APPENDIX A

COLORADO COURT OF APPEALS

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff - Appellee,

v.

BILLY RAYMOND COUNTERMAN
Defendant - Appellant.

Court of Appeals No. 17CA1465

Arapahoe County District Court
No. 16CR2633
Honorable F. Stephen Collins, Judge

ORDER AFFIRMED

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

Announced July 22, 2021

Philip J. Weiser, Attorney General, Joseph Michaels, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Mackenzie Shields, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Bringing an as-applied constitutional challenge, Billy Raymond Counterman appeals his conviction for stalking (serious emotional distress) under section 18-3-602(1)(c), C.R.S. 2020, as a violation of both his federal and Colorado constitutional rights to freedom of speech. Specifically, he contends that section 18-3-602(1)(c), impermissibly criminalizes his protected statements contained in Facebook messages that he sent to the victim — a local musician and public figure.

¶ 2 Applying both federal and Colorado law, we conclude that Counterman's statements were true threats and, thus, unprotected speech under both the First Amendment to the United States Constitution and article II, section 10 of the Colorado Constitution. Accordingly, section 18-3-602(1)(c) isn't unconstitutional as applied to him.

¶ 3 We further hold that the trial court didn't plainly err by failing to sua sponte instruct the jury on true threats or to require the jury to find that Counterman's statements were true threats as an additional element of stalking (serious emotional distress).

¶ 4 Finally, we resolve whether the trial court's response to a jury question, which told the jury that it could consider evidence that the victim suffered serious emotional distress outside of the timeframe in the charging document, was a constructive amendment of the charge or a simple variance and whether it impermissibly lowered the prosecution's burden of proof. We conclude that the response was a simple variance and that it didn't lower the prosecution's burden of proof. Accordingly, we affirm Counterman's conviction.

I. Background

¶ 5 C.W. is a singer-songwriter based in Colorado. C.W. had two Facebook profiles — a public account for promoting her music and a private account for personal use.

¶ 6 In 2014, Counterman sent a Facebook friend request to C.W.[1] Over the next two years Counterman sent "clusters" of messages to C.W.'s accounts. C.W. deleted some of the messages and didn't respond to any of them. She said the messages were "weird" and "creepy." C.W. also blocked Counterman on Facebook multiple times to prevent him from sending her messages, but he would create new Facebook accounts and continue to send her messages.

---

[1] C.W. couldn't remember whether Counterman initially sent the friend request to her personal account or her public account. This isn't material to the case at hand, however, because he sent messages to both accounts and messages to both accounts were used as evidence to support his conviction for stalking.

¶ 7 In 2016, C.W. spoke with a family member about the messages Counterman had sent her. She was "fearful" of Counterman and said that his messages caused her "serious" concern. She was "extremely scared" of being hurt or killed after Counterman sent her messages saying that he wanted her to die. And Counterman's messages alluded to making "physical sightings" of C.W. in public. For example, in one of his messages Counterman told C.W. that he had witnessed her doing "things that [she did] out and about."

¶ 8 In April 2016, C.W. (along with the family member in whom she had confided) contacted an attorney to determine what actions she could take to protect herself from Counterman. In the course of meeting with this attorney, C.W. learned that Counterman was serving probation for a federal offense.

¶ 9 She said that this "scared" her, and she then reported Counterman to law enforcement. C.W. obtained a protective order against Counterman and cancelled some of her planned performances because she worried that he would show up at the venue. Law enforcement arrested Counterman on May 12, 2016.

¶ 10 The People charged Counterman with one count of stalking (credible threat), section 18-3-602(1)(b); one count of stalking (serious emotional distress), section 18-3-602(1)(c); and one count of harassment, section 18-9-111(1)(e), C.R.S. 2020. Before trial, the prosecution dismissed the count of stalking (credible threat).

¶ 11 Counterman filed a motion to dismiss the remaining counts of stalking (serious emotional distress) and harassment. He asserted that sections 18-3-602(1)(c)

and 18-9-111(1)(e), if applied to his Facebook messages, would violate his right to free speech under both the First Amendment to the United States Constitution and article II, section 10 of the Colorado Constitution. Specifically, he contended that his messages to C.W. weren't true threats and, thus, his speech was protected from criminal prosecution. The trial court denied the motion.

¶ 12 On the first day of trial, the prosecution dismissed the harassment count, leaving only the count of stalking (serious emotional distress) under section 18-3-602(1). To convict Counterman of this offense, the prosecution was required to prove, beyond a reasonable doubt, that "directly, or indirectly through another person," Counterman knowingly

> [r]epeatedly follow[ed], approache[d], contact[ed], place[d] under surveillance, or ma[de] any form of communication with [C.W.], . . . in a manner that would cause a reasonable person to suffer serious emotional distress and d[id] cause [C.W.] . . . to suffer serious emotional distress.

§ 18-3-602(1)(c).

¶ 13 The jury found Counterman guilty of stalking (serious emotional distress). The trial court sentenced him to four-and-a-half years in prison.

II. Analysis

¶ 14 Counterman raises two categories of contentions on appeal — constitutional and instructional. We address each in turn.

A. Constitutionality of Section 18-3-602(1)(c) As Applied to Counterman's Facebook Messages

¶ 15 Counterman asserts that section 18-3-602(1)(c) is unconstitutional as applied to his statements because they are protected speech, not unprotected true threats. In the alternative, he asserts that even if his statements were true threats, the court erred by failing to sua sponte instruct the jury on true threats. We address and reject each contention in turn.

1. Additional Facts

a. The Messages

¶ 16 Counterman sent numerous direct messages to C.W. over a two-year period. These messages were largely text, with the exception of some photographs that contained text within the image. The prosecution presented the following messages as evidence that Counterman stalked C.W.:

- "Was that you in the white Jeep?"
- "Five years on Facebook. Only a couple physical sightings."
- "Seems like I'm being talked about more than I'm being talked to. This isn't healthy."
- "I've had tapped phone lines before. What do you fear?"
- An image of stylized text that stated, "I'm currently unsupervised. I know, it freaks me out too, but the possibilities are endless."

- An image of liquor bottles that was captioned "[a] guy's version of edible arrangements."
- "How can I take your interest in me seriously if you keep going back to my rejected existence?"
- "Fuck off permanently."
- "Your arrogance offends anyone in my position."
- "You're not being good for human relations. Die. Don't need you."
- "Talking to others about me isn't prolife sustaining for my benefit. Cut me a break already . . . . Are you a solution or a problem?"
- "Your chase. Bet. You do not talk and you have my phone hacked."
- In a message sent the following day from the "[y]our chase" message, an apology that stated, "I didn't choose this life."
- "Staying in cyber life is going to kill you. Come out for coffee. You have my number."
- "A fine display with your partner."
- "Okay, then please stop the phone calls."
- "Your response is nothing attractive. Tell your friend to get lost."

b. Counterman's Motion to Dismiss and the Trial Court's Analysis

¶ 17 In a pretrial motion, Counterman's counsel argued that the charge for stalking (serious emotional distress) should be dismissed because, if applied to

Counterman, section 18-3-602(1)(c) would criminalize his protected speech. Specifically, counsel asserted that none of his messages to C.W. was a true threat — a category of speech unprotected by the First Amendment and article II, section 10. Rather, counsel argued that Counterman's statements were protected speech under both the First Amendment and article II, section 10. Thus, criminal prosecution of him for those statements would violate his right to freedom of speech under both constitutions.

¶ 18 The trial court addressed Counterman's argument at a motions hearing. It noted that, under *People v. Chase*, 2013 COA 27, and *People in Interest of R.D.*, 2016 COA 186, *rev'd and remanded*, 2020 CO 44, "if something is found not to be a true threat, it's subject to First Amendment protection and it will not support a charge or a conviction of stalking or, I believe, harassment." But, if speech "is found to be a true threat, then it does not benefit from the First Amendment protection and it would provide a basis for a lawful charge and a lawful conviction of either stalking or harassment."

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

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

> [Counterman's] statements rise to the level of a true threat, although ultimately that will be a question of fact for the jury to decide.

¶ 20 However, the trial court warned the parties that "the evidence that comes in at trial may make [the court] reconsider [its order]" and that, if so, it would "go through this analysis again, just to make sure we don't have [a] First Amendment issue."

¶ 21 After the prosecution rested, Counterman's attorney renewed the motion to dismiss the stalking charge for violating Counterman's right to free speech and moved for a judgment of acquittal.

¶ 22 The trial court again denied Counterman's motion to dismiss and denied his motion for judgment of acquittal, ruling that the evidence elicited at trial

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

2. As-Applied Challenge to Section 18-3-602(1)(c)

¶ 23 Counterman contends that section 18-3-602(1)(c) is overbroad as applied to him under both the Free Speech Clauses of the federal and state constitutions because the statute doesn't require the criminalized

speech to be a true threat. Thus, to resolve Counterman's constitutional challenge, we must address whether his speech consisted of true threats or, instead, consisted of protected speech under both federal and Colorado law.

a. Legal Principles Governing True Threats

¶ 24 "[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). Rather, content-based restrictions on speech are permitted "when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'" *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)); *see also Chaplinsky*, 315 U.S. at 571-72 ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.").

¶ 25 One type of permissible content-based restriction on speech is the restriction of "true threats." *See Alvarez*, 567 U.S. at 717 (citing *Watts v. United States*, 394 U.S. 705 (1969)).

¶ 26 The United States Supreme Court has defined "true threats" as "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." *Virginia v. Black*, 538 U.S. 343, 359 (2003). But "[t]he speaker need not actually intend to carry out the threat." *Id.* at 359-60. Rather,

limits to true threats serve to "protect[] individuals from the fear of violence," "the disruption that fear engenders," and "the possibility that threatened violence will occur." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992); *see also Black*, 538 U.S. at 360. The Supreme Court has long held that when determining whether statements are true threats, statements shouldn't be considered in isolation; instead, a court must examine them in the context in which they were made. *See, e.g.*, *Black*, 538 U.S. at 359; *R.A.V.*, 505 U.S. at 388; *Watts*, 394 U.S. at 707.

¶ 27 The Supreme Court recently applied these principles to internet speech. In *Elonis v. United States*, 575 U.S. 723, 726 (2015), the Court addressed whether a federal law prohibiting "any communication containing any threat . . . to injure the person of another" was constitutional as applied to a defendant who created threatening Facebook posts. The defendant, Elonis, was convicted under the statute for sharing Facebook posts (not direct messages) that included "crude, degrading, and violent material about his soon-to-be ex-wife" and material that threatened his former coworkers, police officers, and an FBI agent. *Id.* at 726-27. Elonis's ex-wife and coworkers testified that they "felt afraid and viewed Elonis's posts as serious threats." *Id.* at 731.

¶ 28 The Court held that the statute as applied to Elonis and his Facebook posts was unconstitutional because it didn't require the prosecution to prove the defendant's mental state; it only required the prosecution to prove that a communication was transmitted and that a reasonable person would have found the communication threatening. *Id.* at 737-38. "Federal criminal liability

generally does not turn solely on the results of an act without considering the defendant's mental state." *Id.* at 740. Thus, the statute needed to require the prosecution to prove either that the "defendant transmit[ted] a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Id.*

¶ 29 Just last year, the Colorado Supreme Court provided guidance for determining whether a statement is a true threat. In *People in Interest of R.D.*, 2020 CO 44, the supreme court defined a "true threat" as 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." *Id.* at ¶ 4. This is an objective test. *Id.* at ¶ 51 n.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.").

> 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).

Id. at ¶ 52.

¶ 30 When addressing the "words themselves," the supreme court instructed that a reviewing court's "inquiry should include whether the threat contains accurate details tending to heighten its credibility" and "whether the speaker said or did anything to undermine the credibility of the threat." *Id.* at ¶ 53.

¶ 31 Both parties contend — and we agree — that *R.D.* controls our analysis of whether Counterman's statements constituted a true threat. With this framework in mind, we turn to Counterman's statements.

b. Application

¶ 32 We review the constitutionality of a statute as applied to an individual de novo. *Chase*, ¶ 65. We presume that a statute is constitutional, "and the party challenging the statute has the burden of proving unconstitutionality beyond a reasonable doubt." *Id.*

¶ 33 "Whether a particular statement constitutes a true threat is an issue of fact to be determined by the fact finder in the first instance." *R.D.*, ¶ 63 (citing *Chase*, ¶ 70). But, "in First Amendment speech cases, an appellate

court must make an independent examination of the record to assure itself that the judgment does not impermissibly intrude on the field of free expression." *Id.* Accordingly, whether a statement is a true threat is a matter subject to independent review. *Id.*

¶ 34 Counterman contends that section 18-3-602(1)(c) is overly broad as applied to his speech. We disagree and conclude that his statements were true threats.

¶ 35 We begin, as *R.D.*, ¶ 52, instructs, by looking at the plain language of Counterman's messages to C.W.

¶ 36 Most troubling are the messages that tell C.W. to "die" or to "[f]uck off permanently." These messages, although they don't explicitly threaten C.W.'s life, imply a disregard for her life and a desire to see her dead. Another somewhat suggestive message is an image of stylized text that said Counterman was "unsupervised" and that the "possibilities are endless."

¶ 37 There are also messages that reflect a feeling of entitlement to C.W.'s response or engagement that, when met with silence, turn quickly to hostility toward her: "[s]eems like I'm being talked about more than I'm being talked to," "[y]our arrogance offends anyone in my position," "[h]ow can I take your interest in me seriously if you keep going back to my rejected existence," "[y]ou're not being good for human relations," "[y]ou do not talk," "[s]taying in cyber life is going to kill you," and "[y]our response is nothing attractive."

¶ 38 The messages that reference surveilling or watching C.W., such as "[w]as that you in the white

Jeep?," "[o]nly a couple of physical sightings," "a fine display with your partner," and "tell your friend to get lost," are troubling because they are escalation. That is, they imply that the contact is not just over Facebook but also in person. And again, they imply an entitlement to C.W.'s company and jealousy of her "friend" and "partner" who spend time with her.

¶ 39 Then, there are messages that imply Counterman either suspects that C.W. has contacted authorities about the messages she receives or that exhibit a delusion that he thinks his phone has been tapped: "I've had tapped phone lines before," "you have my phone hacked," and "[o]kay, then, please stop the phone calls." These messages are concerning because they indicate a potential trigger for further escalated behavior. Other messages demonstrate that Counterman fluctuates between affection and hostility. For example, C.W. ignored Counterman's messages and he retaliated by telling her to "die." Thus, this delusion or paranoia, coupled with Counterman's unpredictable mood, causes concern.

¶ 40 *R.D.*, ¶ 53, further instructs that, at this step, we should consider whether Counterman's statements include any "accurate details tending to heighten [their] credibility" and whether Counterman "said or did anything to undermine the credibility of the threat."

¶ 41 Here, there are details that heighten the credibility of Counterman's threats. The references to surveilling C.W. — particularly to seeing her with her partner or friend and the white Jeep — indicate that Counterman may have had a familiarity with C.W. gained

from secretly watching her. These details add to the threat implied in Counterman's messages.

¶ 42 At the same time, nothing in the language of Counterman's messages undermined the threat. Though at one time Counterman appeared to offer an apology after one statement, this didn't undermine the threat. Rather, it contributed to an impression that Counterman was unstable and, at times, delusional when contacting C.W. This unpredictability further buttressed the threats contained in Counterman's other statements.

¶ 43 With the plain language of these statements in mind, we turn to examine them in context, considering the factors articulated in *R.D.*, ¶ 52.

¶ 44 First, we consider the role of Counterman's statements in a broader exchange. Here, it is notable that there was not a broader exchange. That is, Counterman's messages to C.W. were uninvited, and C.W. didn't send any messages back to Counterman or engage in a conversation with him. And yet, he continued over years to send messages to her — some even expressing his frustration that it "[s]eems like I'm being talked about more than I'm being talked to."

¶ 45 Second, we consider the medium or platform that Counterman used to contact C.W. Counterman communicated to C.W. on Facebook from 2014 to 2016. C.W. had both a public Facebook account for her work as a musician and a private Facebook account for personal use. Counterman sent messages to both accounts.

¶ 46 Private accounts typically required a user to be "friends" with the account to communicate with the

account holder. However, in 2014, as a practice, C.W. would accept any friend request she received — either to her public or private account — as a way to grow her business as a musician. She said she believes that this is why she initially accepted Counterman's friend request to her private account — allowing him to send her direct messages.

¶ 47 Another feature of the platform is that users can block another user from contacting them — to a certain extent. Facebook users can block a specific account — but that doesn't mean they can prevent a specific user from creating more accounts.

¶ 48 C.W. testified that she would block Counterman from contacting either of her accounts, but he would create a different account to continue to send messages to her. Thus, when met with being blocked — an action that communicated that C.W. didn't wish to be contacted by him — Counterman would ignore this and create another account, frustrating her efforts to block communication.

¶ 49 This supports an inference that Counterman created accounts and sent messages to C.W.'s two accounts knowing that the messages would cause an emotional response. He also expressed animosity toward C.W. when she didn't engage with him, and he circumvented her efforts to block his unwelcome communications. Indeed, despite being blocked from messaging her — an unequivocal indication that she wished not to be contacted by him — he would take the time to create new accounts, find her account, and her send even more messages.

¶ 50 Third, we consider the manner in which Counterman conveyed his statements. Counterman messaged C.W. privately. He sent her instant messages through Facebook to both of her accounts. The messages were addressed only to C.W. This direct targeting of C.W. is indicative of a specific pursuit of one person and Counterman's specific intent to have an emotional effect on C.W. alone.

¶ 51 Fourth, we consider the relationship between Counterman and C.W., which was, at best, of a fan ceaselessly pursuing a public figure. That is to say, their "relationship" was of Counterman — a stranger to C.W. — sending numerous unanswered and increasingly disturbing messages to a local public figure who never responded except to endeavor to block Counterman's communications.

¶ 52 Fifth and finally, we consider C.W.'s subjective reaction. Her reaction was one of escalating alarm and fear of Counterman. C.W. testified that she was increasingly worried that Counterman was following her and that he wanted to physically harm her. The messages had the subjective effect of threatening C.W. such that she feared for her life and safety. This caused C.W. to contact a family member, an attorney, and law enforcement about her concerns. She cancelled concerts that she had previously scheduled because she feared that Counterman would show up.

¶ 53 Given this context and based on our independent review of the record, we conclude that Counterman's messages were true threats — threats that are not protected speech under the First Amendment or

article II, section 10. And, as such, Counterman's as-applied challenge to section 18-3-602(1)(c) fails.

¶ 54 Counterman contends that his statements — although threatening — didn't rise to the level of a "true threat" because they weren't explicit "statements of purpose or intent to cause injury or harm to the person, property, or rights of another, by an unlawful act." But this limited characterization of a true threat misses the mark by ignoring the importance of the context in which a statement is made. This approach thereby risks excluding true threats that may not be explicit but, when considered in context, are just as undeserving of protection. *See People v. Hickman*, 988 P.2d 628, 638-39 (Colo. 1999) (noting that extortionate threats may not appear to be threats when examined in isolation, but, in context, are true threats); *see also R.D.*, ¶ 4 (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").

¶ 55 And context can cut either way; it can ensure that protected speech remains protected, and that unprotected speech may be criminalized, if the legislature so chooses. In Watts, the plain language of the defendant's statement that "if they ever make me carry a rifle the first man I want in my sights is L.B.J.," 394 U.S. at 706, divorced from any context, could certainly have been interpreted as a serious threat against the then-President's life. But it was the context in which the statement was made — the identity of the speaker and his

relationship (or lack thereof) to President Johnson, the broad audience of the statement of fellow participants in an anti-Vietnam War rally (as opposed to a statement to President Johnson directly), the political and social context of the time, and the hyperbolic tone of the statement — that made the statement protected political opinion rather than a true threat against the President's well-being.

¶ 56 This emphasis on context has only grown as case law has refined the objective standard for true threats when speech is communicated via the internet. The "basic principle[] of freedom of speech" doesn't "'vary' when a new and different medium for communication appears." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)); *see also R.D.*, ¶ 47. But each "medium of expression presents" its own special set of "First Amendment problems which must be examined in the light of the circumstances which are interwoven with the speech in issue." *People v. Weeks*, 197 Colo. 175, 180, 591 P.2d 91, 95 (1979) (citing *Joseph Burstyn, Inc.*, 343 U.S. at 502-03, and *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)); *see also R.D.*, ¶ 47.

¶ 57 When examining statements made via social media, "we are alert to the competing concerns that '[s]ocial media make hateful and threatening speech more common but also magnify the potential for a speaker's innocent words to be misunderstood.'" *R.D.*, ¶ 47 (quoting Lyrissa Barnett Lidsky & Linda Riedemann Norbut, #I  U: Considering the Context of Online Threats, 106 Calif. L. Rev. 1885, 1885 (2018)). While "[t]he risk of

mistaking protected speech for a true threat is high," so too are the "stakes of leaving true threats unregulated." *R.D.*, ¶ 50. Particularly in the context of stalking, online communication can enable "unusually disinhibited communication" from a perpetrator to a victim — "magnifying the danger and potentially destructive impact of threatening language on victims." *Id.*

¶ 58 Recent widely reported cases of online harassment and stalking of public figures — particularly of women — involve internet users who are "strangers to the victims" granted previously unavailable access to their targets through social media. *See* Emma Marshak, Note, *Online Harassment: A Legislative Solution*, 54 Harv. J. on Legis. 503, 504 (2017) (discussing, among other articles on the subject, David Whitford, Brianna Wu vs. the Gamergate Troll Army, INC (April 2015), https://perma.cc/T84K-N2VV (video game developer Brianna Wu released a game and was inundated with "shocking, gruesome, specific, and obscene [threats], involving many variations on murder and rape" over social media platforms like Twitter)).

¶ 59 This context mirrors the one in which Counterman sent his myriad Facebook messages to C.W over two years. And this context buttresses our conclusion that Counterman's statements were true threats that aren't protected under the First Amendment or article II, section 10. Accordingly, we conclude that section 18-3-602(1)(c) is constitutional as applied to his unprotected threats.

B. Jury Instruction on True Threats

¶ 60 Next, Counterman asserts that, even if there was sufficient evidence to prove that he made true threats to C.W., the trial court reversibly erred by failing to instruct the jury on the meaning of true threats. We disagree.

1. Preservation and Standard of Review

¶ 61 "We review jury instructions de novo to determine whether the instructions as a whole accurately informed the jury of the governing law." *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009). Whether to give additional instructions, however, lies within the trial court's sound discretion, *Fain v. People*, 2014 CO 69, ¶ 17, and we will not reverse on this basis "absent manifest prejudice or a clear showing of abuse of discretion," *People v. Rogers*, 220 P.3d 931, 936 (Colo. App. 2008).

¶ 62 Before we address Counterman's contention, however, we must resolve whether he preserved this argument. Counterman asserts that his counsel requested a jury instruction defining true threats by filing a pretrial motion to dismiss the charges for violating his right to free speech. While Counterman's counsel objected to the charges on both federal and state constitutional grounds in his motion to dismiss, his counsel didn't request an instruction on true threats. Nor does the record show that Counterman's counsel tendered a jury instruction on true threats. *See People v. Tardif*, 2017 COA 136, ¶ 10 ("An alleged instructional error is preserved if the defendant tenders the desired relevant instruction even if the

defendant does not object or otherwise raise the issue during the jury instruction conference.").

¶ 63 Accordingly, Counterman's counsel failed to "allow the trial court 'a meaningful chance to prevent or correct the [alleged] error and create[] a record for appellate review.'" *Id.* (quoting *Martinez v. People*, 2015 CO 15, ¶ 14). This contention isn't preserved; thus, we will review for plain error.

¶ 64 Plain error is error that is both "obvious and substantial." *Hagos v. People*, 2012 CO 63, ¶ 18 (quoting *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005)). A plain error is substantial if it so undermines "the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *Id.* (quoting *Wilson v. People*, 743 P.2d 415, 420 (Colo. 1987)).

¶ 65 When courts review jury instructions for plain error, "the defendant must 'demonstrate not only that the instruction affected a substantial right, but also that the record reveals a reasonable possibility that the error contributed to his conviction.'" *Miller*, 113 P.3d at 750 (quoting *People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001)). A court's "failure to instruct the jury properly does not constitute plain error if the relevant instruction, read in conjunction with other instructions, adequately informs the jury of the law." *Id.*

2. Analysis

¶ 66 The trial court instructed the jury on stalking (serious emotional distress). The instruction tracked the model jury instruction for the offense of stalking (serious

emotional distress). *See* COLJI-Crim. 3-6:03 (2017). It didn't include a definition of "true threat."

¶ 67 Counterman contends that this instruction was insufficient. He asserts that the trial court should've sua sponte instructed the jury on the definition of true threats and required the jury to find that the prosecution proved beyond a reasonable doubt that Counterman's statements were true threats before convicting him of stalking (serious emotional distress).

¶ 68 But even if the trial court erred by omitting an instruction on true threats, any error wasn't obvious.

¶ 69 Only two published Colorado cases involve instructing a jury on true threats. In *Chase*, ¶ 71, the defendant explicitly requested a jury instruction on true threats. And "Chase's counsel urged the jury to acquit Chase on the basis that his e-mails were not true threats and were, thus, entitled to First Amendment protections." *Id.* The trial court allowed that instruction to be given separately from the elemental instruction for Chase's charged offense of stalking (credible threat). *Id.* at ¶ 72. Thus, the instruction given in *Chase* defining true threats was akin to a theory of defense instruction.

¶ 70 And, in *People v. Stanley*, 170 P.3d 782, 791 (Colo. App. 2007), the defendant contended, for the first time on appeal, that jury instructions that "set[] forth the elements of the offense" — attempting to influence a public official — "and defin[ed] a threat [of violence] were constitutionally deficient because they . . . incorrectly stated that a 'threat of violence' is not protected by the First Amendment." The division held that "the instruction, considered in its entirety, [wa]s not

erroneous" because, while the instruction stated that "threats of violence are not protected free speech, it also stated in the next sentence that words 'used as mere political argument, or as idle talk or in jest' are not threats." *Id.* at 792 (citation omitted). Thus, the division concluded, the "[i]nstruction . . . properly distinguished between threats of violence that are true threats and those that are not." *Id.*

¶ 71 Neither of these cases addresses the essence of Counterman's contention: whether a defendant is automatically entitled to a jury instruction on true threats when facing a charge that may implicate his protected speech. Simply put, Counterman doesn't point to any case or statute that would've alerted the trial court to his entitlement to such an instruction (assuming such an entitlement exists).

¶ 72 To be sure, whether a statement is a "true threat" is a factual determination. *See id.* at 790 ("[T]he question whether a statement is a 'true threat,' as opposed to protected speech, is, in the first instance, one of fact to be determined by the fact finder."); *see also People v. McIntier*, 134 P.3d 467, 474 (Colo. App. 2005). But it wasn't obvious that Counterman was entitled to an instruction requiring the jury to determine if his statements were true threats absent any request from defense counsel.[2]

---

[2] Whether a true threats instruction is required upon request from defense counsel is a question we save for another day. Here, the record shows that Counterman's counsel didn't request a true threats instruction, nor did his counsel tender an instruction on true threats.

¶ 73 The trial court's instruction on stalking (serious emotional distress) tracked the model jury instruction and the language used in section 18-3-602(1)(c). *See Miller*, 113 P.3d at 750 (it's not plain error if trial court's instruction "adequately informs the jury of the law"). This adequately informed the jury of the guiding law for its decision: whether the prosecution established beyond a reasonable doubt that Counterman had committed stalking (serious emotional distress). Accordingly, we conclude that the trial court didn't plainly err by failing to sua sponte instruct the jury on the meaning of true threats.

C. Court's Response to Jury Question

¶ 74 Counterman raises two contentions regarding a response the trial court gave to a jury question about the timeframe in which it had to find that C.W. suffered serious emotional distress. First, he asserts that the court's response was an impermissible constructive amendment of the stalking count or, alternatively, was a simple variance that caused prejudice. Second, he asserts that the court's response lowered the prosecution's burden of proof for the element of serious emotional distress.

¶ 75 We address, and reject, each contention in turn.

1. Additional Facts

¶ 76 The trial court instructed the jury that "Counterman is charged with the crime of [s]talking in

Arapahoe County, Colorado, between and including April 1, 2014 and April 30, 2016." This was the same charging period identified in the criminal complaint against Counterman.

¶ 77 Another instruction provided,

> The burden of proof upon the prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged.

¶ 78 And,

> If you find from the evidence that each and every element of a crime has been proven beyond a reasonable doubt, you should find Mr. Counterman guilty of that crime. If you find from the evidence that the prosecution failed to prove any one or more of the elements of a crime beyond a reasonable doubt, you should find Mr. Counterman not guilty of that crime.

¶ 79 The court then instructed the jury on the elements of stalking (serious emotional distress):

> The elements of the crime of stalking are:
>
> 1. That Billy Counterman,
>
> 2. In the State of Colorado, at or about the date and place charged,
>
> 3. Knowingly repeatedly followed, approached, contacted, placed under surveillance, or made any form of communication with another person, either

> directly, or indirectly, through a third person,
>
> 4. In a manner that would cause a reasonable person to suffer serious emotional distress, and
>
> 5. Which did cause that person to suffer serious emotional distress.
>
> After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find Mr. Counterman guilty of stalking.
>
> After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find Mr. Counterman not guilty of stalking.

¶ 80 During its deliberations, the jury sent the court the following question:

> What does the date in line item #2 apply to? In particular does the emotional distress in line item #4 and #5 have to occur between April 1, 2014[,] and April 30, 2016, or do the dates only apply to the "stalking" charge?

¶ 81 The court drafted a proposed response and invited counsel to raise any objections. The prosecutor said, "it appears that [the jury] do[esn't] understand that it's Mr. Counterman's conduct that that element applies to as far as between the date and the place charged, and

that they are concerned that it also applies to [C.W.], which it doesn't."

¶ 82 Counterman's counsel disagreed, arguing that

> the crime is alleged to have occurred between April 2014 and April 30th, 2016. Each of the elements that make up that crime need to have occurred within that period of time as charged, and so I don't know that – the proposal by the [c]ourt does necessarily explain what the jury is asking.

Instead, Counterman's counsel asserted that the court's response should be that

> [t]he crime of stalking is alleged to have occurred between and including April 1st, 2014, and April 30th, 2016. As such, each of the elements of the crime must be proven beyond a reasonable doubt to have occurred within that time frame.

¶ 83 Specifically, he argued that the trial court's proposed response would constitute a constructive amendment. He didn't assert, however, that the court's proposed response would lower the prosecution's burden of proof for the element of serious emotional distress.

¶ 84 Proposing an alternative, the prosecutor asked to amend the date range charged in the complaint under Crim. P. 7(e). Counterman's attorney objected, asserting that doing so would be a substantive amendment to the complaint and that it would be a "substantial infringement on [Counterman's] due process rights."

¶ 85 The court denied the prosecutor's request to amend the complaint, stating,

> I do note that I think it would have been the better practice for the People to have made a motion to amend either prior to trial, or even prior to the case going — the — the jury being instructed and deliberation started, to amend the date range to run from the 2014 period through the date of trial. It's unfortunate they didn't do that. Had they done that, I would have granted the amendment.

¶ 86 Rather, applying *People v. Huynh*, 98 P.3d 907 (Colo. App. 2004), the trial court determined that its proposed response to the jury question would be "a simple variance, as opposed to a constructive amendment." Further, the court held that this simple variance wouldn't prejudice Counterman because

> [w]hen [the court] look[s] at how the evidence was presented and the arguments that were being made, this wasn't just an argument that, no, there was no serious emotional distress at any particular time; rather, it was a more generalized argument that, first, a reasonable person would not have suffered serious emotional distress from this; and, second, that this particular alleged victim, [C.W.], did not, in fact, suffer serious emotional distress; and there was no distinction as to when that may have been.

¶ 87 Thus, the court held that the best way to respond [to the jury's question] is similar to what the [c]ourt did in *People v. Rail*, which was go back and tell [the jury], no, the serious emotional distress that the – acts in question by [Counterman] must have taken place within the date charged, but the serious emotional distress does not have to occur within the dates charged.

¶ 88 Counterman's counsel objected again, this time asserting his "due process rights, his right to present a defense[,] . . . a right to effective assistance of counsel, [and] to confront witnesses under the U.S. and Colorado constitutions." He explained that he didn't "agree with the [c]ourt's proposed [response], because I don't think it's an accurate reflection of the law."

¶ 89 The court responded to the jury question over Counterman's objections, as follows:

> [The instruction] sets forth the elements of the crime of [s]talking. The date range referenced in line 2 of Jury Instruction No. 10 refers to the date range in the charge in this case, i.e., th[at] Mr. Counterman is charged with the crime of [s]talking in Arapahoe County, Colorado, between and including April 1, 2014 and April 30, 2016, as set forth in Jury Instruction No. 2. The People must prove beyond a reasonable doubt that [Counterman's] conduct must have taken place within the date range charged. However, the People do not have to prove beyond a reasonable doubt that the alleged victim, [C.W.], suffered serious

> emotional distress within the date range charged.

¶ 90 After the court read its response, Counterman's attorney objected again, on the same grounds.

2. Constructive Amendment or Simple Variance

¶ 91 Counterman asserts that the trial court constructively amended the stalking charge by telling the jury that the prosecution didn't have to "prove beyond a reasonable doubt that the alleged victim, [C.W.], suffered serious emotional distress within the date range charged." Alternatively, he asserts that this response was a simple variance that caused prejudice and, thus, requires reversal. We conclude that the court's response was a simple variance and that it wasn't prejudicial.

a. Legal Principles

¶ 92 The prosecution may charge a criminal defendant by complaint, information, or indictment. *People v. Rodriguez*, 914 P.2d 230, 257 (Colo. 1996). A charging document is "sufficient if it advises the defendant of the charges he is facing so that he can adequately defend himself and be protected from further prosecution for the same offense." *Cervantes v. People*, 715 P.2d 783, 785 (Colo. 1986) (quoting *People v. Albo*, 195 Colo. 102, 106, 575 P.2d 427, 429 (1978)); *see Rodriguez*, 914 P.2d at 257. And the prosecution can't "require a defendant to answer a charge not contained in the

charging instrument." *Rodriguez*, 914 P.2d at 257 (citing *Schmuck v. United States*, 489 U.S. 705, 717 (1989)).

¶ 93 There are two ways that the charge of which a defendant is convicted may differ from the charge contained in the charging instrument: (1) a constructive amendment or (2) a simple variance. *See id.*

¶ 94 A constructive amendment "alter[s] the substance of the indictment." *People v. Gallegos*, 260 P.3d 15, 26 (Colo. App. 2010); *see People v. Rail*, 2016 COA 24, ¶ 50, *aff'd on other grounds*, 2019 CO 99. This occurs "when jury instructions change an element of the charged offense to the extent the amendment 'effectively subject[s] a defendant to the risk of conviction for an offense that was not originally charged.'" *People v. Vigil*, 2015 COA 88M, ¶ 30 (citations omitted), *aff'd*, 2019 CO 105. Divisions of this court have held that constructive amendments are per se reversible. *See* Rail, ¶ 50; *People v. Riley*, 2015 COA 152, ¶ 15; *People in Interest of H.W.*, 226 P.3d 1134, 1137 (Colo. App. 2009); *People v. Pahl*, 169 P.3d 169, 177 (Colo. App. 2006).[3]

¶ 95 A simple variance "'occurs when the charging terms are unchanged, but the evidence at trial proves facts materially different from those alleged' in the charging instrument." *Rodriguez*, 914 P.2d at 257 (quoting *United States v. Williamson*, 53 F.3d 1500, 1512

---

[3] However, *People v. Carter*, 2021 COA 29, ¶¶ 35-48, recently called into question whether a constructive amendment is a structural error mandating reversal. We need not address this question here, however, because we conclude that the court's response to the jury question was a simple variance, not a constructive amendment.

(10th Cir. 1995)). A simple variance requires reversal only if it is material to the merits of the case and "prejudices the defendant's substantial rights." *Rail*, ¶ 51 (citing *Huynh*, 98 P.3d at 912); *see also* § 16-10-202, C.R.S. 2020.

¶ 96 We review de novo whether a variance occurred and whether it was a constructive amendment or a simple variance. *Rodriguez*, 914 P.2d at 256-58; *Rail*, ¶ 48.

b. Analysis

¶ 97 Counterman asserts that the trial court's response to the jury question was a constructive amendment of the stalking (serious emotional distress) charge. We are unpersuaded.

> To prevail on a constructive amendment claim, a defendant must demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the [charging document].

People v. Madden, 111 P.3d 452, 461 (Colo. App. 2005) (quoting *United States v. Milstein*, 401 F.3d 53, 65 (2d Cir. 2005)).

¶ 98 The trial court's response to the jury's question stated that, when considering whether the prosecution had met its burden of proof as to the fifth element of stalking, the prosecution didn't have to prove that C.W. suffered serious emotional distress during the

charging period. Rather, the jury could consider evidence that C.W. suffered serious emotional distress after the charging period ended. This response modified the date range for the fifth element. But, notably, it didn't so alter the element that "it [wa]s uncertain whether [Counterman] was convicted of conduct that was the subject of the [charging document]." *See id.* Rather, we conclude that the court's response to the jury's question constituted a simple variance and not a constructive amendment.

¶ 99 "Generally, a variance between the specific date alleged in the charging document and that which is proved at trial is not fatal." *Huynh*, 98 P.3d at 911.

¶ 100 The court's response was akin to the circumstances in *Rail*. Rail was charged by information with sexual assault of a child. The information alleged that the offense occurred between March 24, 1999, and March 21, 2001, but it didn't describe any specific incidents. *Rail*, ¶ 44. During trial, the victim testified to "roughly twenty-five incidents over several years" with the "worst" incident occurring "at an Embassy Suites hotel when [the victim] was about thirteen years old." *Id.* at ¶ 3. The victim's mother testified that she believed the Embassy Suites incident occurred in 2007. *Id.* at ¶ 44.

¶ 101 During deliberations, the jury asked the trial court if, in light of the testimony about the Embassy Suites incident occurring in 2007, it could only consider the time period charged in the information when reaching a verdict. The trial court responded that the Embassy Suites incident need not be within the time period charged in the information. The jury indicated on the verdict form

that it found beyond a reasonable doubt that the Embassy Suites incident had occurred. *Id.* at ¶ 45.

¶ 102 On appeal, Rail contended that the court's response to the jury's question constituted a constructive amendment. The division in Rail held that "trial testimony indicating that [a charged incident] had occurred outside of the timeframe alleged in the information *epitomizes a simple variance*." *Id.* at ¶ 53 (emphasis added).

¶ 103 Similarly here, evidence was presented that C.W. experienced serious emotional distress outside the time period in the charging document. The court's response to the jury question stated that it could consider evidence of C.W.'s emotional distress that occurred after the charging period. This too epitomizes a simple variance. *See id.*

¶ 104 Further, this simple variance didn't "prejudice [Counterman's] substantial rights." *Id.* at ¶ 51 (citing *Huynh*, 98 P.3d at 912); *see also* § 16-10-202.

¶ 105 Counterman contends that the court's response was prejudicial because he wasn't given adequate notice that his defense should address evidence of C.W.'s emotional distress that occurred outside of the charged timeframe. Specifically, he contends that his defense included an attempt to distinguish when the emotional distress occurred and, thus, the court's response undermined this prepared defense strategy. We disagree.

¶ 106 The complaint charged Counterman with stalking (serious emotional distress). This notified Counterman that an element of the charge he faced was

that C.W. suffered serious emotional distress as a result of his conduct. Further, Counterman was notified that C.W. would testify about suffering serious emotional distress as a result of the messages.

¶ 107 Counterman's defense to the charge was a general denial. As part of that defense, he contended that C.W. didn't experience any emotional distress at any time as a result of his statements. While evidence was elicited at trial that C.W. suffered serious emotional distress both during and after the charging period, there's nothing to indicate that the court's response to the jury's question altered the charge in a way that impaired Counterman's defense. Given the ongoing nature of the alleged crime and its emotional toll, there wasn't a lack of notice nor could it have come as a surprise that C.W.'s alleged emotional distress was ongoing, including after the close of the charging period. Accordingly, we conclude that the simple variance didn't result in prejudice and, thus, doesn't require reversal.

3. Burden of Proof for Fifth Element of Stalking (Serious Emotional Distress)

¶ 108 Finally, Counterman contends for the first time on appeal that the trial court's response impermissibly lowered the prosecution's burden to prove that C.W. suffered serious emotional distress. Specifically, he contends that, because the court's response to the jury stated that the jury could consider evidence of C.W.'s emotional distress that occurred outside of the charging period, the court implicitly

lowered the prosecution's burden to prove that C.W. suffered serious emotional distress. We conclude that the court's response wasn't plain error.

¶ 109 Counterman's counsel objected to the trial court's proposed response to the jury's question on the basis that the court's response would be a constructive amendment of the charge. But his counsel didn't specifically object on the burden of proof grounds he now raises on appeal. Accordingly, we review for plain error.

¶ 110 Again, plain error is that which is both "obvious and substantial." *Hagos*, ¶ 18. A court's "failure to instruct the jury properly does not constitute plain error if the relevant instruction, read in conjunction with other instructions, adequately informs the jury of the law." *Miller*, 113 P.3d at 750.

¶ 111 While perhaps, when read in isolation, the court's response is susceptible of the interpretation that Counterman offers on appeal, as a whole the jury instructions adequately informed the jury of the prosecution's burden of proof — beyond a reasonable doubt. Three different instructions informed the jury that the prosecution's burden of proof was beyond a reasonable doubt and specified that this burden of proof applied to every element of the charge of stalking (serious emotional distress).

¶ 112 One instruction stated that the prosecution was required "to prove to the satisfaction of the jury beyond a reasonable doubt the existence of *all of the elements* necessary to constitute the crime charged." (Emphasis added.) The instruction reiterated that "[i]f you find from the evidence that *each and every* element of

a crime has been proven beyond a reasonable doubt, you should find Mr. Counterman guilty of that crime." (Emphasis added.) And, in the elemental instruction, the jury was instructed that, "[a]fter considering all the evidence, if you decide the prosecution has proven *each of the elements* beyond a reasonable doubt, you should find Mr. Counterman guilty of stalking." (Emphasis added.)

¶ 113 Thus, as a whole, these instructions adequately informed the jury that it was required to find that the prosecution proved each element of stalking (serious emotional distress) — including the fifth element, that C.W. suffered serious emotional distress — beyond a reasonable doubt. The court's response, read in combination with these instructions, didn't obviously lower the burden of proof for the fifth element.

¶ 114 Thus, the trial court's response to the jury's question wasn't plain error.

III. Conclusion

¶ 115 For the reasons set forth above, we affirm.

JUDGE ROMÁN and JUDGE BROWN concur.

APPENDIX B

COLORADO SUPREME COURT

Certiorari to the Court of Appeals, 2017CA1465
District Court, Arapahoe County, 2016CR2633

Supreme Court Case No: 2021SC650

BILLY RAYMOND COUNTERMAN,
Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 11, 2022.

APPENDIX C

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

v.

BILLY RAYMOND COUNTERMAN,

Defendant.

Case No. 16CR2633

COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS

WHEREUPON, the hearing in this matter commenced February 27, 2017, in Division 408, before the HONORABLE JUDGE F. STEPHEN COLLINS, District Court Judge in the County of Arapahoe, State of Colorado.

* * *

A P P E A R A N C E S

FOR THE PEOPLE: Danielle Jaramillo, Esq.
Reg. No. 43542

Laura Robilotta, Esq.
Reg. No. 40087

FOR THE DEFENDANT: Elsa Archambault, Esq.
Reg. No. 44065

* * *

[3] PROCEEDINGS

THE COURT: All right. We'll call People versus Counterman, 16CR2633.

MS. ROBILOTTA: Laura Robilotta on behalf of the People.

MS. ARCHAMBAULT: Elsa Archambault appearing with Mr. Counterman, who is present out of custody.

THE COURT: All right. We are set for a motions hearing today. Are the parties prepared to proceed?

MS. ROBILOTTA: We are, Your Honor.

MS. ARCHAMBAULT: Yes.

THE COURT: All right. The motions that I have are defense motion for 404(b) evidence, along with the People's notice and defense's response. Next we have defense motion in limine to exclude the fact that defendant was on probation for making threatening Internet phone calls at the time of this offense.

Next is their motion to dismiss Counts 1 and 2 on First Amendment grounds. And then finally the motion to suppress statements challenging the validity of the Miranda waiver and voluntariness.

* * *

[48] * * *

THE COURT: All right. Anything further from the People?

MS. JARAMILLO: Your Honor, I just would ask the Court to consider -- I think the Court does have the Facebook messages, obviously, that I think both defense and the People attached to specific motions.

I would note that the elements of harassment say obviously, as the Court stated, that the intent to -- or that they do, in fact, harass or threaten bodily injury. And I think that that "or" is a distinction that needs to be made so it's not only a credible threat that is protected, but it's harassing speech that's also protected or also prohibited by the harassment statute.

I'm not sure which page number it is, but there's one message that defense did not cite in their motion. It's a Facebook message that says, "Staying in a cyber life is going to kill you. Come out for coffee. You have my number."

Furthermore, there's other messages in here that talk about the fact about her driving in a white truck, which [C.W.] will testify that she did at one point have a white truck. And that caused her some concern based on that. It doesn't obviously have to be [49] an explicit or direct threat, but taken as a whole, that a reasonable person standard, a reasonable person would find this threatening in the way that it's stated.

So I would ask the Court at this point to deny defendant's motion, noting that the burden is on them to show that it's unconstitutional.

THE COURT: The motion says it's moving to dismiss 1 and 2. Counts 1 and 2. It was orally clarified to be 1 and 3, but Count 1 is dismissed. Count 2 is still there. So are you moving to dismiss Counts 2 and 3?

MS. ARCHAMBAULT: At this point, yes, please.

THE COURT: I just want to make sure that we're clear that both the stalking and the harassment charge remain in place. Anything further from defense?

MS. ARCHAMBAULT: Judge, I don't think that the distinction between harass or threaten bodily injury matters, because it is -- it's the First Amendment that protects the speech. And the speech itself has to rise to a level that allows for prescription of this type of speech.

And so to say any harassing speech, just because it's called harassing in a statute, passes that [50] question, it's my position that it doesn't. So I'm raising this, analyzing it under either harassing or threatening. Did that make sense at all?

THE COURT: I think so. It seems to me the stalking statute is sort of -- stalking is a Class 5 felony, as I recall, and it requires a certain level of harm to the victim that is not necessarily required of a harassment charge, which is an M3. But both of them would be subject to First Amendment-type protection and issues.

All right. In connection with the motion to dismiss, I reviewed *People versus Chase*, C-h-a-s-e, 2013 COA 27. I also reviewed *People in the Interest of R.D.*, 2016 COA 186. These seem to be the most recent cases that address this, what I'll call the true threat issue. Basically if something is found not to be a true threat, it's subject to First Amendment protection and it will not support a charge or a conviction of stalking or, I believe, harassment.

If, on the other hand, it is found to be a true threat, then it does not benefit from the First Amendment protection and it would provide a basis for a lawful charge and a lawful conviction of either stalking or harassment.

Now, in *People in the Interest of R.D.*, the [51] Court of Appeals found it was not a true threat. In that case, there were a number of Tweets involved. The Tweets did

involve some violent and explicit threatening language, but they found this was mitigated, because the defendant did not know the victim personally and did not know even where Thomas Jefferson High School was located. And he didn't address the victim by name. It was all very general.

It was also mitigated by the fact that the Twitter messages were sent via a public form, Twitter, and it didn't include anything suggesting they were being sent directly to the alleged victim.

Third, it was mitigated by the fact that the victim's statement showed that he subjectively didn't feel threatened by the Tweets. It was clear from the exchange that the alleged victim wasn't taking it particularly seriously.

Now, in contrast, in *People versus Chase*, the Court of Appeals found that the language did constitute true threats. They focused on the forceful and violent language and imagery, and the fact that the defendant expressly referred to the named victims.

E-mails were sent directly to them. The defendant knew where they lived and the victim subjectively felt threatened and took precautionary measures.

[52] In this case, I have to start by looking at the plain language of the statements that were made. And I did that by reviewing the CD that I was given containing various copies of posts and statements in the affidavit that was submitted.

Now, it's clear that the statements often are rambling or don't seem to make a lot of sense. That being said, some of the statements do contain what I would consider troublesome statements. For example, the October 7, 2015, statement, "Was that you in the white Jeep?"

I think this reasonably could suggest that the defendant was watching the alleged victim, Ms. Whalen.

Even though she didn't own a white Jeep any more, she had previously owned a white Jeep and it's suggesting that defendant is specifically tying it in with her, as opposed to just a general statement.

There's also a statement, "Five years on Facebook. Only a couple physical sightings." The reference to a couple of physical sightings is troublesome, because it suggests that he could be watching her. There isn't sufficient information to know if the sightings were real or were of her.

The statement that, "Seems like I'm being talked about more than I'm being talked to. This isn't [53] healthy." Then it goes on later to say, "I've had tapped phone lines before. What do you fear?"

I find that troublesome, because "this isn't healthy that I'm being talked to," that suggests to me that, "Wait a second. If you're not going to talk to me, that's not healthy. Bad things could happen." And that he's had his phones tapped before, "What do you fear?" The asking what she fears is troublesome to me. The "I've had my phones tapped before," I don't know if that's true or not, but it suggests a degree of dangerousness associated with this person that would be unusual.

The posting of a poster containing, "I'm currently unsupervised. I know, it freaks me out too, but the possibilities are endless," and the posting of a poster with, "A guy's version of edible arrangements," and the picture in the poster is somewhat sexually suggestive, I find that troublesome and I think a reasonable person would find that troublesome. Because it's suggesting that he has the ability to do things. And the things that he is thinking about doing could involve some form of sexual contact.

There's another reference at some point to, "How can I take your interest in me seriously if you [54] keep going back to my rejected existence?" This ties into to what I'll

refer to as, for lack of a better word, almost delusional references in various statements that suggest that he's thinking things are taking place that aren't taking place.

I think a reasonable person would take that into consideration in evaluating other statements that are made and in determining whether there is a real threat being addressed to them.

It goes -- another statement is, "Fuck off permanently," which shows anger and, again, what I would view as a somewhat irrational escalation of statements, which I think to a reasonable person would be frightening.

There's later, "Your arrogance offends anyone in my position." Again, that shows escalation and anger. And later, "You're not being good for human relations. Die. Don't need you." I don't know that that's a direct threat that "I'm going to kill you," but any time someone makes reference to, "Die, don't need you," I think that could be interpreted as an implied threat.

Later, it's referenced, "Talking to others about me isn't pro life sustaining for my benefit. Cut me a break already." And then later I think it ends or [55] later says, "Are you a solution or a problem?" Again, under these circumstances, in the context, I can see where a reasonable person would view that as threatening.

Then later it says, "Your chase." Period. And I can't -- I think it said "bet." I can't read my own writing. Something along the lines of "bet," period. "You do not talk and you have my phone hacked." This gets back to that bordering on delusional. That if I'm the person receiving this, I haven't had his phone hacked, I'm getting these contacts, it makes me feel that there's a real threat out there.

The next day -- I think that was on February 13. The next day, he apologizes and says he didn't ask for this life.

I'm concerned with that, because it shows a shift that could suggest a loss of control. Then on, I think it was February 19, he starts up again. That's where you have, "Staying in cyber life is going to kill you. Come out for coffee. You have my number."

You can certainly interpret, "Staying in cyber live life is going to kill you" in a couple different ways. I mean, one, it's -- it could be just expressing a concern to someone, but it also could be [56] interpreted, given the totality of these circumstances, as an implied threat that if she stays in cyber life, she's going to get killed. And I find that troublesome.

2-26 has, "A fine display with your partner," which again suggests that there may be some surveillance or watching going on. 2-29, "Okay, then, please stop the phone calls." That gets back to what I've referred to as the borderline delusional. And March 4, "Your response is nothing attractive. Tell your friend to get lost."

I find that the plain language of these statements when taken -- considering the totality of the circumstances and viewing them together is sufficient to make me go to the next step of the inquiry. That a reasonable person could interpret these as true threats.

The next thing I'm supposed to look at is the context of the statements. That involves looking at to whom made, were they directed to the victim. In this case, they were, as opposed to the *In the Interest of R.D.* case. Although some of them apparently were directed to the victim, but through a friend of the victim, I find that that indirect is still directed to this particular identified alleged victim. It's clear [57] that defendant knows who she is and, as I mentioned earlier, it suggests defendant may be watching her.

The next factor is the manner in which the statements were communicated. In this case, they were

communicated via Facebook. Frankly I don't know enough about Facebook. I know that you can have public settings and private settings. It's unclear to me whether these were public settings or private settings. Whether it's communicated in a way that everyone can see or that only she could see. But it is clearly, again, directed to her through a means that he is confident she will receive, as opposed to just general messages sent out such as *In the Interest of R.D.* case where it was a general Twitter that maybe the person who it's directed to will see it, maybe they won't.

I note that the victim -- alleged victim repeatedly blocked the defendant, and that he evades the block and starts up again either directly or through a friend. So I think the manner communicated is troublesome.

The third factor is subjective reaction of the victim. In this case, her reaction sort of intensified over time. Initially she just blocks defendant, which seems reasonable. That doesn't work. She then gets concerned enough that she goes to an [58] attorney to see, What else can I do? That's where she finds out about the federal probation and that scares her. And I think it's reasonable that she would be scared upon learning that. And that's when she then contacts law enforcement.

I think that is clearly distinguishable from the *In the Interest of R.D.* matter where it was clear that the alleged victim wasn't taking it seriously and frankly didn't care.

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

I also note, as we discussed earlier, that although I'm denying the motion to dismiss now, I do have to see what actually comes in at trial. And the evidence that comes in at trial may make me reconsider. I'd have to go through this analysis again, just to make sure we don't have First Amendment issues. So the [59] motion to dismiss Counts 2 and 3 will be denied.

That gets us to -- here we go. That gets us to the People's motion in limine to preclude testimony, evidence or arguments regarding knowingly applying to the element in harassment -- I'm sorry, in stalking in a manner that would cause a reasonable person to suffer serious emotional distress. So from defense on that?

MS. ARCHAMBAULT: I do think that that's what that case says, and I wouldn't argue that.

THE COURT: All right. So I agree. I'll note that essentially defense acknowledges that the People are correct, and so I will grant that motion in limine.

All right. Then we get to the People's motion in limine to preclude any evidence or argument pertaining to defendant's mental health. People responsibility is that they'll comply with CRS 16-8-107 (3)(d), which requires them to give notice if they intend to introduce expert testimony regarding defendant's mental health.

So absent the appropriate notice being given, there will be no expert testimony regarding defendant's mental health. I have a concern that sometimes people try to circumvent what I think the intent of that rule is by trying to introduce evidence [60] of mental health without introducing expert testimony. And before any effort is made to do that, I would want you to approach so that I can make a determination as to whether it's properly admissible without expert testimony.

I had a case where someone tried to have someone testify that the defendant had been diagnosed with

certain mental issues. I mean, that seems to me pretty clear it was hearsay and needed expert testimony on that.

MS. ARCHAMBAULT: I'm thinking more like what about the line of questioning today asking just about observations of what the officer said and whether it was tracking?

THE COURT: I think that's fine. That's just an observation. And you can ask him, you know, "Did he respond? Did he point you to these websites?" You know, "What was he trying to communicate to you and what did you find?"

Although we may need to see websites, but I don't view that as requiring expert testimony, because that's someone that they factually observed this and they're not saying, "Oh, he's delusional," or, "Oh, he has a mental health issue" as an expert opinion. They're just talking about what they observed and what [61] went through.

So I don't see that that type of evidence would be problematic, but I just want to make sure that we don't go down a road without it being addressed with the Court before the jury hears it so we don't run into a problem that results in a mistrial.

Any questions on that from the People?

MS. ROBILOTTA: Yes, Your Honor. I certainly understand the ability to ask the agents questions about what they observed. What I'm concerned about is making the argument in closings that based off those observations, that the defendant didn't knowingly do something or didn't intentionally do something based off these delusions, which would be the exact thing that the statute is aiming to preclude.

The other issue is in her response, counsel indicates that it may be offered for other reasons. And I appreciate the Court asking to approach beforehand, but I guess what I'm concerned about is if we are going to go down

this road where his mental health is brought up, then I want to have the opportunity to litigate it beforehand to see if there's been some kind of waiver of his medical privilege under 13-90-107(1)(d) by inserting it as some kind of defense, whether pleaded or not.

[62] THE COURT: All right. I haven't seen any waiver at this point, and I think she's entitled to ask law enforcement, "What did you observe with him. Was that a concern to you?" And I think the answer she's going to get is, "No. We didn't understand why he was doing this, but overall he seemed perfectly aware of what he was doing."

And she can then argue that this shows he was not acting knowingly. I think that's more in line, for example, with the cases that have talked about introducing evidence that someone is slow in processing information and therefore couldn't have formed the required mental state isn't triggering a mental health defense.

MS. ROBILOTTA: Your Honor, the courts specifically delineate mental slowness versus mental health conditions from being able to form a knowingly mental state. And the cases that talk about mental slowness specifically delineate that out from those covered by 16-8-101.5.

And I'm specifically talking about (1)(b), that his mental disease or defect prevent him from forming a culpable mental state. That's the exact pleading requirement of why that would need to be pleaded that he could not form the culpable mental [63] state based off the problems that he was suffering.

THE COURT: All right. Let me hear from defense.

MS. ARCHAMBAULT: Your Honor, I don't think that that notice requirement alleviates the People's burden to prove knowingly. And if we have lay testimony suggesting that someone didn't form the necessary mental state for this charge at the time, not that they are

incapable because of a mental defect scientifically, but that their lay observations lead to my ability to argue that they didn't prove "knowingly," I think that's completely proper. And I just disagree with my inability to argue that.

THE COURT: All right. I think I need to hear what the nature of the testimony is that's coming in, and then we can address this further as part of that. I mean, I am skeptical. And we are not going to circumvent rules or backdoor things. But I think I need to hear what it is that comes in, and then I can make a more complete determination.

If either of you want to submit additional authority on that particular issue, please do so prior to the pretrial conference so I have a chance to review it before then. But as of right now, we're not going to have any expert testimony regarding his mental [64] health. And whether defense will be able to argue that something prevented him from forming a culpable mental state, I'll reserve until I've heard what the evidence is that comes in.

All right. I believe we've addressed all the issues raised in the motions. Have we missed anything?

MS. ARCHAMBAULT: No, but I did have some clarification questions.

THE COURT: That's fine.

* * *

APPENDIX D

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

v.

BILLY RAYMOND COUNTERMAN,

Defendant.

Case No. 16CR2633

COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS

WHEREUPON, the hearing in this matter commenced April 26, 2017, in Division 408, before the HONORABLE Judge F. Stephen Collins, District Court Judge in the County of Arapahoe, State of Colorado.

* * *

A P P E A R A N C E S

FOR THE PEOPLE:	Danielle Jaramillo, Esq. Reg. No. 43542
	Laura Robilotta, Esq. Reg. No. 40087
FOR THE DEFENDANT:	Elsa Archambault, Esq. Reg. No. 44065

* * *

[208] With that, I hope you have a pleasant evening. We'll see you back here tomorrow morning at 8:30.

(The jury exited the room.)

THE COURT: All right. The record can reflect that the jury has left the courtroom. Please be seated. So the People have rested. Any motions from defense?

MS. ARCHAMBAULT: Yes, Judge. At this time, the defense motions for a judgment of acquittal. The issue is whether the relevant evidence, both direct and circumstantial, when viewed as whole in the light most favorable to the prosecution is substantial and sufficient to support a conclusion by a reasonable mind that Mr. Counterman is guilty of the charge beyond a reasonable doubt.

At this time, I would renew my request for dismissal based on First Amendment and free speech grounds under both the U.S. and Colorado constitutions. As far as the evidence presented here today and yesterday, I will rest on that record for the standard motion for judgment of acquittal.

THE COURT: All right. We addressed the First Amendment issues back when we had the motions hearing

in this case. And when I gave my ruling on the [209] motions hearing, at that time I did indicate that I'd need to hear the evidence that came in to make a determination of -- based on what I was anticipating the evidence would be, there would not be First Amendment protections. But you never can tell what the evidence actually turns out to be.

I've now had an opportunity to review the evidence, and it basically just confirms the belief I had after the motions hearing that this would not be considered protected speech. And that having considered the totality of the circumstances, a reasonable jury could find that defendant's statements rise to the level of a violation of law and that of a true threat. And, therefore, the charges should be submitted to the jury for them to be making a determination.

I find that submitting the charges to the jury does not impermissibly intrude on or violate defendant's First Amendment rights, and that a reasonable jury, based on this, could find defendant guilty of the charge of stalking.

So I'm going to deny the motion for judgment of acquittal on both the First Amendment grounds and to the extent you rested on the record, I think the evidence is such that a reasonable jury could find [210] Mr. Counterman guilty of stalking. I'm not saying they will. I don't know one way or the other what they are going to do. But certainly there is sufficient evidence for them to make that determination. So motion for judgment of acquittal is denied in its entirety.

Now, at the bench conference, defense had indicated that they did not wish to call any other witnesses, but we haven't made a determination yet of whether Mr. Counterman wishes to testify. Would you like an

opportunity to speak with him for a few minutes before we do the Curtis advisement?

MS. ARCHAMBAULT: Can I just see if I need a few minutes?

THE COURT: Sure. That's fine.

MS. ARCHAMBAULT: Your Honor, I don't need a few minutes. The Court can do the Curtis advisement at this time.

THE COURT: Okay. All right. Mr. Counterman --

THE DEFENDANT: Yes?

THE COURT: -- you have a right to testify in this case. If you want to testify, then no one can prevent you from doing so. You may take the witness stand and testify even if it is contrary to the advice

* * *

APPENDIX E

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

v.

BILLY RAYMOND COUNTERMAN,

Defendant.

Case No. 16CR2633

REPORTER'S TRANSCRIPT

The trial in this matter commenced on April 25, 2017, before the HONORABLE F. STEPHEN COLLINS, District Court Judge in and for the County of Arapahoe, State of Colorado, Division 408, and a Jury of Twelve Plus One.

This transcript covers the proceedings held in this matter specifically on Thursday, April 27, 2017, in its entirety.

* * *

A P P E A R A N C E S

FOR THE PEOPLE:

Ms. Laura A. Robilotta, Esq.
Registration No. 40087
Deputy District Attorney

Ms. Danielle D. Jaramillo, Esq.
Registration No. 43542
Deputy District Attorney

FOR THE DEFENDANT:

Ms. Elsa A. Archambault, Esq.
Registration No. 44065
Deputy State Public Defender

* * *

[6] * * *

THE COURT: Ladies and gentlemen, those are the instructions on the law that you are to apply in connection with your deliberations in this case.

Now that I've instructed you on the law, we move to the final stage of the trial, which is the presentation of closing arguments. Because the People have the burden of proof, they have the opportunity to present closing argument first.

Once they've presented closing argument, Defense has an opportunity to present closing argument if they wish to do so. They're under no obligation to do so. If Defense does present closing argument, then the People, because they have the burden of proof, are given an opportunity to briefly respond to the defense's closing argument.

With that, do the People wish to present a closing argument?

MS. ROBILOTTA: Yes, please, Your Honor.

And would the Court please let me know when I have 15 minutes remaining?

* * *

[9] * * *

I want to talk about the definition of "knowingly," and you have that in the jury instructions and you'll have that when you go back to deliberate.

"A person acts knowingly or willfully with respect to conduct or to a circumstance described by a [10] statute defining an offense when he is aware that his conduct is of such a nature or that such circumstance exist. A person acts knowingly or willfully with respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result."

And if you look, "knowingly" applies to Element 3 only. He had to know that he was repeatedly contacting her. He had to know he was repeatedly following her. "Knowingly" only applies to that. So when he was sending those messages and he hit "send" on Facebook, was it practically certain that that message was going to be sent? Yes, he knew this.

What this does not apply to is the serious emotional distress. He did not need to know that a reasonable person would suffer serious emotional distress, and he did not need to know that [C.W.] suffered serious emotional distress.

And if you look at the further -- in the further elements, you will notice it doesn't say "knowingly" right there in No. 4. It doesn't say, knowingly a matter that

would cause a reasonable person, and it does not say knowingly, which did cause a person to suffer serious emotional distress. All he had to know was that he was sending these messages and that these messages were practically certain to be sent.

* * *