction because 18 U.S.C. § 2261A punished approximately the same conduct as the Colorado statute. And so the ACA did not properly assimilate the Colorado statute. See Lewis, 523 U.S. at 165 (the ACA does "not apply where both state and federal statutes seek to punish approximately the same wrongful behavior."). The district court denied his motion. About a month later, Defendant

moved to dismiss the indictment, arguing 18 U.S.C. § 115(a)(1)(B) also punished approximately the same conduct as the Colorado statute. The district court denied Defendant's motion, finding it untimely because Defendant's argument presented a non-**jurisdictional** challenge that he should have raised pretrial. Following sentencing and entry of judgment, Defendant appealed his conviction.

II.

Defendant makes four claims on appeal: (1) the ACA does not properly assimilate the Colorado statute; (2) the district court erred in interpreting the Colorado statute as containing a mens rea requirement; (3) the district court improperly instructed the jury; and (4) the government presented insufficient evidence to support Defendant's conviction. We**{2021 U.S. App. LEXIS 7}** address each claim in turn, affirming the district court on every issue.

A.

We review a timely objection to the assimilation of a statute de novo. United States v. Rocha, 598 F.3d 1144, 1147 (10th Cir. 2010).

Defendant argues the district court erred in denying his motions about improper assimilation.3 First, he argues he objected pretrial to the ACA's assimilation of the Colorado statute. He did not.4 So we proceed to his second argument-that his failure to object pretrial does not matter because assimilation presents a non-waivable **jurisdictional** issue.

As we see it two alternatives exist here: (1) the ACA properly assimilated the Colorado statute because the Colorado statute does not punish approximately the same behavior as federal law; or (2) the ACA did not properly assimilate the Colorado statute because both state and federal statutes seek to punish approximately the same behavior. Under option one, the district court would have jurisdiction under the ACA. Under option two, the district court would have jurisdiction under the federal statutes-18 U.S.C. §§ 2261A or 115(a)(1)(B). Either way, the district court had jurisdiction over Defendant's purported violations of federal law within the judicial district. So jurisdictionally, whether the government charged**{2021 U.S. App. LEXIS 8}** the offense under the ACA or another provision of federal law did not matter.

Moreover, in this context Defendant's challenge to assimilation resembles a challenge to an indictment.5 And a challenge to an indictment is not **jurisdictional**. See Hall, 979 F.2d at 322-23 (concluding that even if a court mistakenly based jurisdiction on the ACA, rather than a provision of federal law, that error did not compel reversal because improper assimilation was analogous to a citation of the wrong statute in an indictment and did not prejudice the defendant).

The Supreme Court has not expressly analyzed whether assimilation presents a **jurisdictional** issue. But in Lewis, a jury convicted the defendants of first-degree murder under Louisiana law as assimilated through the ACA. 523 U.S. at 158-59. The Supreme Court found the ACA did not properly assimilate the Louisiana statute and remanded the case for resentencing. Id. at 172-73. The Court's silence on the **jurisdictional** argument demonstrated the non-**jurisdictional** nature of the defendants' assimilation appeal. Key, 599 F.3d at 476-77 ("The nonjurisdictional character of any assimilation error [was] reinforced, if not directly ruled on, by the Supreme Court's disposition in Lewis, which merely reversed and remanded for resentencing**{2021 U.S. App. LEXIS 9}** after the Court found an improper assimilation."). Thus, Defendant's challenge here did not present a **jurisdictional** issue.

Because the basis for Defendant's motion-improper assimilation-is non-**jurisdictional**, existed pretrial, and the district court could have resolved the motion without a trial on the merits, Defendant had to make his motion pretrial. Fed. R. Crim. P. 12(b)(3)(B). So unless he can show good cause for

not doing so, Defendant's failure to make his motion pretrial leaves us unable review his challenge. See Bowline, 917 F.3d at 1237. But Defendant does not show good cause for his failure to make this argument pretrial. In fact, he does not even try. So we affirm the district court's denial of Defendant's post-trial motions on this issue.

B.

By its terms, Colorado's stalking statute does not have a mens rea requirement. So the district court interpreted it as requiring intent. We first address whether federal courts can interpret statutes to include a mens rea requirement. Concluding they can, we next address whether federal courts can interpret a state statute assimilated by the ACA as requiring intent. We review the interpretation and constitutionality of a state statute de novo. Camfield v. City of Okla. City, 248 F.3d 1214, 1221 (10th Cir. 2001); Cent. Kan. Credit Union v. Mut. Guar. Corp., 102 F.3d 1097, 1104 (10th Cir. 1996).

The Supreme Court generally interprets**{2021 U.S. App. LEXIS 10}** statutes to include mens rea requirements even where, by their terms, the statutes do not contain one. Elonis v. United States, 575 U.S. 723, 734, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015) (Courts generally interpret [] criminal statutes to include broadly applicable scienter requirements, even where the statute . . . does not contain them." (alteration in original) (internal citation and quotation marks omitted)). And we do the same. United States v. Heineman, 767 F.3d 970, 978-82 (10th Cir. 2014) (interpreting 18 U.S.C. § 875(c), which criminalized the sending of an interstate threat but did not specify a mens rea requirement, to require that the defendant subjectively intended the recipient feel threatened.). Because federal courts can generally interpret statutes to include mens rea requirements, we next address whether they can interpret an assimilated *state* statute to include a subjective intent requirement.

The district court believed it could and, relying on Elonis, interpreted Colorado's stalking statute as including a mens rea requirement-an intent to instill fear in the threat's recipient. Defendant attempts to distinguish Elonis and Heineman from this case arguing that Elonis and Heineman involved violations of a federal statute while this case involves violation of a state statute. And, he argues, Colorado's interpretation of the stalking**{2021 U.S. App. LEXIS 11}** statute prevents the district court from including a subjective intent requirement here because a state's interpretation of its own statutes binds federal courts.6 See Brown v. Buhman, 822 F.3d 1151, 1161 n.6 (10th Cir. 2016). But in making that argument, Defendant does not account for the effect of the ACA.

The ACA adopts state law so the government may punish a crime committed on federal land "in the way and to the extent that it would have been punishable if committed within the surrounding jurisdiction." United States v. Sain, 795 F.2d 888, 890 (10th Cir. 1986). In adopting these state laws, the ACA adopts only the offenses' elements and ranges for punishment. Id. Otherwise, federal courts may interpret an assimilated statute as it would any other federal statute "because the assimilated state law, in effect becomes a federal statute."7 Kiliz, 694 F.2d at 629 (citing Johnson, 321 U.S. 383).

As explained above, federal courts can generally "interpret" a statute to include a mens rea requirement to save the constitutionality of the statute if the statute, by its terms, does not have one.8 The ACA assimilated the Colorado statute and thus adopted its elements and ranges for punishment. Once assimilated, the district court was free to interpret the Colorado statute's elements in the same way it would**{2021 U.S. App. LEXIS 12}** any other federal statute. And it did just that. For these reasons, the district court did not err in interpreting the Colorado statute to require proof that Defendant intended to instill fear in the threat's recipient.

C.

The district court instructed the jury as follows:

> To find the defendant committed the offense of Stalking (Credible Threat and Repeated Communication), you must be convinced that the government has proved each of the following elements beyond a reasonable doubt.
>
> 1. The defendant knowingly made a credible threat to another person, either directly, or indirectly through a third person;
>
> 2. In connection with the threat, the defendant repeatedly made any form of communication with that person, a member of that person's immediate family, or someone with whom that person was having or previously had a continuing relationship, regardless of whether a conversation ensued;
>
> 3. Based on the threats, physical action, or repeated conduct, a reasonable person would be in fear for the person's safety or the safety of his/her immediate family or of someone with whom the person has or has had a continuing relationship; and
>
> 4. The defendant intended the recipient of the threat to**{2021 U.S. App. LEXIS 13}** feel threatened. (as defined in Instruction No. 12).

Defendant objects to the district court's inclusion of the third element-the objective reasonableness standard.9 We review jury instructions de novo to determine whether, as a whole, they correctly state the law. United States v. Gorrell, 922 F.3d 1117, 1121-22 (10th Cir. 2019). We reverse only if we have "substantial doubt that the jury was fairly guided." Id. at 1122 (quoting United States v. Little, 829 F.3d 1177, 1181 (10th Cir. 2016)).

We have held that a "true threat" prosecution requires "proof that a reasonable person would understand the communication to be a threat." United States v. Stevens, 881 F.3d 1249, 1253 (10th Cir. 2018). Under this standard, "[t]he question is whether those who hear or read the threat reasonably consider that an actual threat has been made." Id. (alteration in original) (quoting United States v. Dillard, 795 F.3d 1191, 1199 (10th Cir. 2015)). The Colorado statute captures this requirement by defining stalking as when a person knowingly "[m]akes a credible threat to another person. . . ," and defining a "credible threat" as "a threat, physical action, or repeated conduct that would cause *a reasonable person* to be in fear for the person's safety or the safety of his or her immediate family."10 C.R.S.A. § 18-3-602 (emphasis added). So the district court's reasonable person instruction aligned with the Colorado statute's language.

Defendant remains unsatisfied. He argues**{2021 U.S. App. LEXIS 14}** that Elonis did away with the reasonable person standard in a way which prohibited the instruction here. We disagree. In Elonis, the Supreme Court disavowed use of a reasonable person standard when looking at a defendant's state of mind, not a victim's. 575 U.S. at 740. The Elonis district court instructed the jury that the defendant could be found guilty if "a reasonable person would foresee that the statement would be interpreted" as a threat. Id. at 731. The Supreme Court held the district court erred because "[f]ederal criminal liability generally does not turn solely on the results of an act without considering [a] defendant's mental state." Id. at 740. As explained above, Elonis imposed an intent element in place of the lesser reasonable person standard.

Defendant plucks a quote from Elonis which reads, "[h]aving 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 . . . and we have long been reluctant to infer that a negligence standard was intended in criminal statutes." Id. at 738 (internal citations and quotation marks omitted). But this quote, despite Defendant's contention**{2021 U.S.**

App. LEXIS 15} otherwise, does not help him. The district court did not use the reasonable person standard to define Defendant's intent. So Defendant's reliance on cases disavowing such a use is misplaced. The district court properly instructed the jury in accordance with the Colorado statute's language and federal law, and thus did not err.

D.

Defendant argues the government produced insufficient evidence to sustain a conviction under the Colorado statute because it only proved Beicker-Gallegos received one of Defendant's threats. We review the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the verdict and taking all reasonable inferences in support of the verdict. United States v. Wright, 506 F.3d 1293, 1297 (10th Cir. 2007).

At trial, Beicker-Gallegos testified she recalled receiving only one of Defendant's threats-the last one, which motivated her charging Defendant with threatening bodily injury. Beicker-Gallegos could not recall whether she had seen Defendant's four other threats. Defendant argues that under the Colorado statute the government had to prove Beicker-Gallegos contemporaneously received repeated threats. Defendant is wrong. The Colorado statute specifies that:

> [a] person commits stalking if directly,**{2021 U.S. App. LEXIS 16}** or indirectly through another person, the person knowingly . . . (b) [m]akes a credible threat to another person and, in connection with the threat, repeatedly makes any form of communication with that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship, regardless of whether a conversation ensues . . .C.R.S.A. § 18-3-602(1)(b). The Colorado statute requires *a* credible threat and then repeated forms of communication in connection with that singular threat. Moreover, these communications can be with the person or indirectly through others who have a continuing relationship with that person. Defendant acknowledges that Beicker-Gallegos received at least one of his threats. Defendant addressed his additional written threats to Beicker-Gallegos, and people with whom Beicker-Gallegos had a continuing work relationship intercepted the threats. Even still, viewing the evidence in the light most favorable to the verdict, the evidence shows that prison personnel drew Beicker-Gallegos's attention to at least one other threat they intercepted. Defendant also made oral threatening communications at disciplinary hearings where Beicker-Gallegos presided.**{2021 U.S. App. LEXIS 17}** These comments inspired her to file charges for threatening bodily injury.11 All this serves as ample evidence Defendant made *a* credible threat and repeated communications in connection with that threat.

Defendant also argues the government had to prove that Beicker-Gallegos felt subjectively threatened. But this argument misses the mark. The Colorado statute does not require subjective fear. See People In Interest of R.D., 464 P.3d at 733 ("[A] listener's subjective reaction, without more, should not be dispositive of whether a statement is a true threat . . . [because] whether a particular reader or listener will react with fear to particular words is far too unpredictable a metric for First Amendment protection."). Instead, it defines a credible threat as one which would cause "a *reasonable person* to be in fear for the person's safety or the safety of his or her immediate family or of someone with whom the person has or has had a continuing relationship." C.R.S.A. § 18-3-602(2)(b) (emphasis added). An indirect threat that would cause fear in a reasonable person and that a defendant intended to instill fear in a specific victim is enough. See C.R.S.A. § 18-3-602(b). Defendant addressed multiple threats to Beicker-Gallegos. This evidence shows he intended that *she* feel threatened. The government**{2021 U.S. App. LEXIS 18}** also offered evidence of Defendant's threats to rape and kill white women, his reference to Beicker-Gallegos as a "white DHO b**ch," and his notation that he needed to google her home address. Viewing the evidence in

the light most favorable to the verdict, these explicit and vulgar threats addressed to Beicker-Gallegos would cause fear in a *reasonable person.* For these reasons, the government offered sufficient evidence for the jury to convict.

AFFIRMED.

Entered for the Court

Joel M. Carson III

Circuit Judge

Footnotes

*

This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1

A cop-out is "a means by which inmates may send informal communications through internal prison channels to BOP staff."

2

We see no need to memorialize every vulgar comment Defendant made on his plans to rape and kill. But for the sake of context, some of Defendant's comments included the following:

> Let's see, writing these bull***t shots. Are going to stop me from going down to the river! Taking a shovel, digging up those 3 stainless steel boxes that I buried in 1998! The ones the bullshit FBI still cannot find. Really! Did writing shots in 1997 stop me from leaving the bullshit BOP and gathering up bombmaking material. F**k no!
>
> Will writing shots stop me from going to Chicago and get a AK-47 pistol? This is my 5th time leaving the bull***t BOP. I didn't give a f**k the first four times.

Come on! Tell me what the f**k are these shots supposed to do, except MOTIVATE ME.**{2021 U.S. App. LEXIS 4}**

3

Defendant argues the ACA did not assimilate the Colorado statute because two federal statutes punish approximately the same behavior as the Colorado statute-18 U.S.C. §§ 2261A and 115. We need not address whether such an overlap exists, because Defendant failed to timely object below or show good cause for the delay.

4

True, Defendant did mention the scope of ACA assimilation in his reply to the government's response to his own pretrial motion to dismiss. But in that reply, Defendant argued the ACA did not assimilate the Colorado statute because the Colorado statute *conflicted* with federal policy. Defendant neglected to mention either § 2261(A) or § 115. After the trial, Defendant's position evolved-he argued the Colorado statute and federal law are too *similar.* He filed a motion for new trial six days after the verdict, arguing that the ACA did not assimilate the Colorado statute because § 2261(A) was sufficient to punish his conduct. Later, he argued that § 115(a)(1)(B) also punished approximately the same conduct as the Colorado statute. Because Defendant made a different

argument and failed to reference § 2261(A) or § 115 before trial, we find he first objected to ACA's assimilation of the Colorado statute post-trial.
5

United States v. Key, 599 F.3d 469, 476-77 (5th Cir. 2010); United States v. Todd, 139 F.3d 896, 1998 WL 112562, at *3 (4th Cir. 1998) (unpublished table decision); United States v. Hall, 979 F.2d 320, 322-23 (3rd. Cir. 1992); Hockenberry v. United States, 422 F.2d 171, 173-74 (9th Cir. 1970).
6

Even if Defendant were correct and we had to defer to Colorado's interpretation of the Colorado statute, Defendant has not persuaded us that the Colorado state courts, post-Heineman and Elonis, would have done things any differently. See People In Interest of R.D., 464 P.3d 717, 733-34, 2020 CO 44 (Colo. 2020) (en banc) (avoiding a Constitutional challenge to the Colorado harassing communication statute by interpreting the statute to include a subjective intent element-that the defendant subjectively intended to threaten). See also People v. Smith, 620 P.2d 232, 238 (Colo. 1980) (en banc) ("It is also true that a statute will be presumed to conform to constitutional requirements . . . and a culpable mental state will be implied from a particular statute which does not contain an intent element on its face.").
7

Defendant cites a series of cases which addressed the scope of the ACA. See United States v. Johnson, 967 F.2d 1431, 1434 (10th Cir. 1992). But these cases are inapplicable here because they address when a defendant's act or omission is punishable by state law *and* Congressional enactment. See id.; Lewis, 523 U.S. at 164. When overlap does occur, the courts should consider, among other things, whether the "state law would effectively rewrite an offense definition that Congress carefully considered." Lewis, 523 U.S. at 164. For reasons described above, Defendant waived his argument that state law and congressional enactment punished approximately the same conduct. So for purposes of this argument, we assume the ACA assimilated the Colorado statute. For that reason, these cases are inapplicable and unpersuasive.
8

Defendant argues the district court redefined the Colorado statute by interpreting it to include a mens rea requirement. And he argues that Williams v. United States, 327 U.S. 711, 66 S. Ct. 778, 90 L. Ed. 962 (1946), prohibits the court from redefining or enlarging state statutes under the ACA. Not so. Williams stands for the proposition that, under the ACA, a conflicting state statute cannot redefine or enlarge an offense defined by Congress. Id. at 718. It in no way limits the court's power to interpret state statutes properly assimilated. Even still, the district court neither redefined nor enlarged the Colorado statute by interpreting it to include a mens rea requirement because that interpretation did not alter the statute's enumerated elements.
9

The first two elements are nearly verbatim the Pattern Criminal Jury instruction drafted by the Colorado Supreme Court, See COLJI-Crim. 3:602 (2019), and, for reasons explained above, the district court permissibly read in element four when interpreting the Colorado statute.
10

The Colorado statute does not require the government prove that Beicker-Gallegos felt threatened. Nor do cases interpreting Colorado or Federal law. See People In Interest of R.D., 464 P.3d at 733 ("[A] listener's subjective reaction, without more, should not be dispositive of whether a statement is a true threat."). As much as Defendant argues the government bore that burden, he is wrong. The proper inquiry is whether a reasonable person would understand the communication to be a threat. Stevens, 881 F.3d at 1253. Guesses about whether "a particular reader or listener will react with fear

to particular words is far too unpredictable a metric for First Amendment protection." People In Interest of R.D., 464 P.3d at 733. So although "the subjective reaction of a statement's target or foreseeable recipients will be an important clue as to whether the message is a true threat," the government does not have to prove beyond a reasonable doubt that the recipient felt threatened. Id. at 733.
11

As an example, at one disciplinary hearing he said the prison's disciplinary actions would not "stop his rifles and bullets" and only further motivated him towards violence upon his release. These disciplinary hearings took place before the threat Beicker-Gallegos recalls receiving. But the Colorado statute defined "in connection with" as conduct occurring "before, during, or after the credible threat." C.R.S.A. § 18-3-602(2)(a).

Appendix B

Case No. 20-1083

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ANDRE J. TWITTY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO, DENVER
HONORABLE R. BROOKE JACKSON
D.C. NO. 1:19-CR-00344-RBJ-1

BRIEF FOR DEFENDANT-APPELLANT

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June 29, 2020

ORAL ARGUMENT REQUESTED

III. Whether the District Court lacked jurisdiction under the ACA and whether the application of C.R.S. § 18-3-602(1)(b) was precluded by either 26 U.S.C. § 2261A(1) or 18 U.S.C. § 115.

IV. Whether the Government presented sufficient evidence to sustain a conviction for stalking pursuant to C.R.S. § 18-3-602(1)(b).

STATEMENT OF THE CASE

On September 19, 2019, the Defendant-Appellant Andre Twitty was arrested on the Superseding Indictment. (Rec. Vol. I at 2, 11-15). At the time of arrest, Mr. Twitty was completing a 60-month sentence at the United States Penitentiary, Administrative Maximum Facility in Florence, Colorado, hereinafter ("ADX Florence"). (Rec. Vol. II at 18-19); (TR, 11/1/19, pp 8-9). His Sentence discharged in November of 2019 and he was detained in this case. *Id*; (TR, 11/1/2019, p 4).

The Superseding Indictment alleged that between January and September of 2018 at ADX Florence he:

> made a credible threat to another person, namely S.B.G., intending S.B.G. to feel threatened, and, in connection with the threat, repeatedly made any form of communication with that person, a member of that person's immediate family, and someone with whom that person has or has had a continuing relationship, regardless of whether a conversation ensued.

(Rec. Vol. I at 12-13). In violation of C.R.S. § 18-3-602(1)(b) as assimilated by the ACA. *Id.* The Superseding Indictment varied from the original Indictment only that

it inserted, "intending S.B.G. to feel threatened." (Rec. Vol. I at 8, 12). C.R.S. § 18-3-602(1)(b) does not contain this added element nor do Colorado's jury instructions. (Rec. Vol. I at 30, 32, 55, 155).

Mr. Twitty filed a Motion to Dismiss alleging that Colorado's statute is unconstitutional on its face and as applied. (Rec. Vol. I at 3, 28-55). The Government in its Response cited *United States v. Heineman*, 767 F.3d 970 (2014) and *People in the Interest of R.D.*, 207SC116 (Colo. ___). (Rec. Vol. I at 79, 82, 85-87). It alleged Colorado's Attorney General conceded unconstitutionality[1], and the Government's amendment was consistent with "presumed state law." *Id.* Mr. Twitty replied that Colorado Supreme Court has repeatedly declined to apply knowingly element to "suffer[s] serious emotional distress or the sender intends to make a threat" and federal courts are bound by Colorado's current interpretation. (Rec. Vol. I at 95-96, 99-100). He argued the Government cannot alter Colorado law under the A.C.A. especially in light of similar federal statutes. *Id.*

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[1] At oral argument in front of the Colorado Supreme Court. The opinion in *People in Interest of R.D.*, 2020 WL 2828704 (Colo. 2020) was issued on June 1, 2020. It altered Colorado's "reasonable person standard," requiring amongst other things "the subjective reaction of a statement's target or foreseeable recipients." *Id* at 14; *see* (Rec. Vol. I at 281) (defense instruction that "the recipient was placed in fear"). It declined to follow *Elonis v. United States*, 135 S. Ct 2001 (2015) and *United States v. Heineman*, 767 F.3d 970 (10th Cir. 2014). Failing to decide whether "the First Amendment requires [subjective intent] in every threats prosecution." *Id.* at 15. Despite being notified on November 12, 2019, the Colorado Attorney General has taken no position on the challenge to the constitutionality of C.R.S. § 18-3-602. (Rec. Vol. I pp 4, 164-208, 223-24); *See* C.R.S. § 16-9-501.

No. 20-1083

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANDRE J. TWITTY,
Defendant-Appellant.

ANSWER BRIEF OF THE UNITED STATES

On Appeal from the United States District Court
For the District of Colorado
The Honorable R. Brooke Jackson
D.C. No. 19-CR-00344-RBJ

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United States Attorney

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Attorneys for Plaintiff-Appellee
United States of America

ORAL ARGUMENT NOT REQUESTED

August 26, 2020

Colorado Supreme Court would interpret C.R.S. § 18-3-602(1)(b) just as the district court did—to include a subjective intent to threaten.[5] Certainly, Twitty has not shown beyond a reasonable doubt that it would do otherwise. *Rocky Mountain Gun Owners*, 467 P.3d at 323.

Two state rules of statutory construction support the district court's interpretation. *See Phelps v. Hamilton*, 59 F.3d 1058, 1070-71 & n.23 (10th Cir. 1995) ("State rules of statutory construction should be applied by the federal courts in interpreting a state statute."). First, the presumption of constitutionality discussed above. *Id.* The Tenth Circuit has held that a conviction without proof of intent is unconstitutional. *Heineman*, 767 F.3d at 982. This Court should therefore assume that the Colorado Supreme Court, if given the opportunity, would adopt a construction that would avoid that constitutional infirmity. *Citizens for Responsible Gov't*, 236 F.3d at

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[5] Because this Court is not bound by Colorado's interpretation of the statute, *Sain*, 795 F.2d at 891, it should construe the statute in accordance with *Heineman* and *Elonis*, regardless of what the Colorado Supreme Court has done or would do. But to the extent the Court concludes otherwise, it may wish to certify the question to the Colorado Supreme Court. 10th Cir. R. 27.4(A); Colo. R. App. P. 21.1(a) (authorizing certification if state law may be determinative and there is no controlling supreme court precedent); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) (suggesting that certification may be appropriate "when a federal court is asked to invalidate a State's law").

CASE NO. 20-1083

IN THE UNITED STATES COURT OF

APPEALS FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff – Appellee,	)
	)
v.	)
	)
ANDRE TWITTY,	)
	)
Defendant – Appellant.	)

On Appeal from the United States District Court
For the District of Colorado
The Honorable R. Brooke Jackson
D.C. No. 19-cr-00344-RBJ

APPELLANT'S REPLY BRIEF

Respectfully submitted,

s/ R. Scott Reisch

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Oral Argument is requested.

September 16, 2020

ARGUMENT

COLORADO'S STALKING STATUTE IS UNCONSTITUTIONAL AND THE ACA DOES NOT PERMIT THE GOVERNMENT TO ALTER A STATE STATUTE IN AN INDICTMENT, IT IS BOUND BY STATE INTERPRETATION.

C.R.S. § 18-3-602 suffers from multiple flaws as identified in Appellant's Opening Brief.[1] Far from conceding "that the Colorado stalking statute is constitutional if it is construed to require a subjective intent," trial counsel argued that the statute is unconstitutional and "it's not the Court's job to fix it." Answer Brief at 19; (TR, 11/1/19, p 36); (Rec. Vol. 1 at 97). Appellant contends adding subjective intent to C.R.S. § 18-3-602(2)(b) did not fix the statute.[2] It muddled three areas of law, exceeded the Court's power, and contaminated Mr. Twitty's trial.

There is only one construction of C.R.S. § 18-3-602 the one supplied by Colorado's Supreme Court. *See People v. Baer*, 973 P.2d 1255, 1233 (Colo. 1999) (rejecting specific intent as to C.R.S. § 18-3-602(1)(b) in favor of "objective reasonable person standard"). This construction is inconsistent with Tenth Circuit jurisprudence but established by Colorado law. *United States v. Heineman*, 767 F.3d 970 (2014) (intent to instill fear is a constitutional requirement); *People in Interest*

---

[1] Appellant argues that C.R.S. § 18-3-602(2)(b) is unconstitutional because it omits specific intent but also because it includes a "reasonable listener" and excludes "subjective" reaction on the part of a "foreseeable" listener. Opening Brief at 20-21, 26-28, 30-31, 44.

[2] It is the Government's contention that it did, suggesting that the Colorado Supreme Court "is going to take the exact same approach that the Supreme Court took in *Elonis*," in re R.D. (TR, 11/1/19, p 20). It did not.

prosecution would be unconstitutional based on the omission of the "refine[d] objective standard," regardless of subjective intent. Answer Brief at 26. *Heineman*, contains no such requirement.

People in Interest of R.D., 464 P.3d 717 (Colo. 2020) did not directly address C.R.S. § 18-3-602 but it altered Colorado's true threats jurisprudence to include a "refine[d] objective standard." It is well established under Colorado case law and as a matter of state statute that the *mens rea* applicable to all subsections of C.R.S. § 18-3-602 is "knowingly." Colorado's courts have applied this standard post-*Elonis* and continue to apply it following *People in the Interest of R.D* which addressed and declined to follow *Heineman*. *Id* at 728 n. 18.

C.R.S. § 18-3-602 reads as follows:

> (1) A person commits stalking if directly, or indirectly through another person, the person knowingly:
>
> (a) Makes a credible threat to another person and, in connection with the threat, repeatedly follows, ...
>
> (b) Makes a credible threat to another person and, in connection with the threat, repeatedly makes any form of communication with that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship, regardless of whether a conversation ensues; or
>
> (c) Repeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person . . . in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . serious emotional distress . . .

Appendix "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 19-cr-00344-RBJ

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. ANDRE J. TWITTY,

Defendant.

SUPERSEDING INDICTMENT

The United States Attorney charges that:

COUNT 1

Between and including, on or about January 2018, through on or about September 2018, in the State and District of Colorado, and within the special maritime and territorial jurisdiction of the United States, namely the United States Penitentiary, Administrative Maximum Facility, in Florence, Colorado, the defendant, ANDRE J. TWITTY, knowingly made a credible threat to another person, namely S.B.G., intending S.B.G. to feel threatened, and, in connection with the threat, repeatedly made any form of communication with that person, a member of that person's immediate family, and someone with whom that person has or has had a continuing relationship, regardless of whether a conversation ensued.

All in violation of Colorado Revised Statute Section 18-3-602(1)(b), as assimilated by Title 18, United States Code Section 13.

A TRUE BILL:

Ink signature on file in Clerk's Office
FOREPERSON

JASON R. DUNN
United States Attorney

s/Sarah H. .Weiss
Sarah H. Weiss
Assistant U.S. Attorney
U.S. Attorney's Office
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Attorney for Government

Exhibit 1

pg 1 of 3

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Criminal Action No. 19-CR-00344-RBJ-1

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANDRE J. TWITTY,

Defendant.

REPORTER'S TRANSCRIPT
Motions Hearing

Proceedings before the HONORABLE R. BROOKE JACKSON, Judge, United States District Court for the District of Colorado, commencing on the 1st day of November, 2019, in Courtroom A902, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:
VALERIA N. SPENCER and SARAH H. WEISS, U.S. Attorney's Office, 1801 California St., Ste. 1600, Denver, CO 80202

For the Defendant:
R. SCOTT REISCH, Reisch Law Firm, LLC, 1490 W. 121st Ave., Ste. 202, Denver, CO 80234

Sarah K. Mitchell, RPR, CRR, 901 19th Street, Room A252, Denver, CO 80294, 303-335-2108

Proceedings reported by mechanical stenography; transcription produced via computer.

Congress, or in this particular case the State of Colorado, should go back and fix it. But I don't think it's the Court's job to add language to statutes that are defective.

THE COURT: But that's what the Supreme Court did.

MR. REISCH: I understand that's what the Supreme Court did, but I still don't think that they should do that. I think that the statute reads for itself. The legislature, whether it's Congress or the state legislature, drafted the statute. If it fails, it fails. They don't get to just go back and fix it and add it, and say, Well, this is what the legislature really meant, or this is the way --

THE COURT: Right. Give me some law that says that the Court cannot interpret a statute so as to be constitutional.

MR. REISCH: Well, I think interpret is different than adding language. I think that's the Court acting as a legislator at that moment, and for lack of a better term, fixing the flaws in the statute. If that were the case, no law would ever be found unconstitutional. The Court would simply rewrite it to be constitutional, Your Honor, and I think that just like in this particular case, and even *Elonis* -- I understand what *Elonis* -- the Court did in *Elonis*. They added -- they said it should be there, but they sent it back, and I think it was wrongly decided in that regard. They should have simply said our job is not to rewrite it. Our job

chosen not to.

THE COURT: Well, let me ask you this question then. Is it your position that a mental state, a mens rea of intent to cause harm is not inherent in that state statute?

MR. REISCH: Not as it is written right now.

THE COURT: I'm surprised, because I would think that every defendant in any case would insist on that just as the Supreme Court insisted on it to the benefit of the defendant.

MR. REISCH: I agree, Your Honor. I agree. Every criminal statute should have that. Every criminal statute should say you have to prove what the defendant is saying. But in this particular case, we're challenging the statute on the plain language that exists there, and no Colorado Courts have said go ahead and add that mental state. The legislature has not gone back and fixed it since *Elonis*. And by their failure to do so, they've said we see it as fine.

THE COURT: Well, perhaps if you had done what you were required to do and notified the attorney general, this would have been one of those rare instances where the attorney general actually showed up and took a position on this, and then we would know, at least from that perspective.

MR. REISCH: Your Honor, I would ask then for leave. I would move to continue. I would ask to set this on the Court's calendar, and I will notify the attorney general pursuant to any requirements that I need to do so.

Government is asking for you to do here is precisely what was done in the last trial of Mr. Twitty under the federal threats statute. It is precisely what the Supreme Court did in *Elonis*, and it is precisely what all indications available are that the Colorado Supreme Court is going to do within the next few weeks or months in that In re R.D. case.

THE COURT: Well, I don't know what they're going to do, but did you read the statute that the Supreme Court construed in *Elonis*?

MS. WEISS: I did, Your Honor.

THE COURT: It's a little more vague than this Colorado statute, isn't it? This Colorado statute very specifically states precisely what *Elonis* said was not possible, not constitutional. Well, they didn't say not constitutional. Harris Hartz said it was not constitutional in the Tenth Circuit case. What was his language in *Heineman*, 767 F.3d at 978? Quote, We read Black as establishing that a defendant can be constitutionally convicted of making a true threat only if the defendant intended the recipient of the threat to feel threatened, closed quote. But my point was that this statute on its face, if you don't read the mens rea into it, would have to be unconstitutional. It is more clearly so, in my opinion, than the statute that was construed in *Elonis*. Do you disagree?

MS. WEISS: I disagree somewhat, and part of this has

Government is narrowing the universe of potential criminal conduct by adding this additional element in, which is constitutionally required under *Heineman*. In re R.D. certainly suggests that the Colorado Supreme Court is going to take the exact same approach that the Supreme Court took in *Elonis* and say, as a matter of statutory interpretation, we are going to interpret subjective intent into our state threat statutes going forward.

THE COURT: What is the current status of that case that you've referred to in the Colorado Supreme Court?

MS. WEISS: They had oral argument in May of this year, the middle of May of this year. I checked the docket yesterday, and they have not yet issued an opinion. However --

THE COURT: Well, Mr. Reisch asked for leave to continue this case and notify the attorney general, which he should have done in the first place. You've got this case that you're relying on to support you, but hasn't been decided yet. Maybe the better course of discretion would be to put this case on ice for a little while and see what happens in that other case. What do you think?

MS. WEISS: Your Honor, in this instance, I don't think that's necessary, and why I don't think that's necessary is I have listened to the entire oral argument that happened in that In re R.D. case, and it is very clear from instance

Appendix "D"

WESTLAW

2020 WL 2828704

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR

People In Interest of R.D.
Supreme Court of Colorado. June 1, 2020 — P.3d — 2020 WL 2828704 2020 CO 44 *(Approx. 23 pages)*

The PEOPLE of the State of Colorado, Petitioner,
IN the INTEREST OF Respondent: R.D.

Supreme Court Case No. 17SC116
June 1, 2020

Synopsis

Background: Following bench trial, juvenile was adjudicated delinquent in the District Court, Arapahoe County, Theresa Slade, J., based on messages posted on microblog that threatened high school student that would have constituted harassment if committed by an adult. Juvenile appealed. The Court of Appeals, Hawthorne, J., 2016 WL 74738072016, reversed and remanded. The People filed petition for writ of certiorari.

Holdings: The Supreme Court, Marquez, J., en banc, held that:

1 "true threat," which is not protected by First Amendment, is statement that intended or foreseeable recipient would reasonably perceive as serious expression of intent to commit act of unlawful violence;

2 appellate court had to review constitutionality of harassment statute's application to juvenile's "tweets;"

3 as matter of first impression, objective tests are insufficient to distinguish what is a true threat from what is constitutionally protected speech;

4 reaction of high school students to juvenile's "tweets" was relevant factor for appellate court to consider when determining if juvenile's statements were true threats; and

5 government had to prove that juvenile had the subjective intent to threaten in order to find juvenile guilty of harassment.

Reversed and remanded with instructions.

West Headnotes (39)

Change View

1 **Constitutional Law**
First Amendment's protection of speech is robust, but not absolute: it does not, for example, safeguard the utterance of a true threat. U.S. Const. Amend. 1.

2 **Constitutional Law**
"True threat," which is not protected by First Amendment, is a statement that, considered in context and under totality of the circumstances, an intended or foreseeable recipient would reasonably perceive as serious expression of intent to commit act of unlawful violence. U.S. Const. Amend. 1.

3 **Constitutional Law**
In determining whether statement is a true threat, which is not protected by First Amendment, reviewing court must examine the words used, but it must also consider context in which the statement was made. U.S. Const. Amend. 1.

gun emoji in the article's title "looks like a space pistol on some platforms and like a revolver on others").

¶49 The chance of meaning being lost in translation is heightened by the potential for online speech to be read far outside its original context. These days, one needs no more than a whim and a smartphone to broadcast to a massive audience. A message posted in Denver can reach New York, Tokyo, or Munich in an instant. Indeed, the term "viral" is apt for the rapidity with which an online statement can spread. A recipient might retransmit a message to audiences not foreseeable to the original speaker. A message might be recirculated after an intervening event that alters its impact. And online speech transmitted in the heat of the moment—which, if uttered verbally, would not linger beyond the speaker's apology—might be archived and subjected to scrutiny years after the fact.

¶50 The risk of mistaking protected speech for a true threat is high. But so are the stakes of leaving true threats unregulated. With the click of a button or tap of a screen, a threat made online can inflict fear on a wide audience. *See, e.g.*, Julie Turkewitz & Jack Healy, *'Infatuated' with Columbine: Threats and Fear, 20 Years After a Massacre*, N.Y. Times (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/us/columbine-shooting-sol-pais.html (reporting that "millions of parents, students, and educators across Colorado" awoke on Columbine's 20th anniversary to news of an individual's alarming social media posts and threats to friends and family, and that hundreds of schools across the state closed in response). Indeed, a single online post can trigger the diversion of significant law enforcement resources. *See, e.g.*, *United States v. Bradbury*, 848 F.3d 799, 802 (7th Cir. 2017) (observing that defendant's Facebook post precipitated an extensive police investigation). Or such a threat may be directed to a known and vulnerable victim in the privacy of their home. *See Elonis*, 135 S. Ct. at 2017 (Alito, J., concurring in part and dissenting in part) ("Threats of violence and intimidation are among the most favored weapons of domestic abusers, and the rise of social media has only made those tactics more commonplace."). Online communication—in particular, the ability to communicate anonymously—enables unusually disinhibited communication, magnifying the danger and potentially destructive impact of threatening language on victims. *See Reno v. ACLU*, 521 U.S. 844, 889, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (O'Connor, J., concurring) ("[C]yberspace allows speakers and listeners to mask their identities."). In short, technological innovation has provided apparent license and a ready platform to those wishing to provoke terror.

15 *12 ¶51 Given this changed landscape, we are convinced that the various objective tests previously articulated by this court and the court of appeals are insufficient to distinguish "what is a [true] threat ... from what is constitutionally protected speech." *Watts*, 394 U.S. at 707, 89 S.Ct. 1399. Judging a statement from the vantage point of a "reasonable speaker" or "reasonable listener" in our view inadequately accounts for potentially vast differences in speakers', listeners', and disinterested fact-finders' frames of reference. We therefore hold that a true threat is a statement that, considered in context and under the totality of the circumstances, an intended or foreseeable recipient would reasonably perceive as a serious expression of intent to commit an act of unlawful violence. 23 We believe that this refinement of the objective standard strikes a better balance between giving breathing room to free expression and protecting against the harms that true threats inflict.

¶52 In determining whether a statement is a true threat, a reviewing court must examine the words used, but it must also consider the context in which the statement was made. Particularly where the alleged threat is communicated online, the contextual factors courts should consider include, but are not limited to (1) the statement's role in a broader exchange, if any, including surrounding events; (2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features; (3) the manner in which the statement was conveyed (e.g., anonymously or not, privately or publicly); (4) the relationship between the speaker and recipient(s); and (5) the subjective reaction of the statement's intended or foreseeable recipient(s).

16 17 ¶53 Courts should start, of course, with the words themselves, along with any accompanying symbols, images, and other similar cues to the words' meaning. *Cf. United States v. Edwards*, No. 2:17-CR-170, 2018 WL 456320, at *2 (S.D. Ohio Jan. 17, 2018) (in witness retaliation case, analyzing Facebook post that called confidential informant a snitch and included laughing faces and a skull emoji). This inquiry should include whether the threat contains accurate details tending to heighten its credibility. *See, e.g., Elonis*, 135 S. Ct. at 2005–06 (noting the accuracy of the details in defendant's Facebook post conveying a threat against his wife, including a diagram of her house and directions to "fire a mortar

court heard argument from counsel but took no evidence on that question. Moreover, the trial transcript reveals that the court did not reconsider R.D.'s constitutional argument at the close of the prosecution's case or in the final ruling adjudicating R.D. delinquent. And in judging R.D.'s tweets against the elements of section 18-9-111(1)(e), the trial court actively disregarded testimony suggesting that A.C. and J.W. did not take R.D.'s messages seriously, considering their reaction irrelevant under the statute. As stated above, their reaction was a relevant factor to consider under the First Amendment.

*15 ¶65 Because we have clarified the test to be used when evaluating whether a statement constitutes a true threat, the trial court is in the best position to review the record, to take further evidence in its discretion, and to reach a conclusion on the matter.

IV. Conclusion

¶66 We hold that a true threat is a statement that, considered in context and under the totality of the circumstances, an intended or foreseeable recipient would reasonably perceive as a serious expression of intent to commit an act of unlawful violence. In determining whether a statement is a true threat, a reviewing court must examine the words used, but it must also consider the context in which the statement was made. Particularly where the alleged threat is communicated online, the contextual factors courts should consider include, but are not limited to (1) the statement's role in a broader exchange, if any, including surrounding events; (2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features; (3) the manner in which the statement was conveyed (e.g., anonymously or not, privately or publicly); (4) the relationship between the speaker and recipient(s); and (5) the subjective reaction of the statement's intended or foreseeable recipient(s).

39 ¶67 We agree with the parties that in this case, the government must also prove that R.D. had the subjective intent to threaten. We need not decide today whether the First Amendment requires that showing in every threats prosecution.

¶68 Because neither the juvenile court nor the court of appeals had the benefit of the framework we adopt today, we reverse the judgment of the court of appeals and remand with instructions to return the case to the juvenile court to reconsider the adjudication applying this refined test.

All Citations

--- P.3d ---, 2020 WL 2828704, 2020 CO 44

Footnotes

1 We need not resolve today whether the test for true threats under the First Amendment also requires consideration of the speaker's subjective intent to threaten the victim(s). But even assuming it does, the statutory provision at issue required the State to prove beyond a reasonable doubt that the communication here was made "in a manner intended to ... threaten bodily injury." § 18-9-111(1)(e).

2 Twitter is a "real-time information network that lets people share and discuss what is happening at a particular moment in time through the use of 'tweets.' " *Dimas-Martínez v. State*, 2011 Ark. 515, 385 S.W.3d 238, 243 n.3 (2011).

3 A tweet is a message posted to Twitter that might contain text or other media. A tweet appears on the sender's profile page and may appear on the feed, or timeline, of anyone following the sender. *About Different Types of Tweets*, Twitter, https://help.twitter.com/en/using-twitter/types-of-tweets [https://perma.cc/8ZBR-H79E]. The word "tweet" is also used as a verb to describe the act of posting a message on Twitter. *See, e.g., How to Tweet*, Twitter, https://help.twitter.com/en/using-twitter/how-to-tweet [https://perma.cc/9CQ6-3BYE].

4 A "mention" is a tweet that contains another account's Twitter username, or "handle," preceded by the "@" symbol. When a user's handle is mentioned, the user receives notification of the tweet, but the tweet does not appear on the user's public profile.

5 For purposes of this opinion, we have replaced the students' Twitter handles with their initials.

review. In other words, we assume for purposes of this opinion that section 18-9-111(1)(e) proscribes only conduct that constitutes a true threat, at least insofar as it criminalizes what R.D. is charged with here. Accordingly, we limit our analysis to whether R.D.'s tweets constituted true threats.

17 The objective test has several variations, with some courts asking whether the statement is one a reasonable *speaker* would foresee would be interpreted as a serious expression of intention to inflict bodily harm, *see, e.g.*, *State v. Trey M.*, 186 Wash.2d 884, 383 P.3d 474, 478 (2016), some asking how a reasonable *listener* would construe the speech in context, *see, e.g.*, *United States v. White*, 670 F.3d 498, 507 (4th Cir. 2012), and some considering both perspectives, *see, e.g.*, *Haughwout v. Tordenti*, 332 Conn. 559, 211 A.3d 1, 9 (2019) (requiring 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 intent to harm or assault" and that "a reasonable listener, familiar with the entire factual context of the defendant's statements, would be highly likely to interpret them as communicating a genuine threat of violence rather than protected expression, however offensive or repugnant" (quoting *State v. Krijger*, 313 Conn. 434, 97 A.3d 946, 957, 963 (2014))).

18 *See, e.g.*, *United States v. Heineman*, 767 F.3d 970, 978 (10th Cir. 2014); *United States v. Cassel*, 408 F.3d 622, 631–33 (9th Cir. 2005); *State v. Boettger*, — Kan. —, 450 P.3d 805, 813–15 (2019); *see also Perez v. Florida*, — U.S. —, 137 S. Ct. 853, 855, 197 L.Ed.2d 480 (2017) (Sotomayor, J., concurring in denial of petition for writ of certiorari) ("Together, *Watts* and *Black* make clear that to sustain a threat conviction without encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words—*some* level of intent is required.... These two cases strongly suggest that it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat.").

19 Some have also reasoned that it would be unfair to penalize a speaker for the unintended consequences of their communication. *See* Leslie Kendrick, *Free Speech and Guilty Minds*, 114 Colum. L. Rev. 1255, 1282 (2014).

20 Specifically, the jury was instructed that

> [a] statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein 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.

21 In the absence of additional guidance from the U.S. Supreme Court, we decline today to say that a speaker's subjective intent to threaten is necessary for a statement to constitute a true threat for First Amendment purposes. But even assuming that the First Amendment requires proof of such subjective intent, the statute here required the government to show beyond a reasonable doubt that R.D. "initiate[d] communication ... in a manner intended to ... threaten bodily injury." § 18-9-111(1)(e).

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Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. **19-cr-00344-RBJ**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

1. ANDRE J. TWITTY,

Defendant.

MOTION TO DISMISS INDICTMENT

COMES NOW, the Defendant, Andre Twitty, by and through his CJA appointed counsel, R. Scott Reisch, and hereby moves this Honorable Court for the entry of an Order vacating the judgment and dismissing the Indictment.

AS GROUNDS for this Motion, Mr. Twitty states as follows:

1. On 21 Nov 2019, after a Jury Trial, Petitioner was found guilty on the sole count of the indictment, Stalking – Credible Threat, in violation of C.R.S. § 18-3-602(1)(b) and assimilated under 18 USC § 13, The Assimilative Crimes Act, hereinafter ("ACA"). However, the ACA did not apply to the conduct alleged in the indictment. This jurisdictional defect mandates dismissal of the indictment.

2. The ACA provides limited jurisdiction for federal courts to adopt state substantive offenses, to federal enclaves when federal law is silent. *Lewis v. United States*, 523 U.S. 155, 163 (1998). Federal law is not silent in Mr. Twitty's case.

3. 18 U.S.C. § 115(a)(1)(B) is entitled "Influencing, impeding, or retaliating

against a Federal official by threatening or injuring a family member." It covers threats against federal officials and employees. It supplants C.R.S. § 18-3-602(1)(b). 18 U.S.C. § 115(a)(1)(B) reads in the relevant part:

> Whoever threatens to assault, kidnap, or murder, United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under section [1114].

See U.S. v. Rael, 2019 U.S. Dist. LEXIS 96012 (D. N.M. June 7).

4. "18 U.S.C. § 1114, makes it a [federal offense] to kill or attempt to kill any officer or [employee] of the United States or of any agency in any branch of the United States Government while such officer or employee is engaged in or on account of the performance of official duties." *See U.S. v. Chavez*, 2018 U.S. Dist. LEXIS 212461 (D. N.M. December 18).

5. The person named in the indictment as the victim, S.B.G., the disciplinary hearing officer, was clearly "an officer and [employee] of the Federal Bureau of Prisons, an agency of a branch of the United States government, as designated in [Section 1114.]" *See U.S. v. Murray*, 760 F. Appx. 595, 596 (10th Cir. 2019) (Threatened to kill an employee of the BOP); *U.S. v. Howe*, 289 F. Appx. 74-5 (6th Cir. 2008) (defendant charged with threatening a correctional officer in violation of 18 U.S.C. § 115(a)(1)(B) while incarcerated at a United States Penitentiary). The Government was barred from Charing Mr. Twitty with making a credible threat under C.R.S.§ 18-3-602(1)(b) when the same conduct has already been made criminal under a federal statute.

6. In *Torres v. Lynch*, 136 S.Ct. 1619, 1631 (2016), the United States Supreme Court made clear:

> The [ACA] subjects federal enclaves . . . to state criminal laws except when they punish the same conduct as a federal statute THE ACA thus requires courts to decide when a federal and state law are sufficiently alike that only the federal one will apply.

Here, both statutes punish the same conduct, credible threats.

7. In *Lewis*, the United States Supreme Court made clear that there is "no assimilation where Congress has covered the field with uniform federal legislation." *Lewis v. United States*, 523 U.S. 155, 165 (1998). "The Act will not apply where both where both state and federal statutes seek to punish approximately the same wrongful behavior." *Id.* "[T]he Government can assimilate state law under the ACA only if no act of Congress make such conduct punishable." *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1176, 1180 (10th Cir. 1991); *accord U.S. v. Ganadonegro*, 854 F. Supp. 2d. 1068, 1074-75 (D. N.M. 2012). "The plain meaning of that Act requires that state law not be assimilated where any enactment of Congress' punished the conduct." *Id.*

8. In *U.S. v. Patmore*, 475 F.2d 752-53 (10th Cir. 1973), the Tenth Circuit held that 18 U.S.C. § 113(a) preempted a Kansas assault statute under the ACA where the defendant was imprisoned in a federal penitentiary. *Id* at 753. It held, the "Act has no application if such acts or omissions are made penal by federal statute . . . [a]lthough the crime may be within the definition of the Kansas statute, it is punishable under the provisions of 18 U.S.C. § 113(c), which prevail." *Id quoting United States v. Sharpnack*, 355 U.S. 286, 292 (1958).

9. "[T]he ACA is not intended to make federal enclaves subject to the entirety of the criminal law of the state in which the enclave is located." *U.S. v. Moreno*, 2005 WL

1899393 (E.D. WI, Aug 9). "It thus makes applicable only those state criminal laws that make punishable acts or omissions that have not been made punishable by any Congress." *Id.* "The ACA may not be used to transform a state criminal charge into a federal offense where the same conduct is already subject to prosecution under federal law. *Id citing United States v. Chausse*, 536 F.2d 637, 644-45 (7th Cir. 1976).

10. In *U.S. v. Christie*, 717 F.3d 1156, 1170-71 (10th Cir. 2013), "the district court had to dismiss the assimilated charges as a matter of law after trial." *Id.* at 1170. Where, as here:

> a federal statute applies to the defendant's conduct and that the assimilation of a state law applying to the same conduct would interfere with the achievement of a federal policy or effectively rewrite an offense definition that Congress carefully considered or enter a field Congress has expressed an intent to occupy, then the need for dismissing an assimilated crime may be evidence even before trial.

Id at 171 *citing Lewis*, 523 U.S. at 164. 18 U.S.C. § 115(a)(1)(B) punishes the same conduct as C.R.S. § 18-3-602(1)(b) as a part of a comprehensive regulatory scheme. As such, only the federal act will apply. *Torres*, 136 S.Ct. at 1631; *Patmore*, 475 F.2d at 753 ("the act has no application"). Therefore, the ACA did not confer jurisdiction on the trial court.

11. The Tenth Circuit held in *Gad v. Kansas State University*, 787 F.3d 1032, 1035 (10th Cir. 2015):

> The federal courts are courts of limited subject matter jurisdiction. And since we have limited jurisdiction, we may only hear cases when empowered to do so by the Constitution and by act of Congress.

Id (internal citations omitted). Since the ACA does not apply by its own language, it did not confer any jurisdiction on the trial court as a matter of law. *See Pelkey v. Colorado*

Dept. of Labor, 14CV-02205-RBJ (D. Colo. April 14, 2005) ("statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction"); *See Baker v. Meek*, 2015 WL 10012984 (D. Colo., Dec 31) ("A court lacking jurisdiction cannot render judgment but must dismiss the cause at any state of the proceeding in which it becomes apparent that jurisdiction is lacking.)

12. It is beyond dispute that the trial court did not have proper subject matter jurisdiction because it obtained its jurisdiction from the ACA, 18 U.S.C. § 13(a). The ACA does not apply to Mr. Twitty and his alleged conduct. As such, the trial court judgment is void. *U.S. v. Prentiss*, 256 F.3d 971, 986 n. 14 (10th Cir. 2001) ("Federal crimes are solely creatures of statutes"); *Gad v. Kansas State University*, 787 F.3d 1032, 1035 (10th Cir. 2015) (federal courts jurisdiction limited to constitution and statutes).

13. The U.S. Supreme Court made clear in *Insur. Corp. v. Compagne des Bauxites* 456 U.S. 694, 701-702 (1982), "[t]he valitidy of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties." Without jurisdiction the court is without power, and its orders are invalid. *Hovens v. Colo. Dept. Corr.*, 897 F.3d 1250, 1261 (10th Cir. 2018) ("A court without jurisdiction has no authority to decide an issue on the merits").

14. "When a court assumes a jurisdiction which in fact it could not take . . . all proceedings in that court must go for naught. *U.S. v. Magnan*, 622 Fed. Appx. 719, 722 (10th Cir. 2015). This includes any judgments of conviction rendered by the court in absence of jurisdiction. *Johnson v. Zebst*, 304 U.S. 458, 468 (1938).

15. "[N]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an [ACT] of Congress." *Rumfeld v. Padilla*, 542 U.S. 426, 434

n. 6 (2006) Thus "where imprisonment is unlawful, the Court can only direct the prisoner to be discharged" *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) Petitioner is entitled to his immediate release.

WHEREFORE Mr. Twitty moves that the relief requested be granted and for any further relief which this Honorable Court deems just and proper.

Dated this 5th day of February 2020.

Respectfully submitted,

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