APPENDIX

APPENDIX A

[J-83-2017]

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

No. 3 WAP 2017

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

JAMAL KNOX,

Appellant.

Appeal from the Order of the Superior Court entered on 8/2/16 at No. 1136 WDA 2014, affirming the order of the Court of Common Pleas of Allegheny County entered 2/21/14 at Nos. CP-02-CR-0006621-2012, CP-02-CR-0003870-2013, CP-02-CR-0004264-2013

ARGUED: November 28, 2017

DECIDED: AUGUST 21, 2018

OPINION

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

CHIEF JUSTICE SAYLOR

In this appeal by allowance, we address whether the First Amendment to the United States Constitution

permits the imposition of criminal liability based on the publication of a rap-music video containing threatening lyrics directed to named law enforcement officers.

In April 2012, Pittsburgh Police Officer Michael Kosko initiated a routine traffic stop of a vehicle driven by Appellant. Appellant's co-defendant, Rashee Beasley, was in the front passenger seat. While Officer Kosko was questioning Appellant, the latter sped away, ultimately crashing his vehicle. He and Beasley fled on foot, but were quickly apprehended and placed under arrest. The police found fifteen stamp bags containing heroin and a large sum of cash on Appellant's person, as well as a loaded, stolen firearm on the driver's-side floor of the vehicle. At the scene of the arrest, Appellant gave the police a false name. When Detective Daniel Zeltner, who was familiar with both Appellant and Beasley, arrived, he informed the officers that Appellant's real name was Jamal Knox.

Based on these events, Appellant and Beasley were charged with a number of offenses. Officer Kosko and Detective Zeltner, both of Zone 5 of the Pittsburgh Police Department, were scheduled to testify against them in connection with the charges.

While the charges were pending, Appellant and Beasley wrote and recorded a rap song entitled, "F--k the Police," which was put on video with still photos of Appellant and Beasley displayed in a montage. In the photos, the two are looking into the camera and motioning as if firing weapons. The video was uploaded to YouTube by a third party, and the YouTube link was placed on a publicly-viewable Facebook page entitled "Beaz Mooga," which the trial evidence strongly suggested belonged to Beasley.

The song's lyrics express hatred toward the Pittsburgh police. As well, they contain descriptions of killing police informants and police officers. In this latter regard, the lyrics refer to Officer Kosko and Detective Zeltner by name. They suggest Appellant and Beasley know when those officers' shifts end and that the crimes depicted in the song may occur in the officers' homes ("where you sleep"). The lyrics also contain a reference to Richard Poplawski, who several years earlier had strapped himself with weapons and murdered three Pittsburgh police officers. *See Commonwealth v. Poplawski*, 634 Pa. 517, 130 A.3d 697 (2015). Finally, the song includes background sounds of gunfire and police sirens.

In light of the present issue – whether the song communicated a "true threat" falling outside First Amendment protections – we reproduce the lyrics in full without alteration, although they include violent imagery and numerous expletives:

> Chorus:
>
> *If y'all want beef we can beef/I got artillery to shake the mother fuckin' streets/If y'all want beef we can beef/I got artillery to shake the mother fuckin' streets.*
>
> *You dirty bitches won't keep knockin' my riches/This ghetto superstar committee ain't wit it/Fuck the Police/You dirty bitches won't keep knockin' my riches/This ghetto superstar committee ain't wit it/Fuck the Police.*
>
> Verse 1 – Mayhem Mal, *i.e.*, Jamal Knox:
>
> *This first verse is for Officer Zeltner and all you fed force bitches/And Mr. Kosko, you can suck my dick you keep on knocking my riches/You want beef, well cracker I'm wit it,*

that whole department can get it / All these soldiers in my committee gonna fuck over you bitches / Fuck the, fuck the police, bitch, I said it loud.

The fuckin' city can't stop me / Y'all gonna need Jesus to bring me down / And he ain't fuckin' wit you dirty devils / We makin' prank calls, as soon as you bitches come we bustin' heavy metal.

So now they gonna chase me through these streets / And I'ma jam this rusty knife all in his guts and chop his feet / You taking money away from Beaz and all my shit away from me / Well your shift over at three and I'm gonna fuck up where you sleep.

Hello Breezos got you watching my moves and talkin' 'bout me to your partner / I'm watchin' you too, bitch I see better when it's darker / Highland Park gone be Jurassic Park, keep fuckin' wit me / Hey yo Beaz call Dre and Sweet and get them two 23's / It's Mayhem.

(Chorus repeats)

Verse 2 – Soldier Beaz, *i.e.*, Rashee Beasley:

The cops be on my dick like a rubber when I'm fuckin' / So them bitches better run and duck for cover when I'm buckin' / Ghetto superstar committee bitch we ain't scared of nothing / I keep a forty on my waist, that'll wet you like a mop nigga / Clip filled to the tippy top wit some cop killas / Fuck the police, they bring us no peace / That's why I keep my heat when I'm roamin' through these streets.

Cause if you jump out it's gonna be a dump out / I got my Glock and best believe that dog

gonna pull that pump out / And I'm hittin' ya chest, don't tell me stop cuz I'm resisting arrest.

I ain't really a rapper dog, but I spit wit the best / I ain't carry no 38 dog, I spit with a tec / That like fifty shots nigga, that's enough to hit one cop on 50 blocks nigga / I said fuck the cops nigga / They got me sittin' in a cell, watchin' my life just pass me, but I ain't wit that shit / Like Poplawski I'm strapped nasty.

(Chorus repeats)

Verse 3 – Mayhem Mal, *i.e.*, Jamal Knox:

They killed Ryan, and ever since then I've been muggin' you bitches / My Northview niggas they don't fuck wit you bitches, I hate your fuckin' guts, I hate y'all / My momma told me not to put this on CD, but I'm gonna make this fuckin' city believe me, so nigga turn me up.

If Dre was here they wouldn't fuck wit dis here / Los in the army, when he comes back it's real nigga, you bootin' up / Fuck the police, I said it loud, we'll repeat that / Fuck the police, I'm blowin' loud with my seat back.

They tunin' in, well Mr. Fed, if you can hear me bitch / Go tell your daddy that we're boomin' bricks / And them informants that you got, gonna be layin' in the box / And I know exactly who workin', and I'm gonna kill him wit a Glock / Quote that.

Cause when you find that pussy layin' in the street / Look at the shells and put my shit on repeat, and that's on Jesus' blood / Let's kill these cops cuz they don't do us no good / Pullin'

your Glock out cause I live in the hood / You dirty bitches, bitch!

(Chorus repeats)

Officer Aaron Spangler, also of Zone 5, discovered the video while monitoring the "Beaz Mooga" Facebook page. He alerted other police personnel, including Officer Kosko and Detective Zeltner, who watched the video. Thereafter, Appellant was again arrested and charged with, *inter alia*, two counts each of terroristic threats pursuant to Section 2706(a)(1) of the Crimes Code, and witness intimidation pursuant to Section 4952(a) of the Crimes Code.[1]

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[1] Terroristic threats is defined, in relevant part, as follows:

> **(a) Offense defined.**–A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to: (1) commit any crime of violence with intent to terrorize another. . . .

18 Pa.C.S. §2706(a)(1). The Crimes Code defines witness intimidation as follows:

> **(a) Offense defined.**–A person commits an offense if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to: (1) Refrain from informing or reporting to any law enforcement officer, prosecuting official or judge concerning any information, document or thing relating to the commission of a crime. (2) Give any false or misleading information or testimony relating to the commission of any crime to any law enforcement officer, prosecuting official or judge. (3) Withhold any testimony, information, document or thing relating to the commission of a crime from any law enforcement officer, prosecuting official or judge. (4) Give any false or misleading information or testimony or refrain from giving any testimony, information, document or thing, relating to the commission of a crime, to an attorney

A consolidated bench trial on both sets of charges (as well as a third set of charges which is not presently relevant) ensued at which the Commonwealth introduced the video into evidence without objection and played it for the court. *See* N.T., Nov. 13, 2013, at 203, 205.[2] Officer Spangler testified that he had spent time interacting with individuals in the relevant neighborhood and had learned some of their street slang. He indicated that "busting heavy" means to shoot many rounds; a "tec" is a TEC-9, a semi-automatic pistol which holds a large-capacity magazine; to "spit with a tec" means to shoot with a TEC-9; a "cop killa" is a type of bullet that can pierce armored vests; and "strapped nasty" means carrying multiple weapons. *See* N.T., Nov. 13, 2013, at 200-02, 238. With regard to the lyric, "Hello Breezos got you watching my moves," Officer Spangler explained that *Hello Breezos* was the title of an earlier rap song by Appellant and Beasley, and that a "breezo" is a "brick" of heroin consisting of 50 stamp bags. *See id*. at 180-82, 186.

In terms of the song's effects, Officer Kosko testified that when he heard it he was "shocked" and it made him "nervous." He cited it as one of the reasons he decided to leave the Pittsburgh police force and relocate. *See id*. at 107, 109. For his part, Detective Zeltner stated he found the video "very upsetting," and

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> representing a criminal defendant. (5) Elude, evade or ignore any request to appear or legal process summoning him to appear to testify or supply evidence. (6) Absent himself from any proceeding or investigation to which he has been legally summoned.

Id. §4952(a).

[2] There is one consecutively-numbered trial transcript which covers five separate days of proceedings spanning from November 12-23, 2013.

that it made him concerned for his safety as well as that of his family and fellow officers. *Id.* at 147. He explained that extra personnel had to be assigned to Zone 5 to deal with "the threat." *Id.* As well, the detective was given time off and a security detail. *See id*.

By the conclusion of the trial, it became clear that the rap song was the sole basis on which the Commonwealth sought convictions for witness intimidation and terroristic threats. In his summation, therefore, Appellant argued that the song was protected speech, and hence, any conviction based on it would violate his First Amendment rights. *See* N.T., Nov. 19, 2013, at 437-39, 442. The trial court rejected this argument and found him guilty on both counts of witness intimidation and terroristic threats. *See* N.T., Nov. 21, 2013, at 462-64. In reaching its verdict on the witness intimidation counts, the court found beyond a reasonable doubt that Appellant and Beasley specifically intended to intimidate the officers so as to obstruct the administration of criminal justice, and that they did so in collaboration with one another. *See id*. at 463. The court also found Appellant guilty of, *inter alia*, possessing with intent to deliver a controlled substance. *See id*. at 461; 35 Pa.C.S. §780-113(a)(30).

In his Rule 1925(b) statement, Appellant renewed his contention that the video was constitutionally protected speech, and also claimed there was insufficient evidence that he had the requisite *mens rea* to commit terroristic threats and witness intimidation, as he was allegedly unaware the video would be posted online. *See* Common Pleas Dkt. No. 30, at 1-2. The trial court rejected these claims. As to the First Amendment issue, the court held the song amounted to a "true threat directed to the victims"; as such,

the court concluded it was not protected speech. *Commonwealth v. Knox*, Nos. 201206621, 201303870, 201304264, *slip op*. at 19-20 (C.P. Allegheny Aug. 11, 2015).

The Superior Court affirmed in a memorandum opinion. *See Commonwealth v. Knox*, No. 1136 WDA 2014, *slip op.* (Pa. Super. Aug. 2, 2016). Addressing the *mens rea* claim first, the court explained that the Commonwealth was required to establish that Appellant acted at least knowingly with respect to each element of each offense. *See id.* at 8.[3] Based on trial evidence suggesting a prior course of conduct in which Appellant and Beasley made rap videos which Beasley would then publish online, the Superior Court concluded there was sufficient evidence to support a finding that Appellant was aware that the video in question would be posted to a publicly-viewable Internet site and seen by the police. *See id.* at 10.

The Superior Court next rejected Appellant's First Amendment claim, albeit on different grounds than the trial court. The intermediate court characterized Appellant's argument solely as a contention that the video was inadmissible at trial due to its purportedly protected status under the First Amendment. Any such argument was waived, the court explained, as

[3] Although the court observed that the *mens rea* for a terroristic threats conviction is an intent to terrorize, whereas the scienter threshold for witness intimidation is knowledge or intent to impede the administration of justice, for reasons that remain unclear it proceeded to consider both offenses under the less-exacting "knowingly" standard. *See id.* at 7-8. *See generally* 18 Pa.C.S. §302(b) (defining levels of culpability, including intentional and knowing conduct). The intermediate court also overlooked that the trial court had found Appellant acted intentionally with respect to witness intimidation.

Appellant had not lodged a contemporaneous objection when the video was admitted. *See id*. at 10-11. Notably, the Superior Court did not evaluate whether the song comprised protected speech.[4]

Appellant petitioned for further review, raising the same two issues. We denied the petition in relation to the sufficiency challenge, but granted review limited to the issue of whether the rap video "constitutes protected free speech or a true threat punishable by criminal sanction." *Commonwealth v. Knox*, ___ Pa. ___, 165 A.3d 887 (2017) (*per curiam*).[5] As the question of whether a statement constitutes a true threat is circumstance-dependent, Appellant raises a mixed question of fact and law. Thus, we defer to the trial court's fact findings which are supported by competent evidence and resolve any legal questions, such as

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[4] In this latter regard we observe that, at times during this litigation, Appellant has appeared to labor under the belief that a person's speech is inadmissible at trial if it is constitutionally protected expression. There is no rule of evidence in Pennsylvania to that effect. Still, the substantive issue of whether the First Amendment prohibits the imposition of criminal liability based on the rap song was raised at trial and in Appellant's Rule 1925(b) statement, and argued to the Superior Court. *See, e.g.*, Brief for Appellant, *Commonwealth v. Knox*, 1136 WDA 2014, at 37-45.

[5] Perhaps because of the Superior Court's waiver emphasis, in his framing of this issue Appellant suggested his First Amendment claim was "of such substantial importance" that this Court should overlook any purported waiver. *Id.* Constitutional claims are subject to waiver regardless of their importance. *See, e.g.*, *Commonwealth v. Peterkin*, 511 Pa. 299, 310-11, 513 A.2d 373, 378 (1986); *Commonwealth v. Romberger*, 474 Pa. 190, 197, 378 A.2d 283, 286 (1977). Nevertheless, and as explained, Appellant has not waived his First Amendment claim. *See supra* note 4; *see also* Brief for Appellee at 20 (reflecting the Commonwealth's concurrence that Appellant has preserved his First Amendment claim).

the scope of the true-threat doctrine, *de novo*. *See Commonwealth v. Batts*, 640 Pa. 401, 444, 163 A.3d 410, 435-36 (2017). In conducting our review, we independently examine the whole record. *See In re Condemnation by Urban Redevelopment Auth. of Pittsburgh*, 590 Pa. 431, 440, 913 A.2d 178, 183 (2006).

Appellant denies he intended to threaten the police. His assertion in this regard has two conceptually distinct facets, which at times he intermixes. The first relates to whether the evidence adequately demonstrated that Appellant intended for the video to be uploaded to the Internet and viewed by the police. *See* Brief for Appellant at 31-36; *see also id*. at 42 (suggesting Appellant acted at most recklessly in relation to the video's online publication). The second involves a contention that the song was merely artistic in nature and was never meant to be interpreted literally. In this latter regard, Appellant states that he

> consider[s] himself a poet, musician, and entertainer. Rap music serve[s] as his vehicle for self-expression, self-realization, economic gain, inspiring pride and respect from . . . peers, and speaking on public issues including police violence, on behalf of himself and others . . ..

Id. at 37; *see also id*. at 42 (urging that "rap is art, an expressive outlet for traditionally disenfranchised groups").

Appellant is supported by several *amici* who make similar observations. The ACLU of Pennsylvania argues that artistic expression "has the power to shock," and this is particularly true with rap, which is sometimes "saturated with outrageous boasts and violent metaphors." Brief for *Amicus* ACLU of Pa. at 11; *cf. id*. at

19 (describing rap as a means for those who disagree with the status quo to vent their frustrations, thereby lowering the likelihood they will engage in physical violence).

The Defender Association of Philadelphia questions whether the trial court's interpretation of street language in the rap video as conveying a literal threat was methodologically sound. The Association advocates that the video should not have been seen as "autobiography," but as "art, poetry, and fantasy" addressing social issues. Brief for *Amicus* Defender Ass'n of Phila. at 15, 18; *see also id*. at 15-16 (arguing that rap is fiction aimed at projecting images – such as hustlers, gangsters, or mercenary soldiers – and that a "recurring rap genre" involves the "first person homicidal revenge fantasy" (internal quotation marks and citation omitted)). The Association adds that Appellant's status as a semi-professional rap artist with a distinct rap persona ("Mayhem Mal") should have been taken into account as a contextual factor suggesting Appellant did not intend to communicate an actual threat. *See id*. at 18.

The Thomas Jefferson Center for the Protection of Free Expression and the Marion B. Brechner First Amendment Project, in a joint brief, echo many of these same points. They add that violent depictions receive First Amendment protection in other media such as films and video games, and argue the same protection should extend to rap music as a medium for the expression of ideas. *See* Brief for *Amici* Thomas Jefferson Center & Brechner First Amendment Project at 11.

With respect to Appellant's challenge to the sufficiency of the evidence to show he intended to publish the video to the Internet or convey it to the police, we

note that Appellant raised the same issue as a distinct basis for relief in his petition for allowance of appeal, and the issue was not selected for review. As such, it is not before this Court. Therefore, any proofs along these lines are only relevant insofar as they shed light on contextual factors tending to demonstrate whether the video amounted to a true threat under the circumstances. To answer that question, we initially review the First Amendment's true-threat doctrine as it has developed.

The First Amendment prohibits Congress from abridging the freedom of speech. *See* U.S. CONST. amend. I. This prohibition applies to the States through the Fourteenth Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907, 102 S. Ct. 3409, 3422 (1982). The "heart" of the First Amendment "has been described as the 'ineluctable relationship between the free flow of information and a self-governing people.'" *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 569 Pa. 638, 649, 807 A.2d 847, 854 (2002) (quoting *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1047 (2nd Cir. 1979)). Hence, First Amendment freedoms apply broadly to different types of expression, including art, poetry, film, and music.[6] Such freedoms apply equally to cultured, intellectual expressions and to crude, offensive, or tawdry ones.[7]

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[6] *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569, 115 S. Ct. 2338, 2345 (1995); *Ward v. Rock Against Racism*, 491 U.S. 781, 790, 109 S. Ct. 2746, 2753 (1989); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65, 101 S. Ct. 2176, 2181 (1981); *Commonwealth v. Bricker*, 542 Pa. 234, 241, 666 A.2d 257, 261 (1995).

[7] *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 796 n.4, 131 S. Ct. 2729, 2737 n.4 (2011); *Hustler Magazine, Inc. v. Falwell*,

In light of the above, the government generally lacks the authority to restrict expression based on its message, topic, ideas, or content. *See Ashcroft v. ACLU*, 535 U.S. 564, 573, 122 S. Ct. 1700, 1707 (2002) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65, 103 S. Ct. 2875, 2879 (1983)). This means the state may not proscribe speech due to its own disagreement with the ideas expressed, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 2542 (1992), or because those ideas are unpopular in society. *See Texas v. Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 2545 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

Nevertheless, expressive rights are "not absolute." *Ashcroft*, 535 U.S. at 573, 122 S. Ct. at 1707. The Constitution tolerates content-based speech restrictions in certain limited areas when that speech is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 769 (1942); *see R.A.V.*, 505 U.S. at 383, 112 S. Ct. at 2543 (noting that freedom of speech "does not include a freedom to disregard these traditional limitations"). Accordingly, *J.S.* recognized that "certain types of speech can be regulated if they are likely to inflict unacceptable harm," and listed several exam-

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485 U.S. 46, 55-56, 108 S. Ct. 876, 881-82 (1988); *Cohen v. California*, 403 U.S. 15, 26, 91 S. Ct. 1780, 1789 (1971). In holding that a conviction based on wearing a jacket with the words "F--k the draft" violated the First Amendment, *Cohen* pointed out that words are sometimes used to convey not only ideas, but depth of emotion. *See id*. at 26, 91 S. Ct. at 1788.

ples. *J.S.*, 569 Pa. at 650, 807 A.2d at 854 (citing *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. at 769 (fighting words); *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827 (1969) (*per curiam*) (incitement to imminent lawlessness); *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973) (obscenity); *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964) (defamation)); *see also United States v. Alvarez*, 567 U.S. 709, 717, 132 S. Ct. 2537, 2544 (2012) (mentioning these categories as well child pornography, fraud, and other "speech integral to criminal conduct" (citations omitted)).

Of particular relevance to this case, speech which threatens unlawful violence can subject the speaker to criminal sanction. *See Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 1401 (1969) (*per curiam*) (explaining that the government may criminalize "true threat[s]" but not mere political hyperbole (internal quotation marks omitted)). Threats of violence fall outside the First Amendment's protective scope because of the need to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388, 112 S. Ct. at 2546.

The true-threat doctrine has its genesis in the *Watts* case. In that matter, Watts was attending a discussion group in Washington, D.C., during the Vietnam War when the military draft was in effect. After someone suggested young people become more educated before expressing their views, Watts responded:

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not

> going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.

Watts, 394 U.S. at 706, 89 S. Ct. at 1401 (internal quotation marks and citation omitted).

Watts was convicted under a federal statute making it a crime to threaten the President. *See* 18 U.S.C. §871(a). The Supreme Court found the statute facially valid in light of the "overwhelming" interest in protecting the President's safety and allowing him to perform his duties unhampered by threats of violence. *Watts*, 394 U.S. at 707, 89 S. Ct. at 1401. Nevertheless, the Court concluded that Watts' conviction could only be upheld if his words conveyed an actual threat as opposed to political hyperbole. Considering the full context of the statement – it was uttered during a political debate which often involves inexact and abusive language, the alleged threat was conditioned on an event Watts vowed would never occur (his induction into the military), and the audience reacted by laughing – the Court determined that the statement could only reasonably be interpreted as an expression of political dissent and not a true threat. Thus, the Court overturned Watts' conviction. *See Watts*, 394 U.S. at 708, 89 S. Ct. at 1401-02.

In the years following *Watts*, a number of courts assessed whether a speaker's words constituted a true threat by looking to similar contextual circumstances. *See generally J.S.*, 569 Pa. at 654-56, 807 A.2d at 857-58 (discussing cases). These courts used an objective standard rather than evaluating the speaker's subjective intent. *See id*. at 655 n.8, 807 A.2d at 858 n.8 (citing cases). Various objective tests emerged, some focusing on how a reasonable listener would construe the speech in context, and others asking what kind of reaction a reasonable speaker would foresee on the

part of the actual listener or a hypothetical reasonable listener. *See State v. Perkins*, 626 N.W.2d 762, 767-70 & nn.10-18 (Wis. 2001) (discussing several of these variations). *But cf. United States v. Alaboud*, 347 F.3d 1293, 1297 n.3 (11th Cir. 2003) (indicating that these formulations, in operation, are the same as they ultimately depend on how a reasonable listener would understand the communication), *overruled on other grounds by United States v. Martinez*, 800 F.3d 1293, 1295 (11th Cir. 2015) (*per curiam*).

The Supreme Court next addressed the true-threat concept in *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536 (2003). In that matter, the Court reviewed a Virginia statute which made it unlawful to burn a cross in public or on another's property with the intent to intimidate any person or group. Importantly, the enactment also included a statutory presumption making the burning of a cross "prima facie evidence of an intent to intimidate a person or group of persons." *Id*. at 348, 123 S. Ct. at 1541-42 (quoting VA. CODE §18.2-423).

A majority of Justices found the statutory presumption constitutionally problematic. In a portion of her lead opinion representing the views of four jurists,[8] Justice O'Connor explained that such a presumption could allow the state to criminalize constitutionally-protected cross burnings such as those intended only as statements of ideology or group solidarity, those intended to anger but not intimidate, or those undertaken in a dramatic performance. *See id*. at 365-66, 123 S. Ct. at 1551 (plurality in relevant part). In a non-

[8] Some sections of the lead opinion reflected the views of four Justices, while others were also joined by Justice Scalia, thus attaining majority status.

joining responsive opinion, Justice Souter, joined by two other Justices, articulated similar views, stating, "the symbolic act of burning a cross, without more, is consistent with both intent to intimidate and intent to make an ideological statement free of any aim to threaten." *Id.* at 385, 123 S. Ct. at 1561 (Souter, J., concurring and dissenting). His concern was that, in close cases with conflicting evidence as to the cross-burner's intent, the statutory presumption might sway a factfinder to convict – which in turn could risk converting the statute into a means of suppressing ideas. *See id.* at 386, 123 S. Ct. at 1561-62.

In the post-*Black* timeframe, courts have disagreed over whether the speaker's subjective intent to intimidate is relevant in a true-threat analysis. Some have continued to use an objective, reasonable-person standard. These courts interpret *Black*'s intent requirement as applying to the act of transmitting the communication. *See United States v. Clemens*, 738 F.3d 1, 11 (1st Cir. 2013) (citing cases). In their view, an objective standard remains appropriate for judging whether the speech, taken in its full context, embodies a serious expression of an intent to commit unlawful violence. They reason from the premise that the First Amendment traditionally lifts its protections based on the injury inflicted rather than the speaker's guilty mind. *See, e.g.*, *United States v. Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012), *abrogation on other grounds recognized by United States v. Houston*, 683 Fed. Appx. 434, 438 (6th Cir. 2017); *United States v. White*, 670 F.3d 498, 508-09 (4th Cir. 2012), *abrogated on other grounds by United States v. White*, 810 F.3d 212, 220 (4th Cir. 2016).

Other courts have read *Black* as implying that the First Amendment only allows the government to

penalize threatening speech uttered with the highest level of scienter, namely, a specific intent to intimidate or terrorize. *See United States v. Cassel*, 408 F.3d 622, 632-33 (9th Cir. 2005); *but cf. Fogel v. Collins*, 531 F.3d 824, 831 (9th Cir. 2008) (observing that the Ninth Circuit has not consistently followed a subjective-intent standard). Still others have charted something of a middle course, suggesting that "an entirely objective definition [of a true threat] is no longer tenable" after *Black*, while reserving judgment on whether the standard should be subjective only, or a subjective-objective combination pursuant to which a statement "must objectively *be* a threat and subjectively be *intended* as such." *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (emphasis in original).

As we read *Black*, an objective, reasonable-listener standard such as that used in *J.S.* is no longer viable for purposes of a criminal prosecution pursuant to a general anti-threat enactment.[9] It seems to us that the

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[9] We refer to general anti-threat statutes because the government may have more leeway with regard to anti-threat laws aimed at protecting a specific class of individuals or avoiding disastrous consequences. *See, e.g.*, *CISPES v. FBI*, 770 F.2d 468 (5th Cir. 1985) (dealing with a statute making it a crime to threaten or intimidate foreign officials or internationally protected persons); *United States v. Hicks*, 980 F.2d 963 (5th Cir. 1992) (applying a law which criminalizes the threatening or intimidation of airline crews in such a way as to interfere with the performance of their duties).

The terroristic threats law under which Appellant was convicted qualifies as a general anti-threat statute. *See supra* note 1. By contrast, the witness intimidation statute is aimed at deterring not only threats, but the public harm occasioned by such threats, namely, the obstruction of criminal justice. Still, the parties' advocacy is directed to true-threat jurisprudence in a more general sense. As will be seen below, moreover, Appellant's

seven members of the *Black* Court whose views were represented by Justice O'Connor's plurality opinion and Justice Souter's responsive opinion believed the First Amendment necessitates an inquiry into the speaker's mental state. *Cf. Elonis v. United States*, ___ U.S. ___, 135 S. Ct. 2001 (2015) (holding that, under longstanding common-law principles, a federal anti-threat statute which does not contain an express scienter requirement implicitly requires proof of a *mens rea* level above negligence). Our conclusion in this regard stems from the fact that these Justices viewed the Virginia statute's presumption as raising substantial First Amendment difficulties. In criticizing that aspect of the law, their focus seems to have been on values and concerns associated with the First Amendment: the social undesirability of suppressing ideas, punishing points of view, or criminalizing statements of solidarity or ideology. Construing the Court's discussion of the speaker's intent as pertaining solely to the act of transmitting the speech appears difficult to harmonize with the assertion that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent of placing the victim in fear* of bodily harm or death." *Black*, 538 U.S. at 360, 123 S. Ct. at 1548 (majority in relevant part) (emphasis added); *see also id*. at 363, 123 S. Ct. at 1549 (majority in relevant part) ("The First Amendment permits Virginia to outlaw cross burnings *done with the intent to intimidate* because burning a cross

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convictions under both provisions survive First Amendment restrictions applicable to general anti-threat legislation.

is a particularly virulent form of intimidation." (emphasis added)).[10]

To summarize, then, the two facets of *Black* which are most relevant to this dispute are as follows. First, the Constitution allows states to criminalize threatening speech which is specifically intended to terrorize

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[10] With that said, we are not fully aligned with the Ninth Circuit's view that, under *Black*, a specific intent to threaten is "the *sine qua non* of a constitutionally punishable threat." *Cassel*, 408 F.3d at 631. The *Black* majority used open-ended language to describe the true-threat classification, which is understandable as there was no need in that particular case to decide whether First Amendment protections fall away *only* when there is a specific intent to intimidate. Thus, it remains an open question whether a statute which criminalizes threatening statements spoken with a lower scienter threshold, such as knowledge or reckless disregard of their threatening nature, can survive First Amendment scrutiny. *See Perez v. Florida*, ___ U.S. ___, ___, 137 S. Ct. 853, 854-55 (2017) (Sotomayor, J., concurring in denial of *certiorari*) (expressing that, after *Black*, the distinction between protected speech and punishable threats turns in part "on the speaker's intent," and exhorting the Court, in an appropriate case, to "decide precisely what level of intent suffices under the First Amendment"); *Elonis*, ___ U.S. at ___, 135 S. Ct. at 2026 (Thomas, J., dissenting) ("Neither [*Watts* nor *Black*] addresses whether the First Amendment requires a particular mental state for threat prosecutions."). Because Appellant was found to have acted intentionally with regard to both terroristic threats and witness intimidation, we need not presently resolve that question. We only note here that such statutes are not uncommon. *See, e.g.*, 18 Pa.C.S. §4952(a) (penalizing threats communicated with a "knowing" *mens rea*); *State v. Pukahi*, 776 P.2d 392, 393 (Haw. 1989) (indicating that, pursuant to state law, threatening speech is a crime when coupled with "reckless disregard of the risk of terrorizing"); *cf.* 18 Pa.C.S. §2706(a)(3) (prohibiting the communication of a threat to cause serious public inconvenience or terror "with reckless disregard of the risk of causing such terror or inconvenience").

or intimidate.[11] Second, in evaluating whether the speaker acted with an intent to terrorize or intimidate, evidentiary weight should be given to contextual circumstances such as those referenced in *Watts*. With these principles in mind, we apply our appellate standard of review as articulated above in light of the evidence adduced at trial and the common pleas court's factual findings.

As recounted above, the trial court convicted Appellant of two distinct crimes, terroristic threats and witness intimidation. As to both offenses, the court found beyond a reasonable doubt that Appellant acted with a subjective intent to terrorize or intimidate the officers in question. For purposes of terroristic threats, this follows from fact that such intent is an element of the offense. *See* 18 Pa.C.S. §§2706(a)(1). With regard to witness intimidation, the trial court placed on the record its particularized finding that Appellant acted with such intent. Under *Black*, these findings, if supported by competent evidence, are sufficient to place the rap song within the true-threat category. Thus, we consider the content and full context of what the song communicated.

We first review the content of the speech itself, beginning with the lyrics. They do not merely address grievances about police-community relations or generalized animosity toward the police. They do not include political, social, or academic commentary, nor

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[11] While an intent to intimidate or terrorize is distinct from an intent to carry out the threat, there is little indication in *Black* that, for a statement to attain true-threat status, the speaker must have intended to follow through on his threat. As noted, the fear of violence and the disruption such fear engenders are independent harms that anti-threat statutes seek to curtail. *See R.A.V.*, 505 U.S. at 388, 112 S. Ct. at 2546.

are they facially satirical or ironic. Rather, they primarily portray violence *toward* the police, ostensibly due to the officers' interference with Appellants' activities. In this regard, they include unambiguous threats with statements such as, "Let's kill these cops cuz they don't do us no good" and "that whole department can get it." They reference "soldiers" that will "f--k over" the police, a plan to make false emergency calls and "bust[] heavy metal" toward the officers who respond to the call, and a desire to "jam this rusty knife all in [the officer's] guts."[12]

The lyrics also appear to express a consciousness that they step beyond the realm of fantasy or fiction in that they indicate Appellant was advised by one of his elders "not to put this on CD," but he is ignoring such advice so that the whole city will "believe" him. Similarly, Appellant vows that the activities described will be "real" once a certain named individual returns from military service.

These aspects of the song tend to detract from any claim that Appellant's words were only meant to be understood as an artistic expression of frustration. Most notably along these lines, Appellant mentions Detective Zeltner and Officer Kosko by name, stating that the lyrics are "for" them. Appellant proceeds to describe in graphic terms how he intends to kill those officers. In this way, the lyrics are both threatening and highly personalized to the victims.

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[12] The second verse, sung by Beasley, includes lyrics which portray the killing of police officers in an equally threatening manner. Due to the trial court's finding that the song was a collaborative effort on the part of Appellant and Beasley, and in light of the unifying theme of all three verses as well as the chorus, such words can reasonably be viewed as a joint expression of both defendants. Out of an abundance of caution, however, we will not consider the second verse in our true-threat analysis.

Such personalization occurs, not only through use the officers' names, but via other facets of the lyrics. They reference Appellant's purported knowledge of when the officers' shifts end and, in light of such knowledge, that Appellant will "f--k up where you sleep."

Additionally, the threats are directed at the officers based on the complaint, tied to interactions which had recently taken place between them and Appellant, that the police had been "knockin' my riches" – as Officer Kosko did by confiscating cash from Appellant upon his arrest – and vowing that the police "won't keep" doing so. *See* N.T., Nov. 13, 2013, at 210 (reflecting Officer Spangler's testimony that "knocking riches" is a slang phrase which refers to a police officer confiscating cash during an arrest where drugs are involved). Along these same lines, they refer to the police having "tak[en] money away from" Beasley "and all my s--t away from me." Such harm to Appellant's personal wealth, and the officers' interference with his drug-selling activities, together with the upcoming criminal proceedings at which the latter were scheduled to testify against Appellant, are stated in the lyrics to provide the primary motivation for Appellant's desire to exact violent retribution.

Finally, the lyrics suggest a knowledge of the identity of the officers' confidential informants and a plan to murder at least one such informant with a Glock.

The words themselves are not the only component of Appellant's expressive conduct which tends to make the song threatening. The sound track includes bull

horns, police sirens, and machine-gun fire ringing out over the words, "bustin' heavy metal."[13]

Pursuant to *Watts* and *J.S.*, we also consider contextual factors in assessing whether the speech conveys a serious expression of an intent to inflict harm. *Accord In re S.W.*, 45 A.3d 151, 157 (D.C. 2012). These factors include such items as whether the threat was conditional, whether it was communicated directly to the victim, whether the victim had reason to believe the speaker had a propensity to engage in violence, and how the listeners reacted to the speech. *See J.S.*, 569 Pa. at 656, 807 A.2d at 858.

Here, unlike in *Watts*, the threats are mostly unconditional. As noted, moreover, Officer Spangler immediately notified other police personnel, reflecting that he did not see it as mere satire or social commentary. The victims developed substantial concern for their safety and took measures – such as separating from the police force earlier than planned, moving to a new residence, or obtaining a security detail – to avoid becoming victims of violence. Also, the police department allocated additional resources to Zone 5 to prevent the threatened violence from occurring.

Separately, although the song was not communicated directly to the police and a third party uploaded it to YouTube, this factor does not negate an intent on Appellant's part that the song be heard by the officers. As the Superior Court observed, Appellant's

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[13] Although the photos of Appellant and Beasley appearing to motion as if firing weapons may have added to the menacing nature of the communication, it was unclear whether Appellant was involved with that portion of the video, and at one point the court specifically referred to the "musical track" as containing the threats. N.T., Nov. 13, 2013, at 141.

and Beasley's prior course of conduct suggested they either intended for the song to be published or knew publication was inevitable. Further, after the song was uploaded to YouTube, it was linked to the "Beaz Mooga" Facebook page. Unlike in *J.S.*, there was no suggestion the song was merely in jest or that it should not be conveyed to the police. *See id*. at 658, 807 A.2d at 859 (highlighting that the student's offensive web site included a disclaimer page indicating that it was not intended to be seen by school employees). For its part, the trial court, which heard all the testimony first-hand, found that Appellant intended for it eventually to reach the officers. *See* N.T., Nov. 21, 2013, at 463.

As for whether the officers had reason to believe Appellant might engage in violence, it is relevant that they were aware a loaded firearm had been found near Appellant's feet in the automobile he was driving. Although Appellant was ultimately acquitted of the firearm charges stemming from the weapon's presence in the car, the video was posted to the Internet and seen by the officers well before the trial occurred.

We acknowledge that, as Appellant and his *amici* argue, rap music often contains violent imagery that is not necessarily meant to represent an intention on the singer's part to carry through with the actions described. This follows from the fact that music is a form of art and "[a]rtists frequently adopt mythical or real-life characters as alter egos or fictional personas." Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 23 (2007) (footnote omitted). We do not overlook the unique history and social environment from which rap arose, the fact that rap artists (like many other artists) may adopt a stage persona that

is distinct from who they are as an individual, or the fact that musical works of various types may include violent references, fictitious or fanciful descriptions of criminal conduct, boasting, exaggeration, and expressions of hatred, bitterness, or a desire for revenge.[14] In many instances, lyrics along such lines cannot reasonably be understood as a sincere expression of the singer's intent to engage in real-world violence.

With that said, the rap song here is of a different nature and quality, as detailed above. Even if we accept, *arguendo*, that most "gangsta rap" works solely constitute "art, poetry, and fantasy," Brief for *Amicus* Defender Ass'n of Phila. at 15, the content and surrounding circumstances of the song in issue do not demonstrate an adherence to the distinction between singer and stage persona sufficient to ameliorate its threatening nature. Although some attributes of the song arguably reflect the difference – such as the use of Appellant's stage name "Mayhem Mal," references to an apparently fanciful "ghetto superstar committee," and sophisticated production effects – these features are contradicted by the many factors already discussed tending to suggest the singers are in earnest. Most saliently, the calling out by name of two officers involved in Appellant's criminal cases who were scheduled to testify against him, and the clear expression repeated in various ways that these officers are being selectively targeted in response to prior interactions with Appellant, stand in conflict with the contention that the song was meant to be understood as fiction.

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[14] Nor do we discount that First Amendment freedoms need "breathing space to survive," as *amici* forcefully argue. *See, e.g.*, Brief for *Amicus* ACLU of Pa. at 16 (quoting *NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 338 (1963)).

All of this leads us to conclude that the trial court's finding as to Appellant's intent was supported by competent evidence.

More generally, if this Court were to rule that Appellant's decision to use a stage persona and couch his threatening speech as "gangsta rap" categorically prevented the song from being construed as an expression of a genuine intent to inflict harm, we would in effect be interpreting the Constitution to provide blanket protection for threats, however severe, so long as they are expressed within that musical style. We are not aware of any First Amendment doctrine that insulates an entire genre of communication from a legislative determination that certain types of harms should be regulated in the interest of public safety, health, and welfare. *See Jeffries*, 692 F.3d at 482 ("Jeffries cannot insulate his menacing speech from proscription by conveying it in a music video[.]"); *see also State v. Jones*, 64 S.W.3d 728, 736-37 (Ark. 2002) (holding that a rap song constituted a true threat). Pennsylvania's legislative body has made such a policy judgment by enacting statutes which prohibit the making of terroristic threats and the intimidation of witnesses, and for the reasons given Appellant cannot prevail on his claim that his convictions under those provisions offend the First Amendment.

The order of the Superior Court is affirmed.

Justices Baer, Todd, Dougherty and Mundy join the opinion.

Justice Wecht files a concurring and dissenting opinion in which Justice Donohue joins.

[J-83-2017] [MO:Saylor, C.J.]

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

No. 3 WAP 2017

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

JAMAL KNOX,

Appellant.

Appeal from the Order of the Superior Court entered August 2, 2016 at No.: 1136 WDA 2014, affirming the Order of the Court of Common Pleas of Allegheny County entered February 21, 2014 at Nos. CP-02-CR-0006621-2012, CP-02-CR-0003870-2013, CP-02-CR-0004264-2013.

ARGUED: November 28, 2017

DECIDED: AUGUST 21, 2018

CONCURRING AND DISSENTING OPINION

JUSTICE WECHT

I agree with much of the learned Majority's opinion. For instance, I concur in the Majority's general explication of First Amendment principles in the true threat context. Specifically, I agree that one result of the United States Supreme Court's fractured decision

in *Virginia v. Black*, 538 U.S. 343 (2003), is that our previously-applied objective, reasonable-listener standard for assessing whether a statement was, in fact, a constitutionally sanctionable true threat is "no longer viable." Maj. Op. at 16. The Majority correctly interprets *Black* and its progeny to require, as part of a dual-pronged analysis, an assessment of the speaker's subjective intent. Finally, I agree with the Majority that the facts of this case demonstrate that Jamal Knox intended to communicate a true threat via the lyrics of the contested rap song. Hence, I join the Majority in affirming Knox' criminal convictions.

However, I do not agree with the limited test articulated and applied by the Majority. The Majority distills the relevant jurisprudence into two general "facets:" (1) the First Amendment "allows" states to criminalize speech when it is "specifically intended" to terrorize or intimidate; and (2) "evidentiary weight should be given to contextual circumstances" surrounding the statement.[1] Maj. Op. at 18. My primary disagreement lies with- the unnecessary restraint employed by the Majority in articulating the first prong of this test. The Majority correctly concludes that the First Amendment *permits* imposing punitive actions upon a person who specifically intends to communicate a true threat. But the Majority refuses to consider the more important question of whether the First Amendment *requires* proof of specific intent,

[1] The contextual circumstances referred to by the Majority derive from the United States Supreme Court's seminal true threats case, *Watts v. United States*, 394 U.S. 705 (1969) (*per curiam*). In that case, the Supreme Court held that Watts' statement was not a true threat, *inter alia*, because it was uttered during a political rally, because the statement was conditional, and because those who heard the statement did not take it seriously. *Id.* at 708.

or whether the Amendment would tolerate punishment of speech based upon proof of only a lesser *mens rea* such as recklessness or knowledge. *Id.* at 17-18 n.10. The Majority accurately notes that this latter inquiry is an "open question." *Id.* I would answer that question in this case.

As a general jurisprudential matter, the Majority's restrained approach is not without merit. Nonetheless, there are compelling reasons to resolve this issue presently. First, Knox places squarely before this Court the question of whether specific intent is a necessary and essential element to a true threats analysis. Second, and perhaps more importantly, our current framework predates the United States Supreme Court's decisions in *Black* and *Elonis v. United States*, ___ U.S. ___, 135 S. Ct. 2001 (2015). Following *Black* in particular, the United States Courts of Appeals have been compelled to decide if, and how, *Black* affected their preexisting true threats analyses, and whether *Black* required proof of subjective intent. Most circuits have held that *Black* does not require such proof. Regardless of the outcome, those decisions underscore the necessity of interpreting *Black* and ascertaining its impact upon a true threats analysis. We must undertake a similar analysis, not only because we are asked to do so, but also because our current test clearly is outdated and presently insufficient, in large part because we crafted it in *J.S. ex. rel. H.S. v. Bethlehem Area School District.*, 807 A.2d 847 (Pa. 2002), which predated the United States Supreme Court's most recent guidance in this area of federal constitutional law. Because it is imperative that we reconsider and modify our true threats test, we should construct a complete and final test, not a partial one that leaves uncertainty that will serve only to complicate and protract litigation in future cases.

Finally, and perhaps most importantly, declining to resolve the legal question presented in full would ignore the real and precedential effect of our decisions. Although we are deciding a First Amendment issue that arose in a criminal case, the framework that we are called upon to update and revise will not be so confined. The Majority's limited decision does not provide sufficient guidance to the next musician who seeks to express political views and wants to do so to the fullest extent protected by the First Amendment. It offers no framework for a school district faced with the possibility of punishing (and possibly expelling) a student who has created a tasteless website or made derogatory and potentially threatening comments on social media. It affords no paradigm for application to the teacher who is fired, the police officer who is suspended, or the municipal employee who is disciplined. The reach of today's decision is far more expansive than criminal cases alone. Governmental bodies should know whether they can take punitive actions against students, employees, or officers if those individuals act with something less than specific intent. Similarly, individuals should not be subjected to termination, suspension, or extended desk duty only to find out years later than their conduct was not prohibited by the First Amendment. The issue is more than ripe for disposition, and the reasons to reach it are compelling.

Following *Black*, federal appeals courts have split over whether the subjective intent of a speaker is a necessary component of an actual true threat. *See United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (opining that, after *Black*, "whether the Court meant to retire the objective 'reasonable person' approach or to add a subjective intent requirement to the prevailing test for true threats is unclear"). Recent cases have attempted to parse the "type of intent needed by a

defendant to communicate" a true threat for purposes of the various threat provisions in the United States Criminal Code[2] in the wake of *Black*. *See*, *e.g.*, *United States v. Clemens*, 738 F.3d 1, 2 (1st Cir. 2013).

The First, Second, Third, Fourth, Sixth, Seventh, and Eighth Circuits have determined that the *Black* Court did not impose a subjective intent requirement upon the analysis. Those Circuits eschew such an element, and instead apply an objective test focused upon either a hypothetical reasonable speaker or a hypothetical reasonable recipient/listener. *See Clemens*, 738 F.3d at 10 (assessing threats based upon "an objective defendant vantage point standard post-*Black*"); *United States v. Davila*, 461 F.3d 298, 305 (2d Cir. 2006) ("The test is an objective one – namely, whether an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury."); *United States v. Elonis*, 730 F.3d 321, 331 n.7 (3d Cir. 2013), *rev'd by Elonis v. United States*, 135 S. Ct. 2001 (2015) (describing the Third Circuit test as asking "whether a reasonable speaker would foresee the statement would be understood as a threat"); *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012), *abrogated by United States v. White*, 810 F.3d 212 (4th Cir. 2016) (explaining that a statement constitutes a true threat "if an ordinary reasonable recipient who is familiar with the context . . . would interpret [the statement] as a threat of injury") (internal quotation marks omitted); *United States v. Jeffries*, 692 F.3d 473, 479 (6th Cir. 2012) (holding that a statement constitutes a true threat when "a reasonable person (1) would take the statement as a serious expression of an intention to inflict

[2] *See*, *e.g.*, 18 U.S.C. § 875(c) ("Interstate Transmission of Threat to Injure").

bodily harm (the mens rea), and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation (the actus reus)"); *Parr*, 545 F.3d at 499 (noting that the circuit traditionally has used an "objective reasonable person" test, and declining to decide whether *Black* necessitated an alteration to that test under the circumstances of that case); *United States v. Nicklas*, 713 F.3d 435, 440 (8th Cir. 2013) (holding that the government is required "to prove a reasonable recipient would have interpreted the defendant's communication as a serious threat to injure").

The Fifth and Eleventh Circuits adopted a more general reasonable person test, with no specific reliance upon either the speaker or the listener. *See Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) (explaining that "[s]peech is a true threat and therefore unprotected if an objectively reasonable person would interpret the speech as a serious expression of an intent to cause a present or future harm") (internal quotation marks omitted); *United States v. Martinez*, 736 F.3d 981, 988 (11th Cir. 2013), *vacated by Martinez v. United States*, 135 S. Ct. 2798 (2015) (*per curiam*) (holding that a true threat is "determined from the position of an objective, reasonable person").

The Ninth and Tenth Circuits read *Black* as requiring the true threats analysis to focus upon the speaker's subjective intent to intimidate a person or group of persons. *See United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) ("We are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat."); *United States v. Magleby*, 420 F.3d 1136,

1139 (10th Cir. 2005) ("Unprotected by the Constitution are threats that communicate the speaker's intent to commit an act of unlawful violence against identifiable individuals. The threat must be made with the intent of placing the victim in fear of bodily harm or death.") (internal citations and quotation marks omitted); *United States v. Heineman*, 767 F.3d 970, 972, 975, and 978 (10th Cir. 2014) (quoting the reasonable recipient test, but also adding a requirement that the government prove that the defendant intended the recipient to feel threatened). *But see United States v. Wheeler*, 776 F.3d 736, 743 n.4 (10th Cir. 2015) (limiting the *Heineman* analysis to the statutory definition of a true threat, and holding that the subjective test was not part of a First Amendment analysis).

As noted, the Majority holds only that the First Amendment permits regulating speech that is specifically intended to be a true threat. The Majority does not consider whether specific intent is the only *mens rea* that would pass constitutional muster. For this reason, the Majority explains that the Court is "not fully aligned with" the Ninth Circuit's rule that specific intent is "the *sine qua non* of a constitutionally punishable threat." Maj. Op. at 17 n.10 (quoting *Cassel*, 408 F.3d at 631). Contrary to the Majority, I endorse the Ninth Circuit's holding, and I would adopt it in this case. In my view, the Ninth Circuit correctly determined that the reasoning underlying the Supreme Court's *Black* decision necessitates the conclusion that the First Amendment requires such a subjective examination, and that proof of the speaker's intent to intimidate the recipient of the communication is a required inquiry in order to balance the need to protect victims of threats with the First Amendment rights of the speaker.

It is crucial that we not forget that punishing a person for communicating a true threat, however reasonable it seems, is a content-based regulation of speech. As a general rule, the First Amendment prohibits content-based restraints. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 309-11 (1940); *Texas v. Johnson*, 491 U.S. 397, 406 (1989)). Indeed, "[c]ontent-based regulations are presumptively invalid." *Id.* (citations omitted). Thus, the ability to punish a true threat based upon its content is an exception to the general prohibition. The Supreme Court has insisted that content-based categories of speech that can be regulated be narrowly drawn. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). A content-based proscription of speech that is premised upon something less than the most rigorous standard is a proscription that is not narrowly drawn, particularly when considering true threats in the context of musical expression. *See, e.g., Pap's A.M. v. City of Erie*, 812 A.2d 591, 612 (Pa. 2002) (explaining that a content-based city ordinance restricting First Amendment rights passes constitutional muster only if it is narrowly drawn and if the municipality can show a compelling state interest, *i.e.*, strict scrutiny). Punishing statements that can be construed only as knowingly or recklessly uttered casts a net too wide, as it catches up and penalizes an impermissible amount of protected speech and breeds a "threat of censorship that by its very existence chills free speech." *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 964 n.12 (1984) (citations omitted). After all, the United States Supreme Court has mandated that "First Amendment standards . . . must give the benefit of any doubt to protecting rather than stifling speech." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310,

327 (2010) (citations and internal quotation marks omitted). Proof of specific intent strikes the correct balance between prosecuting that which is unprotected and shielding that which is protected.

However, like the Majority, I also would hold that consideration of a speaker's mindset is only part of the analysis, and would adopt a two-pronged approach to evaluating a true threat for constitutional purposes. First, I would require reviewing courts to conduct an objective analysis to determine whether reasonable recipients would consider the statement to be "a serious expression of intent to inflict harm," and not merely jest, hyperbole, or a steam valve. *J.S.*, 807 A.2d at 858. For this purpose, I believe that the factors that we delineated in *J.S.*, a case I discuss in detail below, are relevant and useful. Those factors include: "the statements, the context in which they were made, the reaction of the listeners and others as well as the nature of the comments." *Id.* No one factor should be considered conclusive, and each should be considered and analyzed, alone and against the others, under the totality of the circumstances. Second, if the first prong is satisfied, I would require courts to conduct a subjective analysis to ascertain whether the speaker specifically intended to intimidate the victim or victims, or intended his expression to be received as a threat to the victim or victims. Failure of the government to satisfy either prong would mean that, under the First Amendment, the statement cannot be penalized or proscribed.

This framework balances the relevant interests at stake, ensuring that only true threats – those that are intended as such – are punished while, at the same time, shielding otherwise-protected speech from unwarranted governmental proscription. The first prong of

my proposed test allows courts to determine objectively whether a statement is a threat and not political hyperbole, as was the case in *Watts*, or an instance of sophomoric utterances that could not be taken seriously, like those that we determined were not true threats in *J.S.* The second prong requires proof that the speaker's purpose was to strike fear in the victim, which further justifies exempting the statement from constitutional protection.

All that remains is application of my proposed test. I begin with the objective prong of the analysis. The most natural starting place, and the first *J.S.* factor, is the words of the purported threat.

Words matter. Indeed, the actual words used by the speaker to convey a thought are one of the strongest indicators of whether an utterance objectively should be perceived as an actual threat. However, those words cannot be read in isolation. An objective assessment necessarily requires consideration of the circumstances in which the statement was made. In this instance, the threats were part of a song. This makes an objective consideration of the threatening language more difficult than with other forms of communication, as music often is rife with hyperbole, boasting, exaggerated attempts at entertainment, overheated invocation of emotion, and nonsensical banter. Of course, that the statements were made in a song does not exempt them from being true threats. But it does complicate the task of determining which lyrical statements objectively should be taken seriously and which should not.

In some instances, the answers are obvious. For example, compare Coolio's "Gangsta's Paradise"[3] with

[3] COOLIO, GANGSTA'S PARADISE (Tommy Boy 1995).

"Weird Al" Yankovic's "Amish Paradise."[4] In "Gangsta's Paradise," Coolio reflects upon the difficulties that he has faced in life and upon the cycles of greed and violence in his community. It is readily apparent that Coolio's song is meant to convey a message that is serious, thoughtful, and personal. On the other hand, Yankovic's song is an obvious parody of "Gangsta's Paradise," premised upon silliness and meant to provoke laughter. Unlike "Gangsta's Paradise," Yankovic's lyrics are not meant to (and cannot) be taken seriously.

In most cases, however, determining whether the lyrics of a particular song are serious, credible statements is more challenging. The difficulty arises from the nature of song lyrics themselves. Artists often use hyperbole in their songs to illustrate emotion.

The Beatles, for example, insisted that they "ain't got nothin' but love babe, eight days a week."[5] The hyperbole is obvious. But the exaggeration may not always be so apparent. Artists sometimes employ metaphors that defy clear definition. Consider the song "Drops of Jupiter" by Train, in which the artists ask, "Did you finally get the chance to dance along the light of day and head back to the Milky Way?"[6] Song lyrics may even lack any discernible meaning on their own, as in The Beatles' classic "Lucy in the Sky with Diamonds," which includes the instruction, "follow her down to a bridge by a fountain where rocking horse people eat marshmallow pies."[7]

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[4] "WEIRD AL" YANKOVIC, AMISH PARADISE (Scotti Brothers 1996).

[5] THE BEATLES, EIGHT DAYS A WEEK (Parlophone 1964).

[6] TRAIN, DROPS OF JUPITER (Columbia 2001).

[7] THE BEATLES, LUCY IN THE SKY WITH DIAMONDS (Parlophone 1967).

Musicians sometimes use violent themes to communicate political messages. In "Bulls on Parade," Rage Against the Machine uses violent imagery ("With the sure shot, sure ta make the boddies drop . . . of tha power dons - that five sided Fist-a-gon . . . the trigger's cold, empty ya purse"[8]) as a political statement to criticize the United States government and its military. In his song "Courtesy of the Red, White, and Blue," Toby Keith employs violent imagery ("We'll put a boot in your ass, it's the American way"[9]) as a political statement to voice support for the United States Armed Forces. Others use violent lyrics to depict actual events, but the lyrics do not necessarily reflect the life of the artist. In "Delia's Gone," Johnny Cash sang: "If I hadn't shot poor Delia I'd have had her for my wife."[10] Although this song is written in the first person and depicts a murder, it actually is a cover of a song about a fourteen-year-old adolescent who was murdered in 1900. SEAN WILENTZ, BOB DYLAN IN AMERICA (2011).

Songs also may contain lyrics that appear facially threatening, but that still constitute protected speech. The band Foster the People produced a song called "Pumped Up Kicks," which describes a school shooting and warns, "All the other kids with the pumped up kicks you'd better run, better run, out run my gun."[11] Further, the rap group N.W.A., in their song "Fuck tha Police," expressly described violence against police

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[8] RAGE AGAINST THE MACHINE, BULLS ON PARADE (Evil Empire 1996).

[9] TOBY KEITH, COURTESY OF THE RED, WHITE, AND BLUE (THE ANGRY AMERICAN) (DreamWorks Nashville 2002).

[10] JOHNNY CASH, DELIA'S GONE (Columbia 1962); *see also* JOHNNY CASH, FOLSOM PRISON BLUES (Sun Records 1957) ("But I shot a man in Reno just to watch him die.")

[11] FOSTER THE PEOPLE, PUMPED UP KICKS (Columbia 2011).

officers, stating, "and when I'm finished, it's gonna be a bloodbath of cops dying in L.A. . . . I'm a sniper with a hell of a scope / taking out a cop or two, they can't cope with me."[12] These examples illustrate that, when song lyrics are read in isolation, the task of distinguishing between words that should be understood as serious, true threats, and those which should be understood as lyrical devices is complex, to say the least.

With this in mind, I turn to the lyrics at issue herein. The words of Knox's rap song were not general or vague as to the targets, a circumstance that would have militated against a finding of a true threat. Had the lyrics been directed at police officers generally, or had they complained about perceived abuses by unnamed police officers, those lyrics objectively could have been understood as political commentary or as a musical ventilation of frustration about the rappers' real-life experiences. That is not what occurred in this case.

In response to being arrested and charged with drug-related crimes months before the release of the video, Knox used lyrics that not only were facially threatening, but were directed specifically at Officer Kosko and Detective Zeltner, whom Knox identified in the song by name. The following excerpts from the verses performed by Knox compel my conclusion that Knox's statements objectively must be considered threatening for constitutional purposes:

> The first verse is for Officer Zeltner and all you fed force bitches And Mr. Kosko, you can suck my dick, you keep knocking my riches. You want beef, well cracker I'm wit it, that

[12] N.W.A., FUCK THA POLICE (Ruthless Records 1988).

whole department can get it. All these soldiers in my committee gonna fuck over you bitches Fuck the police bitch, I said it loud

* * *

We makin' prank calls, as soon as you bitches come we bustin' heavy metal

So now they gonna chase me through these streets

And I'm a jam this rusty knife all in his guts and chop his feet

You takin money away from Beaz, and all my shit away from me

Well your shift over at three and I'm gonna fuck up where you sleep

* * *

My Northview niggas they don't fuck with you bitches, I hate your fuckin guts, I hate y'all.

My momma told me not to put this on C.D., but I'm gonna make this fuckin city believe me, so nigga turn me up.

* * *

They tunin' in, well Mr. Fed, if you can hear me bitch,

Go tell your daddy that we're booming bricks.

And them informants that you got, finna be layin in the box

And I know exactly who workin', and I'm gonna kill him wit a Glock.

The instances of obvious hyperbole ("chop his feet") do not disturb our interpretation of this factor. These

passages – even without considering the statements made during the co-author's verses – contain direct threats to named individuals. Knox threatened those officers with firearms ("bustin' heavy metal") and with knives ("I'm a jam this rusty knife all in his guts"). Knox's lyrical intimidation also extended to the officers' family homes ("I'm gonna fuck up where you sleep"). Knox's proclamation that he knew when the officers' shifts end ("your shift over at three") – regardless of whether the statement was true – conveyed a more personal message that the officers were being watched, lending credibility to the statements and further elevating them over hyperbole or mere musical embellishments. Knox also indicated that he knew the identities of the officers' confidential informants, and threatened them as well.

It bears repeating that the aim of the law in the jurisprudence of threats is to deter and/or remedy the intimidation and fear that such statements inflict upon the victim(s). Many of the lyrics that discuss or advocate violence would not, by themselves, amount to true threats. In fact, as the examples from popular music show, violent topics often are expressed in music without being considered threatening to any particular individual(s), and could not and should not be regulated or punished. What separates this case from other music containing similar lyrics is the direction of those lyrics to specifically named officers, who are targeted as the objects of the violent expressions. Objectively, lyrics uttered in this manner are too personal, focused, and specific to be considered anything other than true threats.

Next, I consider the context in which the statements were made. As the District of Columbia Court of

Appeals observed, "a determination of what a defendant actually said is just the beginning of a threats analysis. Even when words are threatening on their face, careful attention must be paid to the context in which those statements are made to determine if the words may be objectively perceived as threatening." *In re S.W.*, 45 A.3d 151, 157 (D.C. 2012) (footnotes omitted). The lyrics in "Fuck the Police" were not created and sung as part of a broader political commentary on the state of affairs between the police and the citizenry, were not facially hyperbolic or satirical, and did not constitute any other form of speech that would receive constitutional protection. The lyrics were drafted and recorded in the wake of, and in direct response to, Knox's arrest and receipt of criminal charges at the hands of the two named officers. At the time that the song was uploaded to YouTube, the earlier criminal charges were pending, with a hearing less than one month away, at which the two named officers were scheduled to testify against Knox and Beasley.

As part of the examination of the context in which the statements were made, it is necessary to review the means by which the statements were conveyed to the victim(s). The actual communication of the video is the aspect of the case that Knox most vigorously disputes. The crux of his argument is that, because of the dearth of evidence of record to establish that he actually created, uploaded, or published the video, he cannot constitutionally be liable for making a threat. Knox maintains that authorship of a threatening song is only one half of a true threat. The other half is the actual communication of the threat. Absent evidence of the communication, he argues, the song lyrics are no different than writing threats in a personal journal or diary, which are not intended to be seen by anyone

else. *See* Brief for Knox at 36. In Knox' view, the threat can be attributed to him only if the Commonwealth proves that he was the actual person who struck the computer key that caused the video to be uploaded to YouTube.

Knox is correct that the Commonwealth did not prove that he uploaded the video. The evidence confirms that the video was uploaded using an IP address connected to the Hart family, and that the police could not connect Knox with the Harts. Moreover, the police were unable to link Knox to any of the cell phones that had access to the IP address at the time that the video was uploaded. These factors would be dispositive if Knox was correct that he can be responsible only if he personally caused the video to be uploaded. But this is not the law. Knox takes too narrow a view of communication in this context.

Knox and Beasley jointly authored and recorded the "Fuck the Police" song. Both men sang individual verses in the song. The video displays two still photos of Knox and Beasley standing together in corresponding outfits. This was not the duo's first song together. At least two other videos were posted to YouTube in which Knox and Beasley are rapping or talking with each other. Their music, including "Fuck the Police," was promoted to the public via the "Beaz Mooga" Facebook page. There was ample evidence demonstrating that Beasley operated the page. The three email addresses that were associated with the page all contained some form of the name Rashee Beasley. Posts on the page celebrated Beasley's birthday and referenced events that corresponded to actual events in Beasley's life.

The totality of these circumstances establish a sufficient link between the creation of the song and

video, its publication and promotion, and Knox. Knox was sufficiently involved in the process such that he cannot now demand immunity concerning the song's threats simply because someone else may have actually uploaded the video. Knox made no efforts to stop either the dissemination or the promotion of the song. These circumstances differ entirely from Knox's personal diary hypothetical. The record contains ample evidence to conclude that Knox was at least a complicit bystander in the publication of the video.

Having determined that Knox is not immune from liability for the threat, it bears noting that the manner by which a threat is communicated is often as important as the words themselves in an objective assessment of whether a statement amounts to a true threat. Using the example offered by Knox as an illustration, a threat – one intended to be such – that a person writes in a personal journal and that is never seen by the desired victim is unlikely to be considered objectively an actionable true threat. In such a circumstance, the intended victim is never subjected to the fear or intimidation that true threat jurisprudence aims to punish. On the other end of the spectrum, a threat that is delivered face-to-face to the victim in a menacing way almost always will constitute a threat.

The means of communication in this case fall somewhere between those two extremes. The video was distributed to the public via YouTube, and subsequently promoted on Facebook by Beasley, Knox's cohort and musical partner. Neither Knox nor Beasley sent the video directly to any police officer, police department, or local media outlet. Nonetheless, the obvious purpose of uploading a video to the Internet is for it to be viewed and shared. It is reasonable to conclude that, even though the video was not sent

directly to the two named officers, it ultimately would be discovered by them as a result of general dissemination in today's electronically connected world. It is also fair to conclude that, once the video went public, Knox and Beasley knew that it would find its way to the named officers.

Notably, Knox took no efforts to prevent the video from being viewed by law enforcement authorities. To the contrary, Knox offered at least some indicia in the song itself that he did not want to restrict its access to a limited or personal audience ("My momma told me not to put this on C.D., but I'm gonna make this fuckin city believe me. . .").

Absent direct conveyance specifically to the named officers (*i.e.*, the "in your face" scenario), the communication aspect of this case is not overwhelming or conclusive. However, in light of the above discussion, the communication factor nonetheless weighs against Knox. Thus, the contextual circumstances support the conclusion that the lyrics in this case constituted true threats.

The final *J.S.* factor that is relevant to this case, the reaction of the listeners, also supports this holding. This factor was a significant aspect of the Supreme Court's threats analysis in *Watts*, which marked the genesis of the true threats exception to the First Amendment. *See*, *supra*, note 1. It is one of the more difficult factors to assess in a reliable manner. People differ in gender, race, religion, and, most importantly, experience. One person may be emotionally stoic and might not react at all to hearing a threat, while another person might panic immediately and call the police upon hearing the same threat. A person's recent life experiences, the highs and the lows, might inform his or her reaction in that moment, and that reaction

may be different than if the threat was heard a week or a month later (or before). Police officers might or might not react differently to a threat than would a hardened criminal. The scenarios and hypotheticals go on and on. The examples are innumerable, which is what makes assessing the reasonableness of a listener's reaction difficult.

Despite the general complexity of this aspect of the analysis, the factor is easily resolved in this particular case. Officer Spangler was the first police officer to hear the song. When he heard the threatening lyrics, he promptly forwarded the song to his supervisors and to Officer Kosko and Detective Zeltner. As this was happening, a local media outlet found the song and began reporting on it, apparently believing it to contain actual threats as well. Officer Kosko and Detective Zeltner were prevented from working alone, and the police presence in the entire area was increased. Both officers were emotionally distraught by the lyrics. Detective Zeltner was given time off and was provided with additional security when he returned to work. Officer Kosko chose to retire one year after hearing the song. The song necessitated significant efforts to ensure the safety of the two named officers, as well as the officers and civilians in the local community. This factor strongly weighs in the direction of a true threat.

All of these factors support concluding that, objectively, the lyrics in this case constitute true threats. Thus, under my proposed test, I now must consider whether Knox intended them as such.

For this factor, I rely upon much of the same evidence, but view it from a subjective perspective. The tone of the lyrics chosen for this song demonstrates clearly that Knox was angered by his prior

arrest and the effect that the arrest had upon his financial situation. The rage apparent in the lyrics alone would not justify a conclusion that Knox intended the lyrics to be threatening. However, the fact that Knox directed the threats specifically at Officer Kosko and Detective Zeltner does. I discern no credible argument that naming those two individuals served any purpose other than to instill fear in them. The timing of the threats is important as well. The charges that prompted the song lyrics were pending at the time that the song was published. The two officers were slated to appear in person and testify against Knox and Beasley at a hearing approximately one month later. Additionally, Knox referred specifically to the types of violence that he would inflict and when and where he would inflict them. Knox also revealed his motive for levying these threats in the song: revenge for the prior arrest, which harmed his ability to make money through drug trafficking. In the aggregate, the evidence of Knox's subjective intent is plentiful.

For these reasons, I concur with the Majority that Knox's lyrics constitute true threats, and that those lyrics do not receive First Amendment protection. Before concluding, however, I must acknowledge the similarities between this case and *J.S.*, in which this Court reached an opposite conclusion. J.S., an eighth-grade student in the Bethlehem Area School District, created a website on his home computer and uploaded it to the Internet. The website was not related to any school program, assignment, or project. When a person accessed the website, the front page consisted of a "disclaimer," which informed the viewer that, by clicking through and entering the website, the viewer agreed: (1) not to report to anyone affiliated with the school district what the viewer was about to see; (2) that the viewer was not an employee of the district;

and (3) that the viewer would not disclose to anyone the identity of the creator of the website and would not cause any trouble for the creator. Although styled as a disclaimer, the front page did not actually bar access to anyone and was not password-protected. Any person who wanted to access the site could view it simply by clicking through the front page. *Id.* at 851.

The main pages of the website contained derogatory, profane, and threatening statements directed primarily at the principal of the middle school, A. Thomas Kartsostis, and at J.S.' algebra teacher, Kathleen Fulmer. This Court provided the following description of content of the various pages within the website:

> Within the website were a number of web pages. [C]ertain of the web pages made reference to Principal Kartsostis. Among other pages was a web page with the greeting "Welcome to Kartsostis Sux." Another web page indicated, in profane terms, that Mr. Kartsostis engaged in sexual relations with a Mrs. Derrico, a principal from another school, Asa Packer School.
>
> The web site also contained web pages dedicated to Mrs. Fulmer. One page was entitled "Why Fulmer Should be Fired." This page set forth, again in degrading terms, that because of her physique and her disposition, Mrs. Fulmer should be terminated from her employment. Another animated web page contained a picture of Mrs. Fulmer with images from the cartoon "South Park" with the statement "That's right Kyle [a South Park character]. She's a bigger b___ than your mom." Yet another web page morphed a picture of Mrs. Fulmer's face into that of

> Adolph Hitler and stated "The new Fulmer Hitler movie. The similarities astound me." Furthermore, there was a hand-drawn picture of Mrs. Fulmer in a witch's costume. There was also a page, with sound, that stated "Mrs. Fulmer Is a B___, In D Minor." Finally, along with criticism of Mrs. Fulmer, a web page provided answers for certain math lessons.
>
> The most striking web page regarding Mrs. Fulmer, however, was captioned, "Why Should She Die?" Immediately below this heading, the page requested the reader to "Take a look at the diagram and the reasons I gave, then give me $20 to help pay for the hitman." The diagram consisted of a photograph of Mrs. Fulmer with various physical attributes highlighted to attract the viewer's attention. Below the statement questioning why Mrs. Fulmer should die, the page offered "Some Word from the writer" and listed 136 times "F___ You Mrs. Fulmer. You Are A B___. You Are A Stupid B___." Another page set forth a diminutive drawing of Mrs. Fulmer with her head cut off and blood dripping from her neck.

Id. at 851 (footnotes omitted). Eventually, the principal learned of, and viewed, the website. Because he considered the threats to be serious, he informed the school faculty that there was a problem at the school, and he contacted the local police and the FBI, both of which ultimately declined to pursue charges against J.S.

Mrs. Fulmer also viewed the site. She became concerned for her safety. Worse, she experienced, *inter*

alia, stress, anxiety, short-term memory loss, headaches, and depression. She was unable to finish the school year, and was afforded medical leave for the following school year. *Id.* at 852.

J.S. continued to attend the school and was not required to take down the website, although he did so voluntarily one week after the principal viewed it. Initially, the District did not punish J.S. However, at the conclusion of the school year, the District informed J.S.' parents that J.S. would be suspended for three days because J.S.' website constituted a threat to a teacher, harassment of a teacher and the principal, and disrespect to both, all of which affected the health, safety, and welfare of the school community.

The District held a hearing on the suspension, at which the District elected to extend the suspension from three days to ten days. After the hearing, the District reconsidered the suspension and commenced expulsion proceedings against J.S. The District conducted two expulsion hearings before the start of the new school year. J.S. did not attend the second hearing because, by that time, his parents had enrolled him in a school in a different state. At the conclusion of the hearings, the District determined that the website contained threats and harassment directed at a teacher and the principal that resulted in harm to the school community. Consequently, the District expelled J.S. *Id.* at 853.

J.S.' parents appealed the expulsion, maintaining that the sanction violated J.S.' First Amendment rights. The case ultimately reached this Court, which then turned to examine the "difficult issue of whether a school district may, consistent with the First Amendment to the United States Constitution, discipline Sa student for creating at home, and posting on the

Internet, a website that . . . contained . . . threatening statements directed toward one of the student's teachers and his principal." *Id.* at 850.

After discussing basic tenets of the First Amendment, the Court considered how those principles "intersect with the unique school setting," which we described as "a complex and delicate task." *Id.* at 855. "Schools are given the monumental charge of molding our children into responsible and knowledgeable citizens." *Id.* On balance, both the United States Supreme Court and this Court have concluded that a student's constitutional interests must give way – in certain circumstances – to the institutional needs of a school. This includes the student's right to freedom of expression. With this framework in mind, the Court turned to the question of whether J.S.' statements on his website amounted to true threats.

This Court recounted the Supreme Court's *Watts* decision, and observed that the High Court "has offered little more since rendering its decision . . . in terms of guidelines to adjudge what constitutes a true threat." *Id.* at 857.[13] We considered extra-jurisdictional cases that have "attempted to further define what constitutes a true threat and to create a

[13] At the time that the *J.S.* Court considered what constituted a true threat, our Superior Court had been relying upon the United States Court of Appeals for the Second Circuit's decision in *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976). *See Commonwealth v. Baker*, 722 A.2d 718, 722 (Pa. Super. 1998), *aff'd*, 766 A.2d 328 (Pa. 2001). In *Kelner*, the Second Circuit opted to define a true threat as one that "on its face and in the circumstances in which it is made is so unequivocal, unconditionally immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." *Kelner*, 534 F.2d at 1027. This Court has never adopted *Kelner*'s definition.

standard to evaluate speech alleged to constitute a true threat." *Id*. at 857-58 (discussing *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996); and *In the Interest of A.S.*, 626 N.W.2d 712 (Wis. 2001)). Both the United States Court of Appeals for the Ninth Circuit and the Supreme Court of Wisconsin had employed an objective reasonable person standard, inquiring whether the speaker would reasonably foresee that the statement would be interpreted as a serious expression of purpose or intent to inflict harm. *See Lovell*, 90 F.3d at 372; *In the Interest of A.S.*, 626 N.W.2d at 720. To ensure that the statement was not mere "hyperbole, jest, innocuous talk, expressions of political views or other similarly protected speech," *J.S.*, 807 A.2d at 858, the Supreme Court of Wisconsin had held that courts in that state, using a totality of the circumstances approach, were bound to consider the following factors:

> how the recipient and other listeners reacted to the alleged threat; whether the threat was conditional; whether it was communicated directly to its victim; whether the makers of the threat had made similar statements to the victim on other occasions; and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.

In the Interest of A.S., 626 N.W.2d at 720. Five years earlier, the Ninth Circuit had prescribed a similar set of factors in articulating an objective standard for consideration of a purported true threat. *Lovell*, 90 F.3d at 372.

In *J.S.*, we found *In the Interest of A.S.* and *Lovell* compelling and consistent with the Supreme Court's

holding in *Watts*. We concluded the "reasonable guideposts" offered by the Ninth Circuit and the Wisconsin Supreme Court were helpful in differentiating between a true threat and protected speech. We held that, to determine whether a statement is "a serious expression of intent to inflict harm," Pennsylvania courts must "consider the statements, the context in which they were made, the reaction of the listeners and others as well as the nature of the comments." *J.S.*, 807 A.2d at 858.

Following careful deliberation upon these factors, this Court held, ultimately, that J.S.' statements were not true threats. We acknowledged, *inter alia*, that the statements and images on the website were not conditional, and that they contributed to a significant impairment to Mrs. Fulmer's well-being and to her career. Nevertheless, we found it important that the threatening statements were not communicated directly to Mrs. Fulmer. To the contrary, the "disclaimer" indicated that J.S. did not want school faculty to view the material on the site. Moreover, there were no indications that J.S. had made other threatening statements to Mrs. Fulmer, and it was "unclear if Mrs. Fulmer had any reason to believe that J.S. had the propensity to engage in violence, more than any other student of his age." *Id.* at 859.

We observed that a student's First Amendment rights, though limited, are not vitiated entirely by the fact of his being a student, and we recognized the criminal nature of a true threat analysis. *Id.* at 856, 859, and 861. Accordingly, we held that the totality of the circumstances did not support the School District's determination that the website contained sanctionable true threats:

> [T]he web site, taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody. However, it did not reflect a serious expression of intent to inflict harm. This conclusion is supported by the fact that the web site focused primarily on Mrs. Fulmer's physique and disposition and utilized cartoon characters, hand drawings, song, and a comparison to Adolph Hitler. While Mrs. Fulmer was offended, certain others did not view it as a serious expression of intent to inflict harm. Indeed, the actions, or inaction, by the School District belies its assertion that the web site constituted a true threat. To allow J.S. to attend class and extracurricular activities, even if during an investigation, and to only commence discipline well after the conclusion of the school year, severely undermines the School District's position that the web site contained a true threat. The lack of immediate steps taken directly against J.S., and the lack of immediate notification of his parents about the web site, for the extended time period that passed in the case, strongly counters against a conclusion that the statements made in the web site constituted true threats.

Id. at 859-60 (footnote omitted).[14]

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[14] Ultimately, this Court held, while the School District could punish J.S. for his expressive conduct pursuant to the United States Supreme Court's decision in *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969) (holding that a school district may prohibit or punish speech if it demonstrates that the student speech materially disrupts class work, results in substantial disorder in the school, invades the rights of

In the case *sub judice* and in *J.S.*, threatening language was communicated by an online medium. In both situations, the targets of the threats were named specifically, a factor to which I assign great weight in today's case. In *J.S.*, we found it particularly important that the threats were not communicated directly to Mrs. Fulmer, *see* 807 A.2d at 859, just as the threats in this case were not communicated directly to Officer Kosko or Detective Zeltner. Mrs. Fulmer suffered emotional trauma, perhaps even more extensively than did the officers here.

Despite these similarities, it is the content of the threats that distinguishes the present case from *J.S.* We ultimately concluded that the eighth grader's statements in *J.S.* objectively could not be taken seriously, characterizing the threats against Ms. Fulmer as "a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody." *Id.* The depictions of Ms. Fulmer were cartoons, drawings, and absurd comparisons to Adolph Hitler. The same cannot be said here. Although the cases share numerous similarities, the threats themselves do not. Here, the threats to the officers were real, specific, and violent, with nothing of record to indicate that the threats should not be taken seriously or that Knox and Beasley were unable to carry them out. I discern no substantive basis that would compel us to relegate Knox's threats to the same category into which we

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others, or if it is reasonably foreseeable that the speech will do so), the basis for such punishment must rest upon school disruption rather than on the assertion of a true threat. Relying upon *Tinker*, we held that the website "created disorder and significantly and adversely impacted the delivery of instruction." *J.S.*, 807 A.2d at 869. Thus, the District's disciplinary action did not violate J.S.'s First Amendment rights. *Id.*

cast J.S.' threats. Hence, I find *J.S.* to be readily distinguishable.

Ultimately, because I agree with the result reached by the Majority, I concur. However, I respectfully dissent as to the analysis developed and used by the Majority.

Justice Donohue joins this concurring and dissenting opinion.

APPENDIX B

**NON-PRECEDENTIAL DECISION -
SEE SUPERIOR COURT I.O.P. 65.37**

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1136 WDA 2014

COMMONWEALTH OF PENNSYLVANIA,

v.

JAMAL KNOX,

Appellant.

Appeal from the Judgment of Sentence
February 21, 2014

In the Court of Common Pleas of
Allegheny County Criminal Division at No(s):

CP-02-CR-0003870-2013
CP-02-CR-0004264-2013
CP-02-CR-0006621-2012

FILED: AUGUST 02, 2016

MEMORANDUM BY PANELLA, J.

BEFORE: GANTMAN, P.J., BENDER, P.J.E., and PANELLA, J.

Appellant, Jamal Knox, appeals from the judgment of sentence entered after the trial court, sitting without a jury, convicted him of multiple offenses arising from three separate criminal incidents. On

appeal, Knox challenges the legality of a traffic stop of his vehicle, as well as the sufficiency of the evidence supporting his convictions for intimidation of witnesses and terroristic threats. After careful review, we conclude that none of Knox's arguments on appeal merit relief. We therefore affirm.

This is an appeal from a bench trial over charges arising from three separate criminal incidents. However, only two of these incidents are relevant to the issues on appeal, and we therefore need not detail the factual or procedural history relevant to only the third incident.

In April 2012, Pittsburgh police officers Michael Kosko and David Derbish stopped Knox's vehicle after they had observed that he had not properly utilized his turn signal while parallel parking. After Knox indicated that he did not have a valid driver's license, the officers asked him to step outside his vehicle. Rather than comply, Knox sped away in his vehicle before striking a parked car and a fence, leaving Knox's vehicle inoperable. Knox proceeded to run from his vehicle, but was quickly apprehended. A seach of Knox's vehicle revealed heroin, a large sum of cash, and a loaded firearm. Co-defendant Rashee Beasley was a front seat passenger in Knox's vehicle, and was also arrested.

Both Knox and Beasley were charged with multiple offenses, most significantly narcotics and firearms offenses. While these charges were pending, Beasley and Knox recorded a rap video entitled "Fuck the Police." The song had three verses, with Knox rapping the first verse by himself, Beasley rapping the second

by himself, and Knox rapping the third verse.[1] The first verse:

> This first verse is for Officer Zeltner and all you fed force bitches/and Mr. Kosko, you can suck my dick you keep on knocking my riches/ you want beef, well cracker I'm wit it/ that whole department can get it/ all these soldiers in my committee gone fuck over you bitches/ fuck the police, bitch I said it loud/ the fuckin' city can't stop me, y'all gone need Jesus tryin' to break me down/ and he ain't fuckin' with you dirty devils/ we making prank calls, as soon as you bitches come we bustin' heavy metal/ they chase me through these streets/ and I'm a jam this rusty knife all in his guts and trust its beef/ you taking money away from Beaz and all my shit away from me/ well your shift over at three/ and I'm gone fuckup where you sleep/ Hello Breezos got you watching my moves and talkin' 'bout me to your partner/ I'm watchin' you too, bitch I see better when it's darker/ Highland Park gone be Jurassic Park keep fuckin' wit me/ ayo Beaz call Dre and Sweet and get them 2 23s.

See Appellant's Brief, at 8.[2] Beasley then shared their creation with the public. He uploaded the video to

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[1] Some evidence of record indicates that both Beasley and Knox rapped the third verse together. However, in his brief, Knox claims that he performed the third verse solo. Whatever the case may be, it does not affect the ultimate resolution of this appeal.

[2] The transcription of the lyrics in Appellant's Brief is substantially similar to the transcription utilized by the police in their applications for search warrants. Knox does not raise any challenge regarding the transcription of the lyrics of the song.

YouTube, and also posted a link to the video on his Facebook profile.

In November 2012, a Pittsburgh Police Department officer came across the video on YouTube. The use of Detective Zeltner's and Officer Kosko's names, in conjunction with the violent language, caught her attention and the video was referred for further review. Knox and Beasley were subsequently charged with intimidation of witnesses and terroristic threats.

Knox filed a motion to suppress the evidence seized during the April 2012 traffic stop, which the trial court denied. Knox waived his right to a jury trial, and the trial court found him guilty of possession with intent to distribute controlled substances, fleeing and eluding, false statements, possession of controlled substances, intimidation of witnesses, terroristic threats, and criminal conspiracy. The trial court imposed an aggregate sentence of two to six years' imprisonment to be followed by two years of probation. Knox's post-sentence motions were denied, and this timely appeal followed.

On appeal, Knox first argues that the trial court erred in denying his motion to suppress. Specifically, Knox contends that Officer Kosko did not have sufficient reasonable suspicion to perform the stop, and therefore all the fruits of the subsequent arrest and search should have been suppressed.

We review a challenge to a trial court's refusal to suppress evidence pursuant to the following well established standard of review.

> [W]e are limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. We may consider the evidence of the witnesses offered by the

> prosecution, as verdict winner, and only so much of the defense evidence that remains uncontradicted when read in the context of the record as a whole.

Commonwealth v. McAliley, 919 A.2d 272, 275-276 (Pa. Super. 2007) (citation omitted). "Moreover, if the evidence supports the factual findings of the suppression court, this Court will reverse only if there is an error in the legal conclusions drawn from those findings." ***Commonwealth v. Powell***, 994 A.2d 1096, 1101 (Pa. Super. 2010) (citation omitted).

The quantum of proof necessary to make a vehicle stop on suspicion of a violation of the motor vehicle code is governed by 75 Pa.C.S.A. § 6308(b), which states:

> **(b) Authority of police officer.**—Whenever a police officer is engaged in a systematic program of checking vehicles or drivers *or has reasonable suspicion that a violation of this title is occurring or has occurred*, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

(emphasis supplied).

Traffic stops based upon suspicion of a violation of the motor vehicle code under § 6308(b) "must serve a stated investigatory purpose." ***Commonwealth v. Feczko***, 10 A.3d 1285, 1291 (Pa. Super. 2010) (en Banc).

> Mere reasonable suspicion will not justify a vehicle stop when the driver's detention cannot serve an investigatory purpose relevant to the suspected violation. In such an instance, 'it is encumbent [sic] upon the officer to articulate specific facts possessed by him, at the time of the questioned stop, which would provide probable cause to believe that the vehicle or the driver was in violation of some provision of the Code.'

Id. (emphasis and citation omitted).

At the suppression hearing, the Commonwealth presented the testimony of Officer David Derbish. Officer Derbish testified that on the night in question, he was on patrol with his partner, Officer Kosko. ***See*** N.T., Suppression Hearing, 6/5/13, at 16-17. He observed Knox pull his vehicle into a parking space without utilizing his turn signal. ***See id.***, at 17. The officers pulled beside Knox's parked vehicle and questioned Knox briefly. When Knox indicated that he did not have a valid driver's license, Officer Kosko instructed him to stop. ***See id.***, at 18. Officer Kosko began to open his door to investigate further when Knox pulled his vehicle out of the parking space and fled. ***See id.***

Knox argues that these observations were insufficient to justify the traffic stop. However, the Pennsylvania Motor Vehicle Code provides that a driver must utilize a turn signal when changing lanes. ***See*** 75 Pa.C.S.A. § 3334(a). Knox does not dispute that Officer Derbish's testimony was sufficient to establish that he didn't use a turn signal while pulling over into a parking space, but merely argues that this constituted a "minor and momentary" infraction insufficient to provide probable

cause, citing ***Commonwealth v. Garcia***, 859 A.2d 820 (Pa. Super. 2001).

Garcia is easily distinguishable. In ***Garcia***, the relevant sections of the vehicle code pertained to driving within a single lane and driving on the right side of the roadway. ***See id.***, at 822 n.1. These violations necessarily involve a certain amount of discretionary judgment regarding duration and amount of deviance from the lane of travel, especially when a driver may be reacting to a perceived hazard in the roadway. The ***Garcia*** decision notes that the deviations at issue were minor and brief, and in reaction to oncoming traffic. ***See id.***, at 823. Thus, the ***Garcia*** panel held that the observations did not provide probable cause to believe the relevant sections of the vehicle code had been violated.

This case stands in stark contrast to ***Garcia***. Here, there is no discretion involved in section 3334(a); either the turn signal is used when changing lanes, or it is not. Knox does not dispute that he changed lanes. Nor does he argue that he merely was late in using his turn signal. ***Garcia*** is plainly inapplicable. The suppression court did not abuse its discretion in refusing to suppress the evidence gained from the stop.

Next, Knox argues that the evidence at trial was insufficient to support his convictions for intimidation of a witness and terroristic threats. In particular, Knox contends that the evidence at trial was insufficient to establish that he knowingly transmitted the threats in the YouTube video in a manner whereby the officers named in the video would receive the threats.

Knox relies upon the definitions of the two offenses to argue that the Commonwealth was required to prove that he knowingly communicated the threats to

the victimized officers. For intimidation of a witness, the Commonwealth charged Knox with intimidating the officers while they were witnesses in a case against him, "with the intent to or with the knowledge that [he] would obstruct, impede, impair, prevent, or interfere with the administration of criminal justice." Criminal Information, filed 4/11/13, at 1. Under terroristic threats, the Commonwealth charged Knox with "communicat[ing] a threat, either directly or indirectly, to commit a crime of violence with the intent to terrorize" the officers. ***Id.***[3] Pursuant to these charges, we agree with Knox that the Commonwealth was required to establish that he acted at least knowingly with respect to each element of the crimes.

We therefore must evaluate whether the evidence presented by the Commonwealth was sufficient to prove that Knox knowingly communicated the threats contained in the YouTube video. In reviewing a challenge to the sufficiency of the evidence, we evaluate the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." ***Commonwealth v. Bibbs***, 970 A.2d 440, 445 (Pa. Super. 2009) (citation omitted).

> Evidence will be deemed sufficient to support the verdict when it established each element of the crime charged and the commission thereof by the accused, beyond a reasonable

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[3] The Commonwealth argues that under ***Commonwealth v. Kelley***, 664 A.2d 123 (Pa. Super. 1995), it was only required to prove that Knox acted recklessly to sustain the conviction for terroristic threats. However, the Commonwealth did not charge Knox with a violation of § 2706(a)(3), which provides for a conviction if the defendant acted with a "reckless disregard of the risk of causing" terror or inconvenience.

> doubt. Nevertheless, the Commonwealth need not establish guilt to a mathematical certainty, and may sustain its burden by means of wholly circumstantial evidence. Significantly, [we] may not substitute [our] judgment for that of the factfinder; if the record contains support for the convictions they may not be disturbed.

Id. (citation and quotation marks omitted). "Any doubt about the defendant's guilt is to be resolved by the factfinder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances." ***Commonwealth v. Scott***, 967 A.2d 995, 998 (Pa. Super. 2009).

Knox essentially argues that while he knowingly rapped the threatening lyrics in the "Fuck the Police" video, the Commonwealth did not prove that he ever had knowledge that the videos would be made available to the public. He therefore contends that the Commonwealth never proved that he knowingly communicated the threat to the officers, either directly or indirectly.

It is clear from our review that the Commonwealth did not prove that Knox ever directly communicated the threats to the officers. However, as the Commonwealth notes, this is not fatal to the conviction. Communications with third parties in a manner consistent with an intention of transmitting the threat to the victim is sufficient to sustain a conviction. ***See Kelley***, 664 A.2d at 127-128.

To establish knowing or intentional indirect communication of the threatening lyrics, the Commonwealth presented evidence that Knox and Beasley had per-

formed several rap videos together. ***See*** N.T., Trial, 11/13/13, at 180-181, 186-187; N.T., Trial, 11/18/13, at 258.[4] These videos were not merely performed live, but recorded for posterity. ***See id.*** Beasley posted these videos online to YouTube and Facebook accounts that were accessible by the public. ***See id.***, at 180-190, 317-318. "Fuck the Police" was posted several days after the first of these rap videos had been posted. ***See id.***, at 257-258.

Viewing this evidence in a light most favorable to the Commonwealth, as we must, we conclude that this evidence is sufficient to establish that Knox knew his lyrics would be made publicly available. "Fuck the Police" was not a one-off live performance. It was the third in a string of rap videos produced by the duo, all of which were posted to publicly available websites. The trial court, sitting as a fact-finder, was permitted to infer from this evidence that Knox knew that these lyrics would be seen by the police or by third parties who would then notify the police. We therefore conclude that Knox's second issue on appeal merits no relief.

In his final issue, Knox argues that the trial court erred in admitting the "Fuck the Police" video into evidence, as the conduct was protected conduct under the First Amendment. This issue is waived, as Knox did not raise this, or any, objection at trial when the video was entered into evidence. ***See*** N.T., Trial, 11/13/13, at 203; Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). We decline to accept Knox's

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[4] The Notes of Testimony cover several days of testimony, but are consecutively numbered such that testimony from 11/12/13 is recorded at pages 1-100, testimony from 11/13/13 at pages 101-233, and testimony from 11/18/13 at pages 242-398.

invitation to address this issue despite this waiver. Knox is not precluded, based upon the arguments before us, from raising this issue in a collateral proceeding.

Judgment of sentence affirmed.

Judgment Entered.

/s/ Joseph D. Seletyn, Esq.
Joseph D. Seletyn,
Prothonotary

Date: 8/2/2016

APPENDIX C

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL DISTRICT
ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

CC Nos.: 201206621, 201303870, 201304264

COMMONWEALTH OF PENNSYLVANIA,

v.

JAMAL KNOX,

Defendant.

Honorable Jeffrey A. Manning, P.J.
Court of Common Pleas
Room 325 Courthouse
436 Grant Street
Pittsburgh, PA 15219 22

Counsel of Record:

For the Defendant:

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For the Commonwealth:

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Appeals Unit
400 Allegheny County Courthouse
Pittsburgh, PA 15219

OPINION OF THE COURT

Manning, J.

The defendant, Jamal Knox, was charged, at CC 201304264, with three (3) counts of Aggravated Assault (18 Pa. C.S.A. § 2702(a)(3)); one count of Resisting Arrest (18 Pa. C.S.A. § 5104); one count of Escape (18 Pa. C.S.A. § 5121(a)); one count of False Identification to Law Enforcement Officer (18 Pa. C.S.A. § 4914(a)); one count of Disorderly Conduct (18 Pa. C.S.A. § 5503(a)(4)); and one count of Criminal Mischief (18 Pa. C.S.A. § 3304(a)(5)). At CC 201206621, he was charged at one count of Receiving Stolen Property (18 Pa. C.S.A. § 3925(a)); one count of Firearms Not to be Carried Without a License (18 Pa. C.S.A. § 6106(a)(1)); one count of Possession with Intent to Deliver Heroin (135 Pa. C.S.A. § 780-113(a)(30)); one count of Fleeing or Attempt to Elude a Police Officer (75 Pa. C.S.A. § 3733(a)); one count of False Identification to a Law Enforcement Officer (18 Pa. C.S.A. § 4914(a)); one count of Possession of Heroin (35 Pa. C.S.A. § 780-113(a)(16)); and nine (9) summary Motor Vehicle Code violations. At CC 201303870, he was charged with two counts of Intimidation of a Witness or Victim (18 Pa, C.S.A. § 4952(a)(1)); two counts of Retaliation Against a Witness or Victim (18 Pa. C.S.A. § 4953(a)); two counts of Terroristic Threats (18 Pa. C.S.A. § 2706(a)(1)); and one count of Conspiracy to Commit Terroristic Threats (18 Pa. C.S.A. § 903(c)). Finally at CC 201304264, he was charged with one count each of Fleeing or Attempt to Elude a Police Officer (75 Pa. C.S.A. § 3733(a)); Recklessly Endangering Another Person (18 Pa. C.S.A. § 2705); and False Identification to Law Enforcement Officer (18 Pa. C.S.A. § 4914(a)). He was also charged at that case number with ten (10) summary Motor Vehicle Code violations.

The defendant waived his right to jury trial and proceeded non-jury before this Court with trial beginning on November 12, 2013 and concluding on November 21, 2013. At that time, the Court adjudged him guilty at CC 201206621 of one count each of Possession With Intent to Deliver a Controlled Substance (Heroin), Fleeing or Attempting to Elude a Police Officer, False Identification to Law Enforcement Officer, Accidents Involving Attended Vehicle or Property, Possession of a Controlled Substance (Heroin) and seven (7) Summary Motor Vehicle Code Violations. At CC 201303870, he was found guilty of two Counts of Intimidation of a Witness, two counts of Terroristic Threats and one count of Conspiracy to Commit Terroristic Threats. Finally, at CC 201304264, he was found guilty of Fleeing or Attempting to Elude a Police Officer, Recklessly Endangering Another Person, False Identification of a Law Enforcement Officer; Driving While Operating Privilege is Suspended or Revoked, and nine (9) Summary Motor Vehicle Code Violations.

He was sentenced on March 6, 2014, at CC 201206621, to not less than twelve (12) nor more than thirty-six (36) months incarceration, to be followed by twenty-four (24) months probation, at the Possession With Intent to Deliver a Controlled Substance count. No further penalty was imposed on the remaining counts. At CC 201303870, he was sentenced to not less than twelve (12) nor more than thirty-six (36) months incarceration, to be followed by twenty-four (24) months of probation, at each of the two Intimidation of Witness counts and each of the two Terroristic Threat counts. Those sentences were directed to run concurrently with one another but consecutive to the sentence imposed CC 201206621. Finally, at CC 201304264, he was sentenced to not less than six (6) nor more than twelve (12) months at the Fleeing and Eluding count

and to no further penalty on the remaining counts, other than the Summary Motor Vehicle Violations, for which fines were imposed. This sentence was concurrent to all other sentences resulting in an aggregate term of incarceration of not less than twenty-four (24) nor more than seventy-two (72) months to be followed by twenty four (24) months of probation.

The defendant filed Post Sentence Motions, which were denied. Thereafter, new counsel entered his appearance and filed a Notice of Appeal. Pursuant to this Court's Order, he then filed a Concise Statement of Matters Complained of on Appeal. At CC 201206621 he claimed that the Court erred by denying the Motion to Suppress and that the evidence was insufficient as to the offense of Possession with Intent to Deliver. At CC 201303870, the defendant raised the following claims[1]:

> 1. The Court erred in denying the Motion for Judgment of Acquittal because the Commonwealth failed to prove beyond a reasonable doubt that the defendant intended to communicate a threat by way of the video posted on You Tube;
>
> 2. The Commonwealth failed to present sufficient evidence to establish that the defendant possessed the necessary *mens rea* to commit the offenses of intimidation of witnesses and terroristic threats;
>
> 3. The Court abused its discretion in permitting the Commonwealth to use constitutionally protected speech in support of its case against the defendant for intimidation of witnesses and terroristic threats;

[1] The defendant did not identify any claims at CC 201304264.

4. The Court erred when it denied the defendant's Motion for Judgment of Acquittal in that it relied solely and exclusively on constitutionally protected speech with regard to the intimidation of witnesses and terroristic threats counts; and

5. Trial court erred with it found that the video in question was admissible and not protected speech pursuant to *Schenk v. United States*.

Turning first to the claims raised at CC 201206621, the defendant challenges the Court's-denial of his pre-trial Suppression Motion, which challenged the validity of the stop of his vehicle. The Commonwealth established at the April 17, 2012 suppression hearing that Pittsburgh Patrolman Michael Cosko was in a marked vehicle with his partner, Officer David Durvish, when he observed a gold or tan colored Jeep Cherokee speed past his vehicle. He began to follow the vehicle. After following him for a short period of time, he observed the driver of the vehicle turn out of the driving lane into the parking lane without using his turn signal. He pulled his vehicle next to the defendant's vehicle, wound down his window, and asked the defendant what he was doing. The defendant replied that he was visiting his sister. Officer Cosko then asked the defendant if he had a valid driver's license at which point the defendant responded that he did not. Cosko put his vehicle in park and, as he was exiting his vehicle to approach the defendant's, the defendant drove off at a high rate of speed.

Officer Cosko initiated a vehicle pursuit which ended when the defendant's vehicle collided with a fence, disabling it. The defendant fled on foot but officer Cosko was able to catch him and place him under

arrest. His partner arrested the passenger, who also fled after the vehicle came to a stop. In the course of a search of the defendant's person conducted instant to his arrest, Officer Cosko retrieved approximately thirty (30) stamped bags of heroin as well as one-thousand, four-hundred and eighty-nine ($1,489.00) dollars in cash.

The defendant contends that the officer stopped him unlawfully because it is not a violation of the motor vehicle code to fail to signal when pulling along a curb to park. The Court need not address whether there was reasonable suspicion to justify a stop because no stop took place prior to the defendant advising the officer that he was driving without a license and then fleeing.

> There are three levels of interaction between officers and citizens, each requiring a different level of suspicion to validate the encounter. *Commonwealth v. Ellis*, 541 Pa. 285, 662 A.2d 1043, 1047 (1995). The least restrictive level of interaction between a citizen and an officer is a "mere encounter" or request for information by an officer. *Id.* at 1047. The mere encounter does not have to be supported by any level of suspicion and carries with it no requirement that citizens either stop or respond. *Id.* A more restrictive stop, known as an "investigative detention" subjects a person to a stop and a period of detention. *Id.* In order to justify the restraint on liberty imposed by this type of encounter, the investigating officer must have a reasonable belief that the person detained has been involved in criminal activity. *Id*. Finally, the third level of encounter is an arrest or "custodial detention," which must be

> supported by probable cause that an offense has been or is being committed. *Id.*

Commonwealth. v. Bennett, 827 A.2d 469, 477 (Pa.Super., 2003). The initial interaction between the officer and the defendant, with the officer asking the defendant two questions, was a mere encounter. Though the officer testified that it was his intent to detain the defendant for the traffic violation, he never got the opportunity to do so. He did not "stop" the defendant's vehicle because the defendant fled before the officer could ever assert the control necessary to convert the mere encounter into an investigative detention. He did not activate his overhead lights, block the defendant's vehicle in any manner or order the defendant to do anything. He simply asked him two questions: "What are you doing?" and "Do you have a valid driver's license?". At this point, this was nothing more than a mere encounter.

At the moment that the defendant told the officer he did not have a valid driver's license, however, the officer then had reasonable suspicion and could detain the defendant to further investigate. The defendant, however, fled, before the officer could detain him. This flight, and the reckless manner that he drove, endangering other persons, provided the officer with sufficient probable cause to arrest the defendant once the defendant's vehicle came to a stop. The subsequent search of the defendant and his vehicle was proper.

The defendant next challenges the sufficiency of the evidence as to the charge of possession with intent to deliver a controlled substance. The test for a challenge to the sufficiency of the evidence requires the Court to determine whether

> [T]he evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in the light most favorable to the Commonwealth as a verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.
>
> The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Olsen, 82 A.3d 1041, 1046 (Pa. Super. Ct. 2013). When a trial judge hears a case nonjury, the scope of review is no different than if a jury had rendered the verdict. *Commonwealth v D'Angelo*, 422 A.2d 645, 648 (Pa. Super. Ct. 1980).

In order to prove the elements of the offense of Possession with Intent to Deliver a Controlled Substance, the Commonwealth was required to prove beyond a reasonable doubt that the defendant both possessed a controlled substance and that he had the intent to deliver it. *Commonwealth v. Kirkland*, 831 A.2d 607, 611 (Pa. Super.2003). Among the factors relevant in

making this determination include the manner in which the controlled substance is packaged, the behavior of the defendant, the presence of drug paraphernalia and the presence of large sums of cash. *Commonwealth v. Ratsamy*, 934 A.2d 1233, 1237-1238 (Pa. 2007). In addition, expert opinion testimony is admissible regarding whether the facts surrounding the possession of the controlled substance are consistent with Intent to Deliver rather than with the intent to use it personally. *Id*.

In this case, the defendant was found in possession of 15 individually packaged bags of heroin; a large amount of cash ($1,489.00); and a firearm. He fled from the police, both in the vehicle and, after it wrecked, on foot. No paraphernalia for ingesting the heroin was found on his person or in the vehicle.

These facts were presented to the Commonwealth's expert, Edward Fallert, who offered the opinion that these facts were consistent with the defendant having possessed the narcotics with the intent to sell them rather than simply for his own personal use. Detective Fallert stated he reached this conclusion "On the basis of the firearm being located and the amount of money recovered and the lack of any use paraphernalia from the vehicle or from the person". T.T. 85. The facts and circumstances presented at trial, coupled with the expert testimony of Detective Fallert, was more than sufficient to establish beyond a reasonable doubt that the defendant possessed the drugs that were found on his person intending to deliver them rather than intending to ingest them himself.

At CC 201303870, the defendant claims that the evidence did not prove that he intended to communicate a threat or that he had the necessary state of

mind for the charges of Terroristic Threats or Intimidation of a Witness. These claims present essentially the same issue; whether the evidence was sufficient to establish the elements of the crimes for which guilty verdicts were returned so they will be addressed together.

The evidence presented at trial established that on April 2012, Officers Michael Kosko and Daniel Zeltner were employed as plainclothes police officers for the City of Pittsburgh Bureau of Police, assigned to Zone 5. TT 20, 65[2]. Officers Kosko and Zeltner arrested the co-defendant, Rashee Beasely, on April 17, 2012. T.T. 33, 66. He was charged with possession of a firearm, receiving stolen property, carrying a firearm without a license, and escape. Officer Kosko, as one of the arresting officers, was scheduled to testify at Beasley's trial on November 11, 2013. T. T. 110. Officer Zeltner also arrested Beasley in a separate fleeing and eluding case in September 2011. That case was still pending during the subsequent April 17, 2012 arrest. T.T. 144-45.

On November 15, 2012, Pittsburgh Police Officer Aaron Spangler found a link to a video posted on Facebook. T.T. 227. This link took Spangler to a video posted on YouTube. T.T. 227. The video consisted of still frame photographs, synched to lyrics performed by Jamal Knox and his co-defendant. The song specifically referred to Officers Kosko and Zeltner. The lyrics to the song included the following:

> Your shift is over at three. I'll f*** you up where you sleep
>
> . . .

[2] "T.T" refers to the transcript of the trial.

> I keep a 40 on my waist that will waste you like a mop n***** with a clip filled to the top. I top with some of these cop killas. I spit with a tec, that's 50 shots n****. That's enough to hit one cop on 50 blocks.
>
> . . .
>
> Like Poplawski, I'm strapped nasty.
>
> . . .
>
> Let's kill these cops cuz they don't do us no good.

T.T. 203. After finding the video, Officer Spangler circulated the link to the YouTube video to his supervisors and Officers Kosko and Zeltner. T.T. 230. On November 15, 2012, the video featuring Beasley and Knox was taken down from the YouTube website. T.T. 208. After some local media attention, another video was made available on YouTube and Facebook, depicting Beasley and Knox discussing the rap video, admitting that they wrote and performed the song. T.T. 208.

On January 8, 2013, City of Pittsburgh Police Detective Michael Wilkes was assigned to serve an arrest warrant on Knox. T.T. 335. He and other members of a fugitive task force conducted surveillance on the home of Tara Beasley, Rashee Beasley's mother. T.T. 335-336. Eventually, he and several other officers approached the home. They knocked on the door and heard movement inside. The door was opened by a man they later identified as Paul Webb, who initially said that he and his sons were the only ones home. Someone then yelled from upstairs to not let the officers in and Webb yelled back that he "was not messing" with the police officers and allowed the officers into the

home. When he went upstairs, Detective Wilkes encountered several people, including the co-defendant Beasley. Thinking that Beasley was Knox, he addressed him as "Jamal Knox" and took him into custody. When it was determined about half an hour later that the man they arrested was not Jamal Knox, Detective Wilkes returned to the Beasley home. He has seen a loose ceiling tile when he was there earlier but had not searched there as he thought he had Knox in custody. He was once again allowed into the home and he found Jamal Knox hiding in the ceiling. T.T. 338-340.

Turning first to the witness intimidation charges, when the evidence is viewed in the light most favorable to the Commonwealth, the evidence adduced at trial was sufficient to support the verdict of guilty as to those charges. The Pennsylvania Crimes Code provides, in pertinent part:

> A person commits an offense if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to . . . [w]ithold any testimony, information, document or thing related to the commission of a crime from any law enforcement officer, prosecuting official or judge.

18 Pa. C.S. A. § 4952. The actual intimidation of a witness is not an essential element of the crime. *Commonwealth v. Collington*, 615 A.2d 769, 770 (Pa. Super. Ct. 1992) ("The crime is committed if one, with the necessary mens rea, '*attempts*' to intimidate a witness or victim."). Therefore, it is not necessary for the witness to actually receive the threat before testifying. *Id*. A conviction will stand if the timing and

circumstances, if believed, permit an inference that the threat had been made for the purpose of intimidating the witness whose testimony is critical to the criminal case. *Id*.

The following facts were adduced at trial: Officers Kosko and Zeltner both arrested Beasley prior to the video being released on YouTube. Officer Kosko was scheduled to testify during Beasley's November 11, 2013 trial. The prior case where Officer Zeltner was the arresting officer was still open with Beasley in November 2012. The rap video naming Officers Kosko and Zeltner was uploaded onto YouTube on November 12, 2012. The video specifically stated, "[l]et's kill these cops cuz they don't do us no good." Under these circumstances, where criminal cases were still open, and the arresting officers were specifically named in the video, the Court finds there was sufficient evidence to support the conviction of witness intimidation.

Similarly, there was sufficient evidence to establish that the defendant intended to communicate a threat to commit a crime of violence to the two officers. Again, the officers were specifically named and the defendants stated, to the officers in the video, "I'll fuck you up where you sleep." It was posted shortly before the trials on other offenses were to commence where the officers were witnesses. These facts supported the inference that the posting was done intentionally and with the purpose of the officers seeing or hearing it.

In Pennsylvania, a person commits the crime of terroristic threats "If the person communicates, either directly or indirectly, a threat to . . . commit any crime of violence with intent to terrorize another." 18 Pa. C.S.A. § 2706. Direct communication between the defendant and victim is not required to establish the crime of terroristic threats. *Commonwealth v, Sinnott*,

976 A.2d 1184 (Pa, Super. Ct. 2009). Moreover, neither the ability to carry out the threat nor a belief by the persons threatened that it will be carried out is an essential element of the crime. *In re B.R.*, 732 A.2d 633, 636 (Pa, Super. Ct. 1999). The comment to Section 2706 states that "[t]he purpose of the section is to impose criminal liability on persons who make threats which seriously impair personal security or public convenience. 18 Pa. Cons. Stat. Ann. § 2706, official comment 1927; *see also Commonwealth v. Vergillo*, 103 A.3d 831, 834 (Pa, 2014).

Here, the defendants wrote, performed, and recorded a rap video after they had been arrested for other crimes by Officer Kosko and Detective Zeltner. The rap video pictured the defendant and Jamal Knox singing with periodic gunfire sounds in the background. The lyrics to the rap specifically named Officer Michael Kosko and Detective Daniel Zeltner and included the following lines:

> Your shift is over at three. I'll f*** you up where you sleep
>
> . . .
>
> I keep a 40 on my waist that will waste you like a mop n***** with a clip filled to the top. I top with some of these cop killas.
>
> . . .
>
> I spit with a tec, that's 50 shots n****. That's enough to hit one cop on 50 blocks.
>
> . . .
>
> Like Poplawski, I'm strapped nasty.
>
> . . .

> Let's kill these cops cuz they don't do us no good.

T. T. 203. Officer Kosko testified that he was shocked and nervous when he saw the video, and that the threats were one of the reasons why he left the police force. T. T. 108-109. Officer Kosko also stated that after the video was found on YouTube, officers had to work with partners and more officers were scheduled for each shift. T. T. 109. Officer Zeltner testified that he was given time off work, extra security detail, and extra personnel brought into the Zone in order to deal with the threat. T. T. 147.

Viewing the facts in the light most favorable to the Commonwealth, the evidence adduced at trial supports a finding that the defendant stated that he would kill the officers and that he said this intending to terrorize them. *See Commonwealth v. Green*, 429 A.2d 1180, 1183 (Pa. Super. Ct. 1981) (finding sufficient evidence of intention to terrorize where defendant threatened to "kill" the victim and "to blow his brains out" with a gun.). The fact that the threats were made in a music video on YouTube does not shield them from the statute.

The defendant was also convicted of criminal conspiracy. Pennsylvania law provides that a conspiracy with multiple criminal objectives exists "[i]f a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship." 18 Pa. Cons. Stat. Ann. § 903(c). The Pennsylvania Superior Court has explained:

> The essence of criminal conspiracy is a common understanding, no matter how it came

> into being, that a particular criminal objective be accomplished. Therefore, a conviction for conspiracy requires proof of the existence of a shared criminal intent. An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities. Thus, a conspiracy may be inferred where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation. The conduct of the parties and the circumstances surrounding their conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt. Even if the conspirator did not act as a principal in committing the underlying crime, he is still criminally liable for the actions of his co-conspirators in furtherance of the conspiracy.

Commonwealth v. McCall, 911 A.2d 992, 996-997 (Pa. Super. Ct. 2006) (quoting *Commonwealth v. Johnson*, 719 A.2d 778, 784-785 (Pa. Super. Ct. 1998)).

Here, the evidence of the conspiracy is the fact that the defendant dearly acted in concert when he wrote, performed, and recorded a rap song threatening police officers with another person. Moreover, the duet later admitted on another published video that they wrote and performed the song together. T. T. 208. Under these circumstances, the Court finds there was sufficient evidence to support a conviction of criminal conspiracy to make terroristic threats.

The defendant's final three challenges raise essentially the same point: that the video and its contents are protected speech. The Supreme Court recently addressed the issue of threats made under circumstances similar to those presented here. Justice Alito, who concurred in part and dissented in part, explained why "true threats" are not protected:

> It is settled that the Constitution does not protect true threats. See *Virginia v. Black*, 538 U.S. 343, 359-360, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); *R.A.V. v. St. Paul*, 505 U.S. 377, 388, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *Watts*, 394 U.S., at 707-708, 89 S.Ct. 1399. And there are good reasons for that rule: True threats inflict great harm and have little if any social value. A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation. It is true that a communication containing a threat may include other statements that have value and are entitled to protection. But that does not justify constitutional protection for the threat itself.

Elonis v. United States, 135 S.Ct. 2001, 2016 (2015). The Supreme Court reversed the conviction of the defendant in that matter, but only on the grounds that the Court improperly instructed the jury that it could find the defendant guilty, without regard to the defendant's intent, as long as a reasonable person would find the communication threatening. *Id.* 135 S. Ct. at 2012. The Supreme Court did not alter the longstanding precedent that a true threat, i.e. one that is made with the intent that another would consider it a threat, is not protected speech, Here, this Court

has already held that the defendants did intend to threaten; did intend to intimidate, the victims. Accordingly, because the statements by the defendant constituted true threat directed to the victims, those statements were not protected speech.

BY THE COURT:

By the Court:

/s/ Jeffrey A. Manning, P.J.
President Judge

Date: August 11, 2015

APPENDIX D

[1] IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PA

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CRIMINAL DIVISION

CC No. 2012-06621 (KNOX)
CC No. 2013-03870 (KNOX)
CC No. 2013-02464 (KNOX)
CC No. 2012-06615 (BEASLEY)
CC No. 2013-03835 (BEASLEY)
CC No. 2013-01275 (BEASLEY)

———

COMMONWEALTH OF PENNSYLVANIA

vs.

JAMAL KNOX and RASHEE BEASLEY

———

TYPE OF PROCEEDINGS: NON JURY TRIAL

———

DATE: NOVEMBER 12, 2013

———

BEFORE: Hon. JEFFREY A. MANNING

REPORTED BY: Christine M. Vitrano Official Court Reporter

COUNSEL OF RECORD: For the Commonwealth: RACHEL FLEMING, ADA

For the Defendant (KNOX): ALMON BURKE, JR., ESQ.

For the Defendant (BEASLEY): DAVID OBARA, ESQ.

[2] INDEX

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TUESDAY, NOVEMBER 12, 2013

[3] WEDNESDAY, NOVEMBER 13, 2013

[4] MONDAY, NOVEMBER 18, 2013

TUESDAY, NOVEMBER 19, 2013

* * *

* * *

[459] THURSDAY NOVEMBER 21, 2013.

THE CLERK: Your Honor, now is the time and date set for the rendering of verdicts in the cases of the Commonwealth versus Jamal Knox and Rashee Beasley.

THE COURT: Have the papers?

THE CLERK: Yes, Your Honor.

THE COURT: Are they in order? Bring the [460] defendants forward. While the Court sitting as fact finder is not required to, it is my custom to make brief comments to the determination and the deliberations that arrived at the verdicts that I will be entering here.

To begin with the first case in time and the first case presented by the Commonwealth, involves the fleeing of the defendants from the police, the fleeing from the vehicle, leaving in the vehicle a firearm.

The Court notes that under the doctrines of constructive possession and joint possession, Commonwealth may well have had sufficient evidence that would convict both of the defendants, or at least Jamal Knox, the driver of the vehicle, because the firearm was found on the floor of the front seat in the driver's position.

The Court notes, however, that the Commonwealth chose to have scientific tests performed on the firearm and the bandanna around it. *And,* accordingly, they determined that there was, in fact, DNA on that piece of evidence. They did not, however, test that DNA against the defendants or attempt to receive DNA [461] samples from the defendants to determine if the DNA on that firearm belonged to either one of them. Either one or both. Had that occurred, it would be proof well beyond any reasonable doubt as to who was in possession of the firearm.

I note the firearm was a stolen firearm. The vehicle was a stolen vehicle. Neither of which give any indication of who possessed the firearm. While it is clear to the Court, and while I can assume Mr. Knox is the driver of the vehicle was in possession of the firearm, based upon the concept of constructive possession, I believe that the failure of the Commonwealth to properly test evidence that they had properly before them creates a reasonable doubt.

Accordingly, as to the first case, as to Mr. Jamal Knox, Court enters the following verdicts: As to Count 1 and Count 2, receiving stolen property and carrying a firearm without a license, not guilty. As to Count 3, possession with intent to deliver a controlled substance, guilty. As to Count 4, fleeing and attempting to elude, Count 5, false identification, Count 6 leaving the scene of the accident, Count 7 [462] simple

possession, as to those counts, guilty. As to driving without a license summary offense and the remaining violations of the Motor Vehicle Code, guilty.

As to Rashee Beasley, person not to possess a firearm, receiving stolen property, carrying a firearm without a license, as to those counts, not guilty. *As* to escape, guilty.

As to the second case, which relates to what has been described in the testimony as the rap video, the Court has carefully listened to the evidence and the arguments of counsel. It is abundantly clear to me that the conduct of the defendants here is not protected by the First Amendment because it far exceeds the concept of what the First Amendment allows. The controlling case is S-C-H-E-N-C-K, Schenck versus United States, authored by Justice Oliver Wendell Holmes in 1919, dealing with the Espionage Act of 1917, wherein he used the phrase that one cannot shout fire in a crowded theatre. That is not protected speech because it presents a clear and present danger.

Here the Court is satisfied that the First Amendment is not applicable to the conduct of [463] the defendants here. And that they did, in fact, attempt to intimidate and communicated a threat. The rap video by its very nature is a publication, and a publication is what becomes communicated. The Court is satisfied that the Commonwealth proved beyond a reasonable doubt that the defendants with the intent to obstruct impede or impair, prevent the administration of justice, attempted at least to intimidate Officer Kosko in Count 1 and Officer Zeltner in Count 2.

We note that both defendants are charged in the same counts separately. I am not, however, convinced that the defendants harmed – as is the language

of retaliation – against the witness, harmed those individuals by an unlawful act, but I am satisfied that the Commonwealth has proven that they communicated a threat, either directly or indirectly, to commit a crime of violence. And that the Court is satisfied that they did so in collaboration with one another. This becomes not only from the evidence of the video itself but from the interview that occurred sometime thereafter.

Accordingly, as to the second information, [464] the Court adjudges you both guilty as to the charge of intimidation of witnesses, Counts 1 and 2, not guilty as to retaliation against a witness. Guilty as to Counts 5 and 6, terroristic threats, and guilty as to the charge of criminal conspiracy.

The remaining informations involving subsequent acts of fleeing and attempting to elude police officer, as to Jamal Knox, reckless endangerment, false identification, driving while your privileges were suspended and the remaining summary offenses, the Court is satisfied that the Commonwealth has met its burden there, and a verdict of guilty will be entered.

As to the hindering apprehension for Rashee Beasley, the hindering the apprehension by concealing Jamal Knox in his home, the Court is satisfied that the Commonwealth met its burden, and the verdict of guilty will be entered there as well.

All right, gentlemen. Those are the verdicts. I take it you want a pre-sentence report here. We'll order a pre-sentence report.

MR. BURKE: Yes, Judge.

[465] MR. OBARA: Your Honor, just for the record, I believe that after the convictions have been noted,

the highest guideline for my case is nine to 16 months for intimidation of witness for Mr. Rashee Beasley. He has approximately eight months at the Allegheny County Jail to put towards credit. I would –

THE COURT: You would rather – I want a pre-sentence report. I think it's necessary here. You've raised that as a bail issue at the appropriate time. I will order a pre-sentence report. Mr. Rothey.

THE CLERK: February 6, Your Honor.

THE COURT: Sentencing will be held February 26 (sic), 10:00 a.m.

MR. BURKE: Your Honor, I would just note for the record that the Court's finding at Count 1, the vehicle was not stolen. I think that's what the testimony was. The gun was, but the vehicle was not.

THE COURT: Well, he wasn't charged with anything. It was my recollection. It was not their vehicle. Maybe that's what I should have said. But the vehicle wasn't stolen. It wasn't their vehicle.

[466] MR. BURKE: Thank you, Your Honor.

MS. FLEMING: Thank you, Your Honor.

(At this juncture, the above entitled matter was concluded.)

APPENDIX E

[1] IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

CC 201303870
201206621
201304264

COMMONWEALTH OF PENNSYLVANIA

vs

JAMAL KNOX,
Defendant.

Before: Hon. Jeffrey A. Manning
Date: March 6, 2014

SENTENCE

Reported by:

Cheryl A. Chorba, RMR,CRR
Official Court Reporter

Counsel of Record:

For the Commonwealth:

Rachel Fleming
Assistant District Attorney
Fourth Floor – Courthouse
Pittsburgh, PA 15219

For the Defendant:

Almon Stith Burke, Jr.
600 Grant Street
Suite 660
Pittsburgh, PA 15219

[2] (Thursday, February 6, 2014.)

(Open Court at 11:08 p.m.)

THE CLERK: Your Honor, now is the time and date set for the cases of Commonwealth versus Jamal Knox and Rashee Beasley.

Please come forward.

THE COURT: Are you calling any witnesses?

MR. BURKE: No, Your Honor.

THE CLERK: Please raise your right hand.

(Defendants sworn.)

THE COURT: Mr. Burke and Mr. Obara, the Court has the benefit of Pre-Sentence Reports for each of your clients.

Have you had an opportunity to review it?

MR. BURKE: May it please the Court, Al Burke on behalf of Jamal Knox.

Yes. I had an opportunity this morning to read the Pre-Sentence Report for Mr. Knox.

MR. OBARA: May it please the Court, [3] David Obara for Mr. Rashee Beasley.

I too have had the opportunity to review the Pre-Sentence Report with Mr. Beasley.

THE COURT: Are there any additions or corrections either of you wish to make on behalf of your clients?

MR. OBARA: There are a couple that I'd like to make on behalf of Mr. Beasley. Would you like me to go first, Your Honor?

THE COURT: It doesn't matter. Whoever chooses.

MR. OBARA: All right. First off, Your Honor, my client has indicated to me that one error that he noticed while reading the Pre-Sentence Report appears on page 7, bottom paragraph.

I believe it indicates that he was shot on March 31st of 2011 and then gave false information to the police in regards to the shooting.

He's indicated to me that he was shot on May 31st of 2011. He denies that he gave any false information to the police in regard to the incident where he [4] suffered a gunshot wound.

On page 8, there's a bottom paragraph. There's a notation where it indicates while he was on probation, I believe this was as a juvenile, his probation officer indicated that he provided false information. He denies giving false information to his probation officer on page 8.

Then on page 11, he denies that he provided a false address. That appears in one of the paragraphs down below. It indicates he gave a false address. He did not in his opinion give a false address to the Probation Office.

That's all.

THE COURT: I can only tell you that I'm not really concerned about a false address. We know where he is.

MR. OBARA: I did tell him, Your Honor, that the primary concern for this Court probably was the instant charges. Just for clarity of the record though, he did indicate that he disputes those points that I mentioned in the [5] Pre-Sentence Report.

THE COURT: Mr. Burke, any additions or corrections?

MR. BURKE: Your Honor, on behalf of Mr. Knox just briefly.

Mr. Knox objects to the factual statement recited by the Probation Officer regarding the first incident –

THE COURT: Please keep your voice up, sir.

MR. BURKE: – where the police went to pull Mr. Knox over.

The statement was that the vehicle was being driven erratically initially. I don't believe that those were the facts of that case, Your Honor.

There was also an objection to –

THE COURT: Would that really make any difference because he proceeded to flee and elude?

MR. BURKE: That's correct, Your Honor. Just for the record, Your Honor, we're just making the objection.

The next objection in that situation, Your Honor, we would object to any [6] statement about firearms since the result of the trial was that he was not convicted of the firearms charge.

THE COURT: That is correct. The Court did not find there was sufficient proof beyond a reasonable doubt.

MR. BURKE: Yes.

THE COURT: I'm not altogether certain that the Department of Corrections, Pennsylvania Board of Probation and Parole, can't consider the evidence, although it did not result, it did not raise itself to the level of a conviction.

MR. BURKE: Your Honor, regarding the situation with the rap song.

THE COURT: Do you want to proceed to sentencing now? Are you making an argument?

MR. BURKE: No, Your Honor. There was an objection in the Pre-Sentence Report.

THE COURT: Okay.

MR. BURKE: I don't believe that Officers Kosko and Zeltner were the main officers on the arrest in that situation. I thought they were backup officers. It [7] indicated in the report, I thought, that they were the main officers on the case. So, that was the objection there.

The next objection that we would have, Your Honor, is that there was a statement included by Officer Zeltner to the effect that the Defendant shot a guy last year. We would object to the inclusion of that statement in the report itself.

That would be all the objections.

THE COURT: Well, that objection will be sustained. That portion of the report will be stricken.

Anything else?

MR. BURKE: Nothing else, Your Honor. Thank you.

THE COURT: Do you want to proceed to sentencing at this time?

MR. BURKE: Yes, Your Honor.

THE COURT: Is there anything you wish to say on behalf of your client?

MR. BURKE: Yes, Your Honor.

THE COURT: Mr. Obara, if you and

Mr. Beasley want to have a seat, you may. Mr. Burke.

[8] MR. BURKE: Thank you, Your Honor.

With permission, Your Honor, after I say a few words, my client also has a statement.

THE COURT: He absolutely has the right to allocution. He will have that opportunity.

MR. BURKE: Thank you, Your Honor.

My client does want the Court to know that he's a high school graduate, that he had begun his own business in the music industry, in the performing arts industry, as the Court has become aware. My client has established himself as a business and has made it an LLC.

He has obtained a bit of notoriety on the local and national levels for his efforts. To that end, Your Honor, he wishes to continue to pursue those goals after this case is over with.

My client is remorseful for the situation that has come about in this case, and he will speak to the Court about that. He has indicated to me that he never intended to bring any harm to city 9] officers as a result of this song being made.

My client wants you to know that he has lots of creations that do not involve violence. They do not involve threats of death or do not involve any kind of attacks on individuals. That my client, the situation that happened here, he regrets tremendously.

He would like to say a few words himself about that situation, Your Honor.

THE COURT: All right. Miss Fleming, anything you wish to say?

MS. FLEMING: Thank you, Your Honor.

There is nothing indicated in the Pre-Sentence Report that suggests there's anything mitigating about –

THE COURT: Hang on a second. Is there something amiss here?

MR. BURKE: No, Your Honor. My client has asked for a cup of water. That was all. I was looking for a pitcher on the table. I don't see one.

THE COURT: Miss Kearney.

Do you understand you get to be last?

[10] MR. KNOX: Okay.

THE COURT: That's why I asked her.

MR. KNOX: Okay.

THE COURT: Go ahead.

MS. FLEMING: Thank you, Your Honor. Again, after having reviewed the Pre-Sentence Report, there's certainly nothing encouraging or mitigating in it from the Commonwealth's perspective as pertains to sentencing.

The Court obviously knows the gravity of the offenses that were committed. This was a series of crimes beginning in April of 2012 culminating with his fleeing and eluding in March of 2013.

These crimes were committed consecutively. They were committed while he was on bond, and rather than being remorseful, the Defendant has shown nothing but defiance prior to the proceedings with his production of the rap video in question and all throughout these proceedings. Commonwealth's position is that these consecutive acts justify consecutive sentences.

[11] The Defendant has a violent history. His prior record score is based on a juvenile adjudication for possession with intent to deliver. That was February, 2011. 139 bags of heroin, a gun, and $5,800.

In the instant cases, in the video he was depicted with a firearm. Although the Court did not find beyond a reasonable doubt on the charges of the gun, in his first case, in the fleeing and eluding case and the possession with intent case, there was a gun under the seat of that car. He's been shot. He's in the lifestyle drugs, guns, money. The police know him to be violent.

THE COURT: I want to note the Court, not having found there to be sufficient proof on that charge, that also eliminated the requirement for the mandatory sentence.

MS. FLEMING: It did, Your Honor.

THE COURT: The mandatory five-year sentence.

MS. FLEMING: That's right, Your [12] Honor. But considering the guidelines, if Your Honor were to sentence even within the standard range on the most serious offenses on each of these cases and run them consecutively, he would still be looking at a five-to-ten year sentence. So the Commonwealth requests that at a minimum.

THE COURT: Mr. Knox, is there anything you want to say?

MR. KNOX: Yes. Is it all right if I sit right there so I can face the whole Zone 5 Bureau?

THE COURT: Speak to me.

MR. KNOX: My legs are a little shaky.

THE COURT: Pardon me?

MR. KNOX: Standing up. It's kind of hard to speak at the same time and think. My legs is hurting.

All right? Is it all right with you, Judge, if I sit down?

THE COURT: Mr. Burke?

MR. BURKE: May I have a moment, Your Honor.

(Discussion held off the record.)

[13] THE COURT: Mr. Burke, if you want to call your own client as a witness and proceed in question and answer, you have the right to do that, similar to his right to allocution.

MR. BURKE: Thank you, Your Honor. But I think at this moment my client understands what he needs to communicate with the Court and how he needs to do it. So I think he's all right at this point.

THE COURT: All right.

MR. KNOX: Your Honor, I just want to let the Court know that I take full responsibility for all my actions that I did that you found me guilty of and everything.

I want to let the whole Zone 5 Police District Bureau know that the song that was put on YouTube and everything was not intentional. I had nothing to do with the publication of the song. It was really a total mistake.

But I do accept all responsibilities because you found me guilty. You're the last one to make a decision in the [14] courtroom when you found me guilty of that. So I will accept all responsibilities for what you charged me for.

I just want to let my family know, my mom, all my siblings back there know that I'm sorry for the situation I got in, being away from home all this time

when I should be out there making something better of myself.

I mean, sometimes it seems like a nightmare to me, you know, because like the song wasn't meant – it wasn't meant – I didn't have nothing to do with the song coming out.

I mean as a rapper, we have to put on an image. So even when things may go wrong, like you got to make it still seem like as if it's right. Do you know what I mean? If you don't know what I mean, I will explain it to you.

Like how the song was put out there. I had nothing to do with it. Of course, I have fans. I have an image to look up to. I mean an image to stand behind.

[15] Like my business is a product. My name. It's not Jamal Knox being a rapper. My product is Mayhem Mal. But I don't want the Court to look at me as Mayhem Mal and Jamal Knox as one person. I want the Court to look at me as Jamal Knox, a human being.

I'm not that type of person. I mean I have songs about God. I even make songs about my mom. I even make songs about, you know, how to stop violence. I make songs about violence, you know, things pertaining to that.

I just want the Court to know it wasn't intentional. I'm sorry if any officers felt threatened, any police dogs. It wasn't intentional and everything. I just want to get back home to my family, get on with my business.

THE COURT: Mr. Knox, perhaps you think this is all about the song. Believe me it isn't. It's about fleeing and eluding, endangering the lives of police officers.

MR. KNOX: Yes, sir.

[16] THE COURT: And members of the public. Running stop signs and being in possession with intent to deliver drugs.

MR. KNOX: Yes, sir.

THE COURT: Albeit I did find you not guilty of carrying a firearm without a license, but there is no question there was a firearm there.

MR. KNOX: Yes, sir.

THE COURT: This case is unfortunately what we might call run-of-the-mill we see, but you happen to enhance it somewhat with your video. I will talk about that at the appropriate time.

MR. KNOX: Okay.

THE COURT: The case is not about just the video.

MR. KNOX: I was going to get on to that too.

THE COURT: All right.

MR. KNOX: I mean I found a habit. It is a little embarrassing to sit up here and even admit to it, but I found a habit a little bit after I got shot. That's no excuse for doing drugs, doing heroin.

[17] The gun being there, honestly, it was not my car. I didn't know anything about the firearm being in the car. So, I didn't admit to it, you know.

I'm sorry for putting – I apologize for putting the police in danger fleeing, but I just didn't want to be caught with the badge. I accept all responsibility for all my actions. I have no excuses to make. I just want to tell the truth about everything, I mean, in the case.

Rachel Fleming, Miss Rachel Fleming, I don't want you to look at us as gangsters or anything, you know. We just make music, you know. We make music for

everything, all situations. Court situations. I mean we're not going to go back out there and –

THE COURT: Excuse me for just a minute. Pardon me for interrupting.

Judge Borkowski is going to take criminal division motions. It's well past half an hour. Sorry for the inconvenience.

All right. Mr. Knox, you may [18] continue.

MR. KNOX: Miss Rachel Fleming, I don't want you – I overheard you last time we were in here. You said that you felt that we were gangsters, and we don't care about anything. We were all about violence.

I just want you to know that it's not what it seems, you know. We're just trying to sell records. You know, that's how I'm trying to make a living. I have to – I have to be this person for it to be successful.

I mean, I don't have to be on one subject all the time when I'm rapping. But you know you got to fulfill all areas, you know.

Just like Tupac did. You know, he made songs where you could cry. He made songs where you might want to just go ahead and shoot yourself to. He made everything for you, you know. He made good songs. He made sad songs. He made mad songs.

But one thing for sure that you can [19] bet is Tupac never made a bad song. You might feel that it's bad. Some people might feel that it was a good song, you know. You might not like the song or anybody else might not like the song.

But at least there might be one person who might like the song, you know. That one person could come up to – it could be a million people that like the song

that he lets a friend know that lets a friend know that lets a friend know, you know.

I don't want you to look at it like we're trying to start a riot or anything like that, you know. It just, it just, it happened. I mean it was a coincidence. I have no excuses.

I just want you to like separate the two names from my business name to me as a person, you know. I just hope that, you know, you feel what I'm saying because I'm really being sincere right now.

I'm not trying to be nobody. I'm being Jamal Knox right now. I'm being a human being. I'm not being a rapper. This is not the rapper that is in the [20] courtroom today. This is me today. I'm telling you that I had no intentions on anyone getting hurt. I'm sorry for the fleeing and eluding, putting the officers in danger.

I'm sorry for the song getting out there. But it was like – I mean what do you do when you sit back and, you know – you sit back and you're looking, like what are you supposed to do? You're supposed to make it look like it was supposed to happen that way.

Like say Beyonce got up there on stage and she fell. She's going to get up, and she's going to keep on going. She's going to act like it was all a play. You know, her heel falls off or something, she's going to act like it was all with the play, what she was supposed to do.

That's basically what I did. It was a mistake that I had to pick up on and keep going with it. I really didn't want to get up there and say, well, you know, I didn't put it out there because the song is already out there. Many people came to [21] love the song. Some people came to hate the song.

What I wasn't going to do is sit back and don't do nothing about it. I mean, this is a business that I have to run. You know, I have shows to attend.

So I just want you to know that it was not intentional. I hope that you some way feel what I'm saying today and to let you know that it wasn't intentional.

Judge Manning, I'm really at a loss for words. I think I got everything out there that I really want to say today. I hope that, I hope that you can understand what I'm trying to say and put it in the way that I put it today and letting you know that – I mean, you know, what are you supposed to do when things go wrong, and you're supposed to make it look like it's right?

You know, sometimes I mean – can I speak to my lawyer real quick, please?

THE COURT: Yes.

(Off record discussion between attorney and Defendant.)

[22] MR. KNOX: I have one more thing to say. Is that all right?

THE COURT: Yes.

MR. KNOX: If I'm not taking up too much time. I want to take my time when I say this to you.

Well, my mom is sitting back there. I remember back in the fifth grade when I used to really have problems with my anger, you know. She had signed me up for anger management classes in school. I used to get mad if we'd lose basketball games. I'm real competitive.

So she signed me up for anger management classes with this lady. She was a white lady. She had blonde hair. What she used to tell me when I really got mad,

she gave me a stress ball. The stress ball, she said squeeze it whenever you're mad. Don't punch nothing. Just squeeze the stress ball. You can't hurt it. Squeeze it as hard as you want.

So I would get mad, and I would squeeze it. Squeeze on a stress ball. And it would hold my anger, but it [23] wouldn't.

When I got to the middle school, I became in love with poetry. I started loving poetry, like Maya Angelou, Langston Hughes, and Tupac Shakur. I used to always read it. I was like, he's a rapper. He can write poetry. He wrote his feelings in his poetry.

So I began to start writing my feelings in my poetry. Some of it, of course, I never let no one hear. I will keep it to myself. I will never let no one hear it.

I would write songs about my girlfriend back there. She would never hear it. I would just write my feelings on paper because I was too shy to say it to her or I didn't want anybody to hear the poem. Some of it, I will let people hear it.

My best friend I met in middle school, he was my first producer. His name is Leon Ford. He had a studio. He was like in school he asked me one day, do you want to come record in the studio. I said man, [24] I don't rap. I don't rap. I write poetry. He said poetry is rap. I said yeah? He said yeah. You put it on a beat and you say it.

I said, man, I don't really like putting my stuff out there. I don't really like putting my art out there, like my poetry out there. He said you can make some songs where you don't put it out there, and you can make some songs where you let people hear it and see what they think. Just try it.

So I tried it. He gave me a beat. I went home. I was all over the beat. I didn't know the format of the song. I just rapped from the beginning of the song to the end of the song. He laughed at me. He said it's good, but you need a concept to it.

So, he showed me how to do it. Showed me how to do a chorus, showed me how to do a verse, and whatnot. So I started doing it. Some songs I never put out there. Some songs I did put out there.

I want the Court to know that this [25] song was never, ever supposed to be put on the media. Never supposed to be publicized. No one was supposed to hear the song. Honest to God, no one was supposed to hear the song. I listen to the song all the time.

Now I don't want to blame anybody. I take responsibilities for everything. I'm willing to take it. But I don't know if someone might have came to the studio and recorded a song and said, hey, I want you to send that song to my email. I don't know. I don't know if he accidentally sent my song to the email and said hey, listen to this. Did you hear this new man Jamal? It hasn't come out yet. I don't know. I don't know if he did that or not. I don't know if he sent it to somebody that sent it to somebody that put the song up under my name and Rashee Beasley's name. That's what I don't know, Your Honor. I don't know if it's one of my worst enemies that want to see me fail, that don't want to see me make it. I don't know. I don't know if it's one of [26] my biggest fans that loves me but didn't know the song wasn't supposed to be out there. I don't know.

I want to take responsibility for everything. I just want the Court to know that I had no actions on publicizing the song. I am really sorry for what happened. I had no intention of doing any harm to any officers of

Zone 5 or any zone. I just want – I mean, that's really all I have to say.

I really want to get back to my family. I want to let my mom know at the end of the day that I apologize for not being home and helping out, and being a good family member to the family, and teaching my nephews how not to be in the situation that I'm currently in right now.

Thank you.

THE COURT: All right. Mr. Burke and Ms. Fleming, do you want to add anything?

MS. FLEMING: No, Your Honor.

MR. BURKE: Your Honor, I don't really have anything to add. I think my client was eloquent enough in his expressions.

[27] THE COURT: All right. We seem to continue to come back to the rap video. This needs to be very clear that this isn't about freedom of speech.

Almost a hundred years ago, Justice Oliver Wendell Holmes in Shane versus United States wrote the first amendment does not protect the man who is falsely shouting fire in a theater and causing a panic.

This clearly was intimidation of witnesses. It clearly was terroristic threats, particularly the reference to the heinous actions of Richard Poplawski who murdered three Pittsburgh police officers from Zone 5 in April of 2009.

You threatened that those acts would be repeated and identifying the police officers, two specific police officers as victims. That's clearly what it was.

MR. KNOX: Can I speak?

THE COURT: There is before the Court a laundry list of offenses for which Mr. Knox has either been acquitted or convicted.

[28] The Court has taken account of Defendant's right to allocution, the arguments of both counsel for the prosecution and for the defense. I have examined the sentencing guidelines, and I believe the guideline sentences, standard range guideline sentences are appropriate here. Accordingly the following sentence will be imposed.

At 201206621, at Count 3 wherein Defendant was adjudged guilty of possession with intent to deliver a controlled substance, you are committed to the custody of the Pennsylvania Department of Corrections for imprisonment for not less than 12 nor more than 36 months.

That is to be followed by a two-year period of probation for a total of five years supervision.

At 201303870, at Counts 1 and 2, intimidation of witnesses, and 5 and 6, terroristic threats, at each of those counts a sentence of not less than 12 nor more than 36 months is imposed.

These sentences to run concurrently [29] with one another at this information but consecutively to the previously imposed sentence, and also to be followed by a period of three years of probation. Two years probation. Pardon me. That sentence will be imposed, as I said, consecutively to the previous information.

At 201304264, at Count 1, fleeing and attempting to elude a police officer, a sentence of not less than six nor more than twelve months is imposed concurrently with the previously imposed sentences.

The driving while your operating privileges were suspended, a mandatory $200 fine is imposed as well as a mandatory $200 fine on the reckless driving, and the appropriate fines on all of the other motor vehicle violations.

Sentence in the aggregate, not less than 24 nor more than 72 months to be followed by a two-year period of probation.

Do you understand the sentence?

MR. KNOX: Can I ask –

(Off record discussion between [30] Attorney Burke and Defendant.)

THE COURT: The Defendant is to be given credit for time served.

Mr. Rothey, I don't know if you have calculated that. He's statutorily entitled to credit for time served since the Court revoked his bond.

THE CLERK: It would be about ten and a half months from March 21st of last year.

THE COURT: The Court having sentenced you, you have ten days to file a Post-Sentencing Motion with this Court, 30 days to file an appeal with the Superior Court.

If you file a motion with me, you would have an additional 30 days to file an appeal should I deny it. So, 10 days to file post-sentencing motion, 30 days to file an appeal.

If you cannot afford a lawyer, one will be appointed to represent you.

I assume, Mr. Burke, you will continue to represent him should he choose to do so?

[31] MR. BURKE: We haven't contracted in that nature. But if he speaks to me about that we can –

THE COURT: Let the Court know as soon as possible because otherwise we will have to appoint counsel. The public defender or other counsel.

MR. BURKE: Thank you.

THE COURT: That's all.

(Proceedings concluded.)

APPENDIX F

Number of defendants in cases commenced and terminated with Title 18 U.S.C. § 875(c) as most serious charge, FY2007-2016

Fiscal Year	Defendants in cases commenced	Defendants in cases terminated			
		Total	Convicted	Sentenced to prison	Average prison term
	Number	Number	Number	Number	Mean
2007	33	20	18	14	37 mos.
2008	33	31	25	16	39
2009	33	31	25	12	30
2010	30	34	23	9	27
2011	37	29	26	17	20
2012	34	41	35	22	43
2013	37	45	32	19	28
2014	34	48	34	21	18
2015	27	28	22	13	26
2016	32	32	26	15	26

Note: Defendants in cases commenced and cases terminated in U.S district court with Title 18 U.S.C. § 875(c) as most serious offense. Most serious offense is determined based on the charge with the greatest maximum statutory penalty (when there is more than one charge).

Source: Bureau of Justice Statistics based on data from the Administrative Office of the U.S. Courts, Criminal Master File, fiscal year (October 1st to September 30th).