

No. 22-138

**In The
Supreme Court of the United States**

BILLY RAYMOND COUNTERMAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

**On Writ Of Certiorari To The
Colorado Court Of Appeals, Division II**

**JOINT APPENDIX
VOLUME I**

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**Petition For Certiorari Filed August 9, 2022
Certiorari Granted January 13, 2023**

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DISTRICT COURT,
ARAPAHOE COUNTY, COLORADO

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

v.

BILLY RAYMOND COUNTERMAN,
Defendant.

Case No. 16CR2633

RELEVANT DOCKET ENTRIES

Date Filed	Filing Party	Docket Text [Doc.] Doc. Title
02/27/2016	The People of the State of Colorado	[Exhibits – Trial/Hearing] People’s Exhibit 2 from 2-27-16
09/22/2016	The People of the State of Colorado	[Affidavit] Affidavit for Arrest Warrant <hr/> [Felony Complaint Filed (<i>Related Document</i>)] Complaint and Information

09/22/2016	The People of the State of Colorado	[Motion] Motion for Protective Order <hr/> Proposed Order (<i>Related Document</i>)] Proposed Order re Motion for Protective Order
09/23/2016	N/A	[Order (<i>Related Document</i>)] Order: Proposed Order re Motion for Protective Order
09/23/2016	N/A	[Order (<i>Related Document</i>)] Order: Complaint and Information
09/23/2016	N/A	[Order (<i>Related Document</i>)] Order: Complaint and Information
09/26/2016	N/A	[Order] Mandatory Protection Order Granted
09/26/2016	N/A	[Mandatory Protection Order Granted] N/A
10/03/2016	Billy Raymond Counterman	[Filing Other] Setting Slip for Arraignment 11/21/16 at 8:30 a.m. in Div 408
11/21/2016	N/A	[Filing Other] pretrial services conditions of release

11/21/2016	N/A	[Order (<i>Related Document</i>)] Order: Motion to Clarify Speedy Trial
12/23/2016	Billy Raymond Counterman	[Motion] Motion to Remove GPS as a Condition of Bond
01/26/2017	Billy Raymond Counterman	[Motion] MOTION FOR NOTICE OF THE DISTRICT ATTORNEYS INTENT TO INTRODUCE EVIDENCE OF OTHER TRANSACTIONS PURSUANT TO CRE 404(B) (DEF-1)
01/26/2017	Billy Raymond Counterman	[Motion] MOTION IN LIMINE (DEF-2)
01/26/2017	Billy Raymond Counterman	[Motion] Motion to Dismiss Counts One and Two Because, As Applied, the Statute Infringes Upon Mr. Countermans First Amendment Right to Free Speech (Def-3)
01/26/2017	Billy Raymond Counterman	[Motion to Suppress] MOTION TO SUPPRESS STATEMENTS (DEF-4)

01/27/2017	The People of the State of Colorado	<p>[Motion in Limine] Motion in Limine to preclude any evidence, testimony, or argument related to defendants mental health</p> <hr/> <p>[Proposed Order] Proposed Order re: Motion in Limine precluding any evidence, testimony, or argument related to defendants mental health</p>
01/27/2017	The People of the State of Colorado	<p>[Motion in Limine] Motion in Limine to preclude testimony, evidence, or argument regarding knowingly applying to in a manner that would cause a reasonable person to suffer serious emotional distress</p> <hr/>

		<p>[Proposed Order] Proposed Order re: Motion in Limine to preclude testimony, evidence, or argument regarding knowingly applying to in a manner that would cause a reasonable person to suffer serious emotional distress</p>
01/27/2017	The People of the State of Colorado	<p>[Motion] Motion to Introduce Evidence as Res Gestae or in the Alternative Pursuant to CRE 404(b)</p> <hr/> <p>[Exhibit-Attach to Pleading/Doc] Exhibit 1 (Facebook Messages)</p> <hr/>

		<p>[Exhibit – Attach to Pleading/Doc] Exhibit 2 (Criminal History)</p> <hr/> <p>[Exhibit – Attach to Pleading/Doc] Exhibit 3 (Tolman Report)</p> <hr/> <p>[Exhibit – Attach to Pleading/Doc] Exhibit 4 (Incampo Affidavit)</p> <hr/> <p>[Exhibit – Attach to Pleading/Doc] Exhibit 5 (Tolman Affidavit)</p> <hr/> <p>[Proposed Order] Proposed Order re: Motion to Introduce Evidence as Res Gestae or in the Alternative Pursuant to CRE 404(b)</p>
01/30/2017	Billy Raymond Counterman	<p>[Response] Response TO THE PROSECUTIONS MOTION IN LIMINE TO PRECLUDE ANY EVIDENCE, TESTIMONY, OR ARGUMENT RELATED TO DEFENDANTS MENTAL HEALTH</p>

01/31/2017	Billy Raymond Counterman	[Response] RESPONSE TO THE PROSECUTIONS MOTION TO INTRODUCE EVIDENCE AS RES GESTAE OR IN THE ALTERNATIVE PURSUANT TO CRE 404(B)
04/20/2017	The People of the State of Colorado	[Jury Instructions – Proposed] Peoples Proposed Jury Instructions
04/20/2017	The People of the State of Colorado	[Jury Instructions- Proposed] Jury Instructions – modifications requested by defense
04/25/2017	The People of the State of Colorado	[Witness List] Witness List
04/25/2017	The People of the State of Colorado	[Exhibit List] Exhibit List
04/25/2017	Billy Raymond Counterman	[Jury Instructions Proposed] Jury Instructions – Proposed
04/26/2017	N/A	[Filing Other] Jury Questions of Witnesses

04/26/2017	The People of the State of Colorado	[Jury Instructions – Proposed] Jury Instructions – Proposed
04/27/2017	N/A	[Jury Instructions-Accepted] Jury Instructions – Accepted
04/27/2017	N/A	[Filing Other] Juror Deliberation Question and Response
04/27/2017	N/A	[Verdict] Verdict
04/27/2017	The People of the State of Colorado, Billy Raymond Counterman	[Exhibits – Trial/Hearing] People’s Exhibits 1-5, Defendant’s Exhibits A-D, Da-De, E from 4-25-17 to 4-27-17
04/28/2017	N/A	[JTRL Dispo-Guilty] N/A
06/21/2017	N/A	[Pre-Sentence Investigative Report Filed] Pre-Sentence Investigative Report Filed
06/29/2017	Billy Raymond Counterman	[Motion (<i>Related Document</i>)] MOTION FOR APPOINTMENT OF THE PUBLIC DEFENDERS OFFICE ON APPEAL AND TO PROCEED IN FORMA PAUPERIS
06/30/2017	N/A	[Case Closed] N/A

06/30/2017	Billy Raymond Counterman	[Mittimus-Issued] Mittimus – Issued
06/30/2017	N/A	[Order (<i>Related Document</i>)] Order: MOTION FOR APPOINTMENT OF THE PUBLIC DEFENDERS OFFICE ON APPEAL AND TO PROCEED IN FORMA PAUPERIS
07/07/2017	Billy Raymond Counterman	[Exhibits – Trial/ Hearing] Exhibits – Defense Closing Power Point
08/16/2017	Billy Raymond Counterman	[Notice of Appeal] Notice of Appeal
08/16/2017	Billy Raymond Counterman	[Designation of Record on Appeal] Designation of Record on Appeal
09/11/2017	Billy Raymond Counterman	[Motion] Motion for Reconsideration of Sentence Pursuant to Colorado Rules of Criminal Procedure 35(b)
10/16/2017	N/A	[Order] Denying defendant’s motion for sentence reconsideration 35(b)

02/22/2018	N/A	[Transcript Filed on Appeal] Transcript Filed on Appeal 1-17-17
02/22/2018	N/A	[Transcript Filed on Appeal] Transcript Filed on Appeal 2-27-17
02/22/2018	N/A	[Transcript Filed on Appeal] Transcript Filed on Appeal 3-17-17
02/22/2018	N/A	[Transcript Filed on Appeal] Transcript Filed on Appeal 4-14-17
02/22/2018	N/A	[Transcript Filed on Appeal] Transcript Filed on Appeal 4-25-17
02/22/2018	N/A	[Transcript Filed on Appeal] Transcript Filed on Appeal 4-26-17
02/22/2018	N/A	[Transcript Filed on Appeal] Transcript Filed on Appeal 4-27-17
02/22/2018	N/A	[Transcript Filed on Appeal] Transcript Filed on Appeal 6-30-17
02/22/2018	N/A	[Transcript Filed on Appeal] Transcript Filed on Appeal 11-21-16
02/22/2018	N/A	[Filing Other] Index of Record – Exhibits

02/22/2018	N/A	[Notice] Electronic Record Certified to Court of Appeals 17CA1465
02/22/2018	N/A	[Certificate] Electronic Record Mailed to Court of Appeals 17CA1465. 2 Exhibit Envelopes
05/03/2018	Non-Party	[Filing Other] Receipt for Trial Court Record from COA 17CA1465; 2 Exhibit Envelopes
06/14/2018	Billy Raymond Counterman	<p>[Motion (<i>Related Document</i>)] Motion for Bond Pending Appeal</p> <hr/> <p>[Exhibit – Attach to Pleading/Doc] Attachment A</p> <hr/> <p>[Exhibit – Attach to Pleading/Doc] Attachment B</p> <hr/> <p>[Exhibit – Attach to Pleading/Doc] Attachment C</p>
06/22/2018	N/A	[Order (<i>Related Document</i>)] Order: Motion for Bond Pending Appeal

08/27/2018	N/A	[Case Closed – Post Judgment] N/A
04/11/2022	Non-Party	[Filing Other] Order of Court from SC 21SC650. It is Ordered that Petition for Writ of Certiorari is Denied, 17CA1465
04/15/2022	Non-Party	[Mandate from Appeals Court] Mandate with Opinion from COA 17CA1465. Court Orders – Judgment Affirmed
09/27/2022	N/A	[Mandatory Protection Order Vacated] N/A
09/27/2022	N/A	[Mandatory Protection Order Granted] N/A

COLORADO COURT OF APPEALS

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

BILLY RAYMOND COUNTERMAN

Defendant-Appellant.

Court of Appeals No. 17CA1465

RELEVANT DOCKET ENTRIES

Date Filed	Filing Party	Docket Text [Doc.] Doc. Title
08/16/2017	Billy Raymond Counterman	[Notice of Appeal] Notice of Appeal
08/18/2017	N/A	[Notice of Filing Notice of Appeal] ADVISEMENT OF FILING NOTICE OF APPEAL
03/22/2018	N/A	[Notice of Filing Record] NOTICE OF FILING OF RECORD ON APPEAL AND BRIEFING SCHEDULE
02/25/2019	Billy Raymond Counterman	[Opening Brief] Opening Brief

03/15/2019	Billy Raymond Counterman	[Amended Opening Brief] Amended Opening Brief
03/26/2020	The People of the State of Colorado	[Answer Brief] Answer Brief
04/10/2020	The People of the State of Colorado	[Supplemental Authorities/Cites] Supplemental Authorities/Cites
06/04/2020	Billy Raymond Counterman	[Reply Brief] Reply Brief
06/18/2020	Billy Raymond Counterman	[Motion or Request] Motion or Request – Oral Argument
01/13/2021	N/A	[Notice] NOTICE OF ORAL ARGUMENT
01/13/2021	N/A	[Attachments to Pleading] Attachments to Pleading
03/14/2021	The People of the State of Colorado	[Supplemental Authorities/Cites] Supplemental Authorities/Cites
07/22/2021	N/A	[Opinion] Opinion
07/22/2021	N/A	[Opinion Issues – Mandate Pending] N/A
09/02/2021	N/A	[Cert Awaiting Action] N/A
10/14/2021	N/A	[Cert Awaiting Action] N/A

10/28/2021	N/A	[Cert Awaiting Action] N/A
04/15/2022	N/A	[Mandate] MANDATE
04/15/2022	N/A	[Mandate Issued] N/A
04/15/2022	N/A	[Record] N/A

COLORADO SUPREME COURT

BILLY RAYMOND COUNTERMAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

Supreme Court Case No: 2021SC650

RELEVANT DOCKET ENTRIES

Date Filed	Filing Party	Docket Text [Doc.] Doc. Title
09/03/2021	Colorado Supreme Court	[Order] ORDER OF COURT
10/14/2021	Billy Raymond Counterman	[Petition for Writ of Certiorari] Petition for Writ of Certiorari [COA Opinion/Order] COA/Opinion/Order
10/28/2021	The People of the State of Colorado	[Opposition to Petition] Brief in Opposition

11/04/2021	Billy Raymond Counterman	[Reply in Support of Petition] Reply to Brief in Opposition
12/28/2021	N/A	[Petition for Writ of Certiorari] N/A
04/11/2022	N/A	[Closed] N/A
04/11/2022	Colorado Supreme Court	[Order] ORDER OF THE COURT

District Court, Arapahoe County, Colorado 7325 S Potomac St Centennial, CO 80112	DATE FILED: September 22, 2016 3:05 PM
THE PEOPLE OF THE STATE OF COLORADO vs. BILLY RAYMOND COUNTERMAN, Defendant	<input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
George H. Brauchler Eighteenth Judicial District District Attorney, # 25910 District Attorney's Office 6450 S Revere Parkway Centennial, CO 80111 Phone Number: 720-874-8500 Fax: 720-874-8501	Case No: Div: Courtroom:
COMPLAINT AND INFORMATION	

CHARGES: 3

**COUNT 1: STALKING, C.R.S. 18-3-602(1)(b)
 (F5)(03092)**

**COUNT 2: STALKING, C.R.S. 18-3-602(1)(c)
 (F5)(03093)**

**COUNT 3: HARASSMENT, C.R.S. 18-9-111(1)(e)
 (M3)(27104)**

Warrant Requested

Bond Requested: \$NO BOND HOLD

Bond set at: \$ _____

Judge: _____

Signature

Date

George H. Brauchler, District Attorney for the Eighteenth Judicial District, of the State of Colorado, in the name and by the authority of the People of the State of Colorado, informs the court of the following offenses committed, or triable, in the County of Arapahoe:

COUNT 1-STALKING (F5)

Between and including April 1, 2014 and April 30, 2016, Billy Raymond Counterman unlawfully, feloniously, and knowingly, directly or indirectly through another person, made a credible threat to [C.W.] and, in connection with the threat, repeatedly made any form of communication with the victim and someone with whom that person has or has had a continuing relationship, namely: Kimberly O'Hara; in violation of section 18-3-602(1)(b), C.R.S.

COUNT 2-STALKING (F5)

Between and including April 1, 2014 and April 30, 2016, Billy Raymond Counterman unlawfully, feloniously, and knowingly, directly or indirectly through another person, repeatedly followed, approached, contacted, placed under surveillance, or made any form of communication with, [C.W.] and someone with whom [C.W.] has or has had a continuing relationship, namely: Kimberly O'Hara, in a manner that would cause a reasonable person to suffer serious emotional distress, and caused [C.W.] serious emotional distress; in violation of section 18-3-602(1)(c), C.R.S.

COUNT 3-HARASSMENT (M3)

Between and including April 1, 2014 and April 30, 2016, Billy Raymond Counterman, with intent to harass, annoy, or alarm [C.W.], unlawfully directly or indirectly initiated communication with a person or directed language toward another person, anonymously or otherwise by telephone, telephone network, data network, text message, instant message, computer, computer network, computer system, or other interactive electronic medium in a manner intended to harass or threaten bodily injury or property damage; in violation of section 18-9-111(1)(e), C.R.S.

All offenses against the peace and dignity of the people of the State of Colorado.

George H. Brauchler
District Attorney, #: 25910

By: /s/ Danielle Jaramillo Date: 9/22/2016
Danielle Jaramillo #: 43542
Deputy District Attorney

ENDORSED WITNESS LIST

<i>[C.W.]</i>	<i>Kimberly O'Hara</i>
Protected Address	Protected Address
John F Incampo	Carl Tolman
Arapahoe County	Cbi Denver-Investigations
District Atty Office	Cbi Denver-Investigations
6450 S Revere Parkway	710 Kipling Street, Suite 200
Centennial, CO 80111	Denver, CO 80215
Michael Thrapp	Eric Denke
Aurora Police Department	Denver Police Department
15001 E Alameda Parkway	1331 Cherokee Street
Aurora, CO 80012	Denver, CO 80204
Kit Griffin	Christopher Forrest
U S Bureau Of Prisons	Littleton Alternative
U S Bureau Of Prisons-	Dispute Resolution Inc.
Littleton	1901 West Littleton Boulevard
Pending	Littleton, CO 80120
, CO	
Katy Miller	
Littleton Alternative	
Dispute Resolution Inc	
1901 West Littleton Boulevard	
Littleton, CO 80120	

DEFENDANT INFORMATION

DOB: []/[]/1961

Race: W Gender: M

Height: 510 Weight: 215 Hair: BRO Eye: BRO

Birthplace: NY Tattoo:

Address: 3450 Monroe Street
Denver, CO 80205

Home Phone #: 720-435-2620 Work Phone #: -

AKA: Bray Counterman

CASE INFORMATION

Arresting Agency:

Arresting ORI: Other Number:

Offense Agency: Arapahoe County District Atty Office

Offense ORI: CO003015A

Arrest #: Agency Case #: 18416I090840

Date of Arrest: BAC: _____

CCIC#: NCIC #: 648669EB8 SID#: 2589823

DISTRICT COURT,
ARAPAHOE COUNTY, COLORADO

Court Address: Arapahoe District Court
7325 South Potomac Street
Centennial, Colorado 80112

HEARING RE MOTION TO REMOVE GPS
January 17, 2017

PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

COURT USE ONLY

BILLY RAYMOND COUNTERMAN,

Defendant.

CASE NO. 16CR2633

COURT REPORTER'S
TRANSCRIPT OF PROCEEDINGS

WHEREUPON, the hearing in this matter commenced January 17, 2017, in Division 408, before the **Honorable Judge F. Stephen Collins**, District Court Judge in the County of Arapahoe, State of Colorado.

APPEARANCES

For the People: Danielle Jaramillo, Esq.
Registration No. 43542

For the Defendant: Elsa Archambault, Esq.
Registration No. 44065

[2] **PROCEEDINGS**

THE COURT: Call People versus Counter-
man, 16CR2633.

MS. JARAMILLO: Danielle Jaramillo for the
People.

MS. ARCHAMBAULT: Elsa Archambault
for Mr. Counterman, who appears today out of custody.

THE COURT: We are here today for defen-
dant's motion to modify bond to remove the GPS re-
quirement. Are the parties prepared to proceed?

MS. JARAMILLO: Yes, Judge.

MS. ARCHAMBAULT: Yes.

THE COURT: I have reviewed the motion
and the complaint and affidavit. Let me hear from de-
fense.

MS. ARCHAMBAULT: Your Honor, I con-
tacted Mandy Koss last week on the 12th, Thursday – I
think that was when we got this official date – to see if
she was available to come. She had other scheduled in-
takes at this point, but she did let me know that I was
okay to represent to the Court that since – and I know I
put this in my motion, but that was dated a month ago.

Still, since the time that Mr. Counterman has been
put on GPS, she has had no issues with him being com-
pliant with the GPS or otherwise on pretrial, [3] and that
she did not have an objection to removing GPS.

THE COURT: So she has no objection to removing it?

MS. ARCHAMBAULT: Correct.

THE COURT: That goes beyond what was in the motion.

MS. ARCHAMBAULT: Oh, I'm sorry.

THE COURT: Did you pass that along to the People?

MS. ARCHAMBAULT: I did not. I can forward that e-mail though.

THE COURT: Please do. I just want to make sure they have an opportunity to see it.

MS. ARCHAMBAULT: If the Court has read the affidavit about the allegations in this case, including the alleged threats that were made that are, I mean, obviously in my opinion, not actually credible threats. But just based on the nature of the communication that everything was over the Internet, that since the case was filed, there has been absolutely no issues, that Mr. Couterman was actually placed on GPS several months after the case was filed and has had no contact with [C.W.] either before or after GPS, we are now requesting that GPS be removed since he's been compliant with the Court's order and because it is so [4] incredibly costly.

THE COURT: All right. From the People?

MS. JARAMILLO: Your Honor, from the victim's position, she is asking the Court to keep on the

GPS and so are the People. The victim in this case has basically stated that this has been the first time in a long time, since he's been on GPS, that she's felt safe and secure knowing that there's no way Mr. Counterman can be attempting to contact her or follow her.

As the Court can see, this date of offense spans a long period of time where she was being allegedly harassed and stalked by Mr. Counterman. He does make some admissions to that to the officers, which I think is also something that the Court should consider. But we are asking the Court to keep on the GPS at least until the trial date based on community risk factors, as well as based on the victim being able to feel safe and secure now that she's having some at least knowledge that he cannot be following her or coming to her place of business.

I would also like the Court to know, and I'm not sure if the pretrial report was ever done for this case, a pretrial services report, from the beginning of the case, but the defendant does have a prior federal [5] conviction for very similar circumstances, which is telephone threats, which he was placed on probation for in the past.

So despite the fact that he has had some sort of supervision in the past and gotten treatment supposedly for this sort of behavior, he's still continuing to do it, which is why I believe GPS is appropriate and necessary right now, at least until we know that he is being supervised or getting treatment for the ongoing condition or whatever it is that's creating these circumstances where he is participating in this sort of behavior.

THE COURT: Anything further from defense?

MS. ARCHAMBAULT: Your Honor, in regard to [C.W.]’s, I guess her worries about her safety, the allegations are that this communication was going on for a couple of years at least. [C.W.] during that time never contacted the police and expressed her fears at that time. This was only actually brought to the police’s attention because [C.W.] went to an attorney originally to see what she could do about the issue.

And so now that it is suddenly a fear issue after almost a year of no contact is sort of confusing to me. There’s been a protection order where [6] [C.W.]’s address is confidential and so Mr. Counterman doesn’t know where she lives. He doesn’t know where she lives or her where her place of business is. And without more – even the stalking itself doesn’t allege any person-to-person contact.

Without more, the GPS really just isn’t addressing a community risk factor. I can tell the Court that the federal case involved communication that Mr. Counterman made while he was in California to people in New York. So when we’re talking about the actual risk of something more than just verbal communication happening, I don’t think that that previous case can be used to say anything in regard to risk factor.

If the Court wanted to order something to actually address some issues that Mr. Counterman has as far as mental health, I think that that would be a separate issue

and probably a lot more productive than GPS. But at this time, we are asking just that GPS be removed.

THE COURT: Is Mr. Counterman undergoing any sort of mental health treatment?

MS. ARCHAMBAULT: He's not at this time. And, frankly, the way that the statute is written, if we want to bring in potential mental health [7] information, it's sort of tricky in that regard, as far as my advice for him to go and see someone at this time. And I'm sort of sorting through that conundrum right now.

THE COURT: All right. Well, I can certainly understand from the victim's point of view why the contacts that she maintains she received from defendant were disturbing and were interpreted as potentially threatening. I am not terribly concerned about the timing when she came to seek police, because it was an escalating sort of thing.

That being said, we already have in the mandatory protection order that he is to have no contact with her, not harass her, not deal with her at all. And I don't know that GPS adds any significant protection given that and given the fact that his history of contact with her was all electronic.

So what I'm going to do given that there have been no violations since GPS was imposed, and I think it was imposed back in November of 2016, is to order that GPS be removed as a condition of bond. But I want to be sure that Mr. Counterman doesn't misunderstand my intention in removing that condition.

I view these as very serious allegations. And what I'm trying to do is balance the alleged [8] victim's right to be free from harassment against placing prohibitively expensive conditions on you.

Now, I'm taking off the GPS, but all other provisions of the mandatory protection order remain in place. That is no contact. No anything with the alleged victim. And if I find that you disregard in any way the requirements of the mandatory protection order, I will then look at this and say, "Gee, I made a mistake by reducing these financial constraints on him," and you will be subject to much more severe conditions of bond. Do you understand that, sir?

THE DEFENDANT: Yes, I do.

THE COURT: All right. Anything else we need to address today from the People?

MS. JARAMILLO: No, thank you, Judge.

THE COURT: Anything else from defense?

MS. ARCHAMBAULT: No, thank you.

THE COURT: All right. Then we'll be in recess. Thank you all.

(The within proceedings were concluded.)

* * *

[9] [Reporter's Certificate Omitted]

District Court, Arapahoe County, Colorado Arapahoe District / County Court 7325 S Potomac St Centennial, CO 80112 (303) 649-6355	DATE FILED: January 27, 2017 10:44 PM
PEOPLE OF THE STATE OF COLORADO Plaintiff, v. BILLY COUNTERMAN, Defendant.	↑COURT USE ONLY↑
George H. Brauchler DISTRICT ATTORNEY BY: Laura Alyse Robilotta Deputy District Attorney Attorney Registration No.: 40087 District Attorney's Office 6450 S Revere Parkway Centennial, CO 80111 Telephone: (720) 874-8500 Fax: (720) 874-8501	Case Number: 2016CR 02633 Div./Ctrm: 408
MOTION IN <i>LIMINE</i> TO PRECLUDE ANY EVIDENCE, TESTIMONY, OR ARGUMENT RELATED TO DEFENDANT'S MENTAL HEALTH	

COMES NOW GEORGE H. BRAUCHLER, District Attorney for the Eighteenth Judicial District, State of Colorado, by and through his duly appointed Deputy, moves this Court for an Order precluding any evidence, testimony, or argument related to defendant's mental health. As grounds, the People state:

1. The Defendant is charged with two counts of stalking in violation of C.R.S. 18-3-602(1)(b) and (c) and one count of Harassment in violation 18-9-111(1)(e). The People anticipate testimony, evidence, or argument regarding defendant's mental health may be offered by the defense. Neither insanity nor impaired mental condition has been pleaded.
2. If the defendant seeks to present evidence, testimony, or argument related to his mental health the only proper purpose would be to raise insanity or impaired mental condition.
3. Both insanity and impaired mental condition must be pleaded at arraignment unless good cause has been shown. C.R.S. § 16-8-103(1.5)(a), *People v. Low*, 732 P.2d 622 (Colo. 1987).
4. "In no event shall a court permit a defendant to introduce evidence relevant to the issue of insanity, as described in section 16-8-101.5, unless the defendant enters a plea of not guilty by reason of insanity, pursuant to section 16-8-103." C.R.S. 16-8-107(3)(a).
5. If insanity or impaired mental condition are not pleaded, any evidence about the defendant's mental health would only serve an improper purpose, such as misleading the jury, confusing the issue, or eliciting sympathy and would therefore be inadmissible under CRE 401 and 403.

WHEREFORE, the People request that the Court enter an Order precluding any evidence, testimony, or argument related to defendant's mental health.

RESPECTFULLY SUBMITTED this 27th day of January, 2017.

GEORGE H. BRAUCHLER
District Attorney

By: /s/ Laura Robilotta Date: 1/27/2017
Laura Robilotta #: 40087
Deputy District Attorney

[Certificate Of Service Omitted]

District Court, Arapahoe County, Colorado Arapahoe District / County Court 7325 S Potomac St Centennial, CO 80112 (303) 649-6355	DATE FILED: January 27, 2017 10:42 PM
PEOPLE OF THE STATE OF COLORADO Plaintiff, v. BILLY COUNTERMAN, Defendant.	↑COURT USE ONLY↑
George H. Brauchler DISTRICT ATTORNEY BY: Laura Alyse Robilotta Deputy District Attorney Attorney Registration No.: 40087 District Attorney's Office 6450 S Revere Parkway Centennial, CO 80111 Telephone: (720) 874-8500 Fax: (720) 874-8501	Case Number: 2016CR 02633 Div./Ctrm: 408
MOTION IN <i>LIMINE</i> TO PRECLUDE TESTIMONY, EVIDENCE, OR ARGUMENT REGARDING "KNOWINGLY" APPLYING TO "IN A MANNER THAT WOULD CAUSE A REASONABLE PERSON TO SUFFER SERIOUS EMOTIONAL DISTRESS"	

COMES NOW GEORGE H. BRAUCHLER, District Attorney for the Eighteenth Judicial District, State of Colorado, by and through his duly appointed Deputy, moves

this Court for an Order precluding testimony, evidence, or argument regarding “knowingly” applying to “in a manner that would cause a reasonable person to suffer serious emotional distress.” As grounds, the People state:

1. The Defendant is charged with two counts of Stalking in violation of C.R.S. 18-3-602(1)(b) and (c) and one count of Harassment in violation of C.R.S. 18-9-111(1)(e).
2. The “knowingly” element for Stalking in violation of C.R.S. 18-3-602(1)(c) applies only to “repeatedly followed, approached, contacted, placed under surveillance, or made any form of communication with another person, either directly, or indirectly through a third person” and not to “in a manner that would cause a reasonable person to suffer serious emotional distress.” C.R.S. 18-3-602(1)(c), *People v. Cross*, 127 P.3d 71, 77–78 (Colo. 2006).
3. The jury instruction for this charge does not have knowingly as a stand-alone numbered element but rather includes it with “repeatedly followed, approached, contacted, placed under surveillance, or made any form of communication with another person, either directly, or indirectly through a third person.” COLJI-CRIM. 3-6:03 (2015).
4. “Adding ‘knowingly’ to modify ‘in a manner that would cause a reasonable person to suffer serious emotional distress’ would lead to the absurd result that a defendant who is so out-of-touch with the objective reality of his behavior would escape criminal liability for his or her conduct. This the

legislature surely did not intend.” *People v. Cross*, 127 P.3d at 78.

5. The Supreme Court and legislature were very clear on their intent. Any testimony, evidence, or argument that the defendant did not know that his actions were “in a manner that would cause a reasonable person to suffer serious emotional distress” would not only be irrelevant, but would also mislead the jury. CRE 401, 403.

WHEREFORE, the People request that the Court enter an Order precluding testimony, evidence, or argument regarding “knowingly” applying to “in a manner that would cause a reasonable person to suffer serious emotional distress.”

RESPECTFULLY SUBMITTED this 27th day of January, 2017.

GEORGE H. BRAUCHLER
District Attorney

By: /s/ Laura Robilotta Date: 1/27/2017
Laura Robilotta #: 40087
Deputy District Attorney

[Certificate Of Service Omitted]

District Court, Arapahoe County, Colorado 7325 S. Potomac St., Centennial, CO 80112	DATE FILED: January 30, 2017 4:39 PM
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. Billy Counterman, Defendant	○COURT USE ONLY○
Douglas K. Wilson, Colorado State Public Defender Elsa Archambault, #44065 Deputy State Public Defender Arapahoe County Public Defenders 12350 E. Arapahoe Rd., Suite A Centennial, CO 80112 Phone (303) 799-9001 Fax (303) 792-0822 elsa.archambault@coloradodefenders.us	Case No. 16CR2633 Division: 408
RESPONSE TO THE PROSECUTION'S MOTION IN LIMINE TO PRECLUDE ANY EVIDENCE, TESTIMONY, OR ARGUMENT RELATED TO DEFENDANT'S MENTAL HEALTH	

1. Mr. Counterman is not running an insanity defense.
2. Impaired mental condition does not exist as a defense for offenses alleged to have been committed after July 1, 1995. §16-8-103.5(8), C.R.S..
3. The statement in the prosecution's paragraph 2 is simply untrue and the prosecution does not cite any law that supports that assertion.

4. Although not mentioned in Ms. Robilotta's motion, the defense is aware of the pleading requirements demanded by §16-8-107(3)(b), C.R.S., and Mr. Counterman does not plan to call any expert witnesses.
5. Defense disagrees that, at this time, the Court is able issue a blanket ruling that evidence, testimony or argument related to Mr. Counterman's mental health is irrelevant or inadmissible pursuant to CRE 403.

DOUGLAS K. WILSON
COLORADO STATE PUBLIC DEFENDER
Respectfully submitted,

/s/ Elsa Archambault
Elsa Archambault, #44065
Deputy State Public Defender

Dated: January 30, 2017

[Certificate Of Service Omitted]

DISTRICT COURT,
ARAPAHOE COUNTY, COLORADO

Court Address: Arapahoe District Court
7325 South Potomac Street
Centennial, Colorado 80112

MOTIONS HEARING

February 27, 2017

PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

vs.

COURT USE ONLY

BILLY RAYMOND COUNTERMAN,

Defendant.

CASE NO. 16CR2633

COURT REPORTER'S
TRANSCRIPT OF PROCEEDINGS

WHEREUPON, the hearing in this matter commenced February 27, 2017, in Division 408, before the **Honorable Judge F. Stephen Collins**, District Court Judge in the County of Arapahoe, State of Colorado.

APPEARANCES

For the People: Danielle Jaramillo, Esq.
Registration No. 43542

For the Defendant: Elsa Archambault, Esq.
Registration No. 44065

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[3] PROCEEDINGS

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

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

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

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

MS. ROBILOTTA: We are, Your Honor.

MS. ARCHAMBAULT: Yes.

THE COURT: All right. The motions that I have are defense motion for 404(b) evidence, along with the People's notice and defense's response. Next we have defense motion in limine to exclude the fact that

defendant was on probation for making threatening Internet phone calls at the time of this offense.

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

From the People, I have motion in limine to preclude testimony, evidence or argument regarding [4] knowingly applying to the elements of, quote, in a manner that would cause a reasonable person to suffer serious emotional distress, closed quote.

I've got the motion in limine to preclude any evidence, testimony or argument relating to defendant's mental health. And I've got motion in limine, which is basically their notice of the 404(b) evidence.

Are there any other defense motions?

MS. ARCHAMBAULT: No.

THE COURT: Are there any other motions from the People?

MS. JARAMILLO: Your Honor, we have actually decided – me and Ms. Robilotta discussed this morning, we've decided to dismiss Count 1. So at this point, we'll move to dismiss Count 1 and I'll follow up with a written motion.

THE COURT: Any objection from defense?

MS. ARCHAMBAULT: No objection.

THE COURT: All right. Count 1 will be dismissed.

MS. JARAMILLO: Furthermore, Your Honor, upon discussing and looking at some case law, the People have decided that we are going to withdraw a portion of our 404(b). Namely we'll withdraw the [5] portion of the 404(b) which talks about bringing in the defendant's prior conviction. So we are not going to elicit that in our case.

Obviously, if defense goes into that with the victim, then it's going to come up as is it will. But the People will not be eliciting information about the defendant's prior conviction.

THE COURT: Are you going to elicit information about the acts underlying the prior conviction?

MS. JARAMILLO: No, Your Honor. In fact, the only thing we were asking to elicit was just the victim's knowledge that the defendant was on probation. But now we will not elicit that from the victim.

THE COURT: So that basically means you're not pursuing any 404(b); is that correct?

MS. JARAMILLO: Your Honor, we had a portion of the 404(b)/res gestae motion talking about the contacts that the victim had with the defendant in 2010 in order to establish identity. He does send her some Facebook messages back in 2010 which she does not remember until the police end up talking to her about it. The defendant does make admissions to law

enforcement about talking to the victim back in 2010. So we are still asking to elicit those statements.

[6] THE COURT: And you're maintaining that would be res gestae to explain what?

MS. JARAMILLO: Your Honor, basically the identity. The "knowingly" contact. The fact that he was knowingly making contact and that it was, in fact, him that was doing it in this case, based off his admissions that he did that back in 2010. And we do have a copy of those.

THE COURT: All right. From defense?

MS. ARCHAMBAULT: Your Honor, I addressed this issue in the written response, but the messages that the prosecution is referencing are from three years prior to the charged date range at issue in this case.

So when we're talking about res gestae, of course one of the factors to consider is the temporal relation to the instant charges. It being three years prior, [C.W.], the named victim, not even remembering that they had occurred, and essentially having Mr. Counterman admit to present messages, I don't think that they're necessary to show identity. And their probative value would be low in that regard.

THE COURT: I think that they do go to show identity, that he was doing it before and he's doing it later. I think that they also are relevant to the fact [7] that he's acting knowingly in terms of contacting her. This isn't just a random person that was selected.

I think there is some passage of time, but I don't think it's such a sufficient passage of time that it wouldn't qualify as *res gestae* in a sense to explain those points. But even if it was outside the period of time in *res gestae*, which, again, as I said, I don't think it necessarily is, I think it's linked sufficiently for these purposes.

I think it would fall within 404(b). Although he's not charged with doing anything wrong in those particular contacts, so it's not really a prior bad act. It's a prior act. And I think it would be relevant to a material fact; that it's logically related to the material fact; that the logical relevance is unrelated to any inference that would be prohibited.

In other words, convicting him just by thinking he's a bad guy. And I don't find that the probative value is substantially outweighed by the risk of unfair prejudice.

So it would be – it's going to be admitted on either of those two alternative theories. Now, there will be no evidence presented by the People regarding his November 28, 2011, conviction for making [8] threatening interstate telephone calls or the substance of that. And I take it you're not even going to talk to the victim and, say, have her explain, "This is why I did certain things, because I learned of that"; is that correct?

MS. JARAMILLO: Yes, Your Honor. We're not going to have her talk about that. Exactly. We're going to keep that away. Obviously if defense counsel cross examines on that, she can talk about it. But I'm going to let her know basically that she's not allowed to elicit

anything about the fact that she knew he was on probation or what he was on probation for.

And if she feels like someone is asking her a question and she feels the need to have to talk about that, to let me know or to say “I don’t know that I can answer that question,” so we can approach and talk to the clerk about that before we elicit that.

THE COURT: So give her an appropriate instruction about what to talk about on direct examination. Now, if that comes up and the door is opened on cross examination, what I’d ask is that you ask to approach and let’s confirm that I agree that the door’s been opened before we go down that path.

MS. JARAMILLO: Yes, Judge.

THE COURT: That seems to address the 404(b) [9] motion. With respect to the motion in limine from defense excluding that he was on probation, I’m taking it that the People are confessing that and don’t intend to address that either?

MS. JARAMILLO: Yes, Your Honor. For the same reasons as withdrawing 404(b).

THE COURT: That’s fine.

MS. ARCHAMBAULT: Just to be abundantly cautious, it won’t be elicited from the named victim or anybody else?

MS. JARAMILLO: Oh, yes. Yes.

MS. ARCHAMBAULT: Just checking.

THE COURT: Do we need evidence on the motion to suppress?

MS. ROBILOTTA: Yes, Your Honor.

THE COURT: All right. Let's proceed with that, so we don't keep witnesses waiting.

MS. ROBILOTTA: The People are going to call Agent Carl Tolman.

Your Honor, other than this case, I've never appeared in your courtroom before. Do you have a preference? Do you want me at the lectern?

THE COURT: Yes, please.

MS. ROBILOTTA: And I do have an audio CD that I will be admitting. It's lengthy, but I'm only [10] going to play the first minute or two for the Court, during the Miranda advisement.

THE COURT: In the future, please provide me with any CDs that you're going to be using prior to the motions hearing so that I can listen to them ahead of time.

MS. ROBILOTTA: Yes, Your Honor.

THE COURT: But we can just go through a couple minutes of that.

CARL TOLMAN,

being first duly sworn in the above cause, was examined and testified as follows:

THE COURT: Please be seated.

DIRECT EXAMINATION

BY MS. ROBILOTTA:

Q Good afternoon. Could you please state your name and spell your last name.

A Carl Tolman, T-o-l-m-a-n.

Q How are you employed?

A I'm an agent with the Colorado Bureau of Investigation.

Q And how long have you been an agent with the Colorado Bureau of Investigation?

A About nine years.

Q And were you working in your capacity [11] as an agent on May 20 of 2016?

A Yes, ma'am. I'm with the Rocky Mountain Safe Streets Task Force. I was working there at that time.

Q And what specifically – what actions did you take with regard to an arrest regarding Billy Counterman on April 20, 2016?

A I completed an investigation, including collecting evidence and speaking to the victim and the witnesses. And I did an arrest warrant and we went to a federal halfway house where Mr. Counterman was living with a Denver detective and knocked on the door, informed Mr. Counterman that he was under arrest, what he was under arrest for. And we transported him to the

Denver police station where we read him Miranda warnings and interviewed him.

Q Okay. I'm going to back it up just a little bit. Do you remember the specific address of where you went to arrest Mr. Counterman on this arrest warrant?

A No, ma'am, I don't know. I don't remember the address.

Q Would it refresh your recollection to take a look at the report that you created in this [12] case?

A Yes, ma'am, it would.

Q Agent Tolman, was it 3450 Monroe Street in Denver?

A Yes, ma'am, it was.

Q Was the defendant, in fact, placed under arrest?

A Yes, he was.

Q And you indicated that he was transported to the Denver police department; is that correct?

A That is correct.

Q And prior to advising him of his Miranda warnings that you testified to, when you were at the house placing him under arrest, were any threats or promises made to him at that point?

A No, ma'am, there was not.

Q And that's including express or implied?

A That's correct.

Q And when you testified that you told him that he was under arrest, what did you advise him that he was under arrest for?

A Harassment.

Q And how was this interaction with him [13] at his home? If you can describe it sort of time-wise and tone.

A It was probably about ten minutes. It was very cordial. He was very respectful. Very cooperative.

Q Once you got to the police department, how did you advise him of the Miranda warnings?

A It was in an interview room. This was recorded. And I read it from a standard Denver Miranda warnings page.

MS. ROBILOTTA: Your Honor, if I may approach the witness? I'm showing defense counsel what has been marked as People's Exhibit 2 and has been previously provided in discovery.

THE COURT: You may.

Q (By Ms. Robilotta) Agent Tolman, do you recognize what has been marked as proposed People's Exhibit 2?

A Yes, that is a copy of the Miranda warning advisement page.

Q And how do you know it relates to this case?

A It has Mr. Counterman's signature on it, it has the date, and it will have the case number on it somewhere. It looks like the top [14] part of this copy is cut off.

Q Is this a fair and accurate representation of the written Miranda advisement and waiver that you went over with the defendant on May 20 of 2016?

A Yes, ma'am, it is.

MS. ROBILOTTA: Your Honor, at this point, the People would move to admit Exhibit 2 into evidence.

MS. ARCHAMBAULT: No objection.

THE COURT: Exhibit 2 will be admitted.

(People's Exhibit 2 was admitted into evidence.)

Q (By Ms. Robilotta) You had mentioned there was some audio recording capability. Before the recording actually started, did you have a discussion with the defendant about what was going to happen?

A As far as recording did we tell him it was going to be recorded?

Q Yes. That's one of my questions. Did you tell him it was going to be recorded?

A I believe we told him it was going to be recorded. I'm not positive about that.

Q Did you go over that you were going to be advising him of Miranda and asking him [15] questions?

A I don't believe we did. I think we just told him we were going to give him an opportunity to tell his side of it and explained to him what was going on. I think we talked to him very briefly really, because he was transported by a Denver police officer. I wasn't there. So it was just what happened in the holding cell before we interviewed him.

Q Okay. Was the interview with him digitally recorded?

A No. Just audio.

Q And the audio, did that include you going over the Miranda advisement with him?

A Yes.

MS. ROBILOTTA: Your Honor, if I may approach with People's Exhibit 1, which has been provided to defense counsel in discovery, which I'm showing her.

THE COURT: That's fine.

Q (By Ms. Robilotta) Agent Tolman, do you recognize People's proposed Exhibit 1?

A Yes, ma'am. That's a copy of the disk that – of the recording of the interview.

Q And is this a fair and accurate [16] representation of the audio recording of the interview that you had with him on May 20?

A Yes, ma'am.

MS. ROBILOTTA: Your Honor, at this point the People would move to admit proposed Exhibit 1 into evidence.

MS. ARCHAMBAULT: No objection.

THE COURT: Exhibit 1 will be admitted.

(People's Exhibit 1 was admitted into evidence.)

MS. ROBILOTTA: And if I may play the first minute or two of the Miranda advisement.

THE COURT: You may.

(Exhibit 1 published, in part.)

MS. ROBILOTTA: Your Honor, if I may approach so I can give the Court Exhibits 1 and 2?

THE COURT: You may.

Q (By Ms. Robilotta) Agent Tolman, approximately how long did you have the opportunity to speak to Mr. Counterman for?

A Probably about 45 minutes.

Q And on People's Exhibit 1 that I just played for the Court, you could hear your tone of voice in that recording. During your 45 minutes that you had your conversation with him, was the [17] tone similar?

A Yes, I'd say it was similar throughout.

Q And how would you categorize that tone?

A Cordial. Friendly.

Q During the 45 minutes that you had opportunity to speak with him about these allegations, did you make any threats to him either express or implied?

A No, ma'am, I did not.

Q Did you make any promises to him either express or implied?

A No, ma'am, I did not.

Q Did you do anything to overbear his will during this time period?

A No, ma'am, I did not.

Q Did you, in fact, ask him questions about the nature of the charge in the arrest warrant?

A Yes, ma'am, I did.

Q Can you tell the Court generally the subject of the questions that were asked.

A Yes. I asked him about – specifically about sending Facebook messages to a woman called [C.W.] He had been sending her messages for a number of years over Facebook. And the [18] messages were gradually getting more frequent and starting to really harass [C.W.], to the point where – she's a local senior, and she felt threatened and scared – that she canceled some of her shows that she was planning to have locally.

She hired a lawyer and had them take a look at this, and that's when they contacted the FBI.

THE COURT: Is this everything that he was telling the defendant? It's unclear to me.

MS. ROBILOTTA: Sure.

A Those are generally the questions that I was asking him. The type of questions that we were asking.

THE COURT: For example, you asked him if she had hired a lawyer?

THE WITNESS: Got your point. Good point, sir.

Q (By Ms. Robilotta) Agent Tolman, did you ask him about his usage of Facebook?

A Yes. He admitted to using Facebook. He used it on his cell phone.

Q Did you ask him who he communicated with on Facebook?

A Yes. He did admit to contacting [C. [19] W.]

Q Is that a name that you provided him or is that a name that he provided to you?

A He eventually brought that name up. I asked him some specific questions, and then he asked if this was about [C.W.]

Q Did you ask him about when he had communicated or sent messages to her?

A I'm sorry. Say that again.

Q Did you ask him about when he had sent Facebook messages to her?

A Yes, he showed me on his phone. He had messages going back to, I believe it was about 2010, 2011 is when they first started.

Q Did you ask him about Facebook messages during the time period of 2014 through 2016?

A Yes, I did. He showed me some of the Facebook messages he had sent to [C.W.] during that time frame.

Q Are those similar messages that [C.W.] had also showed you that she had received on her Facebook account from Bill or Billy Countermand?

A Yes, ma'am, it appeared to be the same exact messages.

[20] Q Did you have an opportunity to ask him if he had more than one Facebook account?

A Yes, I did.

Q Why did you ask that?

THE COURT: I guess I'm not understanding how this goes to the motion to suppress. I understand it challenged first the validity of the Miranda waiver and then it made a general challenge to the voluntariness of the statements.

I'm not understanding how the substance of what he said –

MS. ROBILOTTA: Your Honor, one of the challenges is that due to the defendant's mental health condition, the Miranda was not knowing, intelligent and voluntary. I'm hoping to show the Court that the waiver was knowing, intelligent and voluntary.

When mental health is raised as challenging the validity of the waiver, one of the things the Court is to look at is whether the answers the defendant was giving were in response to the questions being asked. Whether he was aware of his surroundings and the nature of the charges.

THE COURT: Why don't you ask him more along those lines, as opposed to just having him tell me, "He said this. He said that." That doesn't help me with [21] all that.

MS. ROBILOTTA: Yes, Your Honor.

Q (By Ms. Robilotta) Agent Tolman, when you were asking him questions, was he able to respond with answers that indicated to you that he knew what you were asking him?

A Yes, ma'am. I'm sure he understood what I was asking.

Q Was he able to provide you with answers that led you to believe he was able to make decisions?

A Yes, ma'am.

Q Was he able to provide you with answers that led you to believe that he was aware of his surroundings?

A Yes.

Q What about the nature of what he was charged with?

A Yes, I believe he understood that.

Q Okay. And, Agent Tolman, as part of your investigation in this case, have you had an opportunity to familiarize yourself, in general, with the defendant's criminal history?

A Yes, ma'am, I did.

Q And I'm not looking for specific dates [22] or charges, but, in general, has he had no, one or multiple contacts with law enforcement during his lifetime?

A Multiple contacts.

MS. ROBILOTTA: If I may have a moment, Your Honor?

THE COURT: You may.

MS. ROBILOTTA: Your Honor, at this point the People have no further questions.

THE COURT: Any cross examination?

CROSS EXAMINATION

BY MS. ARCHAMBAULT:

Q Good afternoon.

A Good afternoon.

Q Now, Agent Tolman, when you contacted Mr. Counterman back in May of last year, he was on parole, or I guess what's called probation federally?

A Yes, ma'am.

Q And you had communicated with his parole officer?

A Yes, ma'am, I did.

Q And his parole officer directed him to be at his house at a certain time?

A That's correct.

[23] Q And you knew that, which is why you showed up at the house at that certain time?

A That's correct.

Q Now, when you went to the home, were you in uniform or were you dressed as you are today?

A I was dressed more or less as I am today. We had a uniformed Denver – actually, I took two uniformed Denver police officers with us at the time.

Q So when you say “with us,” that's Detective Denke –

A Denke (pronouncing).

Q – Denke that you're referring to?

A Yes.

Q What was he wearing?

A About the same as me.

Q So a suit jacket?

A Probably not a suit jacket, but some kind of a jacket and then slacks.

Q Did you have something that identified yourself as a police officer or a law enforcement officer?

A Yes. We had our credential and badges and I showed mine to him.

[24] Q To Mr. Counterman?

A Yes.

Q And what about Detective Denke?

A Yes, he showed the same.

Q And did you and Detective Denke show up in the same car or different cars?

A We showed up in the same car.

Q Were those obviously law enforcement cars or was it –

A No, these were both unmarked cars. There were two marked police cars with us that the two Denver cops showed up in.

Q So there were two additional Denver police officers?

A Yes, ma'am.

Q And they were in normal police uniform that you would think of?

A Yes.

Q Including, obviously, badges and guns and things like that?

A Yes, ma'am.

Q And they were in marked patrol cars?

A Yes, ma'am.

Q Was it Mr. Counterman that answered the door?

[25] A Yes, it was.

Q And so from his perspective, he would have been able to see those police cars?

A I believe so, yes.

Q Now, did all four of you go inside the home?

A Yes, ma'am, we did.

Q And it sounded like you had a ten-minute or so conversation with Mr. Counterman in the house?

A In the house, that's about right.

Q Where was everybody situated during that ten minutes?

A The house had a large family room or dining – the entryway room was like a common room, and we were all in there.

Q Was anyone seated or was everyone standing?

A Everyone was standing.

Q And where was Mr. Counterman in relation to the doorway out of the home?

A We were fairly close to the door. I was standing between him and the door.

Q Did he invite you in or what did that look like?

[26] A He invited us in.

Q Now, at what point in that ten-minute conversation did you actually let him know that he was under arrest?

A Probably about three or four minutes into it.

Q So was he, at that time, handcuffed?

A Not yet. We handcuffed after I told him he was under arrest.

Q I'm sorry. So, yeah, three or four minutes in, you then handcuffed him?

A Yes, after I told him he was under arrest.

Q And then the conversation continued for several minutes after that?

A Yes.

Q And he was handcuffed behind his back or in front?

A Behind his back.

Q And at that point, it sounds like Mr. Counterman was escorted out of the home and, I assume, put in one of the patrol vehicles?

A That's correct.

Q And it was one of those officers that took him to the Denver jail?

[27] A Yes.

Q And you met him there?

A Yes.

Q During the ten-minute conversation in the house, was anything said about him being on parole?

A I don't believe so, no.

Q Do you know what was said to Mr. Counterman on the way to the police station?

A No, I don't know.

Q Do you know what statements, if any, Mr. Counterman said on his way to the police station?

A I don't know.

Q Do you remember who it was that transported him?

A No, I don't remember.

Q Now, at the Denver police department –

A Yes.

Q – who was in the room during that – this video or this audio recording that we just listened to?

A Eric Denke. He's a Denver detective. Police detective.

Q And yourself?

[28] A Yes.

Q No one else?

A No one else.

Q Obviously besides Mr. Counterman?

A Mr. Counterman.

Q Sorry. And what did the room look like that you guys were in?

A It's a holding cell. It had three chairs, a table, and no windows.

Q When you say holding cell, is this where –

A Yeah, this was actually in the holding cell area. It wasn't an actually holding cell. It was an interview room in the holding cell area.

Q So three chairs. A table or anything like that?

A There's a table, three chairs in just a smaller room.

Q Did Mr. Counterman remain handcuffed during that conversation?

A No, he was not handcuffed.

Q Was the door left open or was it closed?

A It was closed.

Q Was Mr. Counterman ever advised that he [29] was free to leave at that point?

A No, he was under arrest. He was not free to leave.

Q What about free to leave the room?

A No, we told him – we read him the Miranda warnings, but other than that, no.

Q And you said it was a 45-minute conversation?

A Approximately.

Q Was there any substantive conversation before the recording started?

A No.

Q Did you ever have any concerns that Mr. Counterman was under the influence of drugs or alcohol?

A No, it didn't appear that he was. I suspect he was not. I believe as part of the federal probation, he had to take urinalysis tests.

Q Did he seem to be making a lot of sense to you in response to your questions?

A Yes, he made good sense. He answered my questions directly.

Q He answered the questions, but did the content of his responses make sense?

[30] A I'm sorry. What do you mean by that?

Q Well, for example, did he have the opportunity to show you to various web pages, for example?

A Yes, he did.

Q And he did that to demonstrate communication that was being made by [C.W.] to him?

A Right.

Q Was there anything in the websites that you saw that would indicate that that was actually happening?

A No, not that I could see.

Q And there were several different websites that you guys visited together?

A Yes.

Q He did seem to indicate, though, that [C.W.] was communicating to him?

A Yes. He told me that he believed that [C.W.] had been trying to communicate with him through these third-party websites.

Q What was his demeanor? I know we can hear his voice in the recording, but what was his physical demeanor during this conversation?

A He was friendly. Respectful.

[31] Q Did he make eye contact with you?

A Yes, he did.

Q Did he seem comfortable or on edge or how would you describe that?

A I would say he was comfortable.

Q At any point at the police department, did you mention his parole or probation to him?

A I don't remember.

Q Anything about how his cooperation could affect his parole, for example?

A I don't think so.

MS. ARCHAMBAULT: Can I have just one moment, Judge?

THE COURT: You may.

MS. ARCHAMBAULT: Nothing further, Your Honor.

THE COURT: Any redirect?

MS. ROBILOTTA: Yes, Your Honor.

REDIRECT EXAMINATION

BY MS. ROBILOTTA:

Q Agent Tolman, after you had – after the defendant was placed under arrest and – told he was being placed under arrest and actually handcuffed, had you

interrogated him or asked him any questions about the substance of this case [32] prior to Mirandizing him at the Denver police department?

A No, ma'am, I did not.

Q Were you the lead investigator on this case?

A Yes, ma'am, I was.

Q Did you ask anyone else to interview him or have any reason to believe that anyone else interviewed him or made any threats or promises to him?

A No, ma'am, I don't.

Q During your 45-minute interview with the defendant that's on the audio recording, did he ever ask for counsel or ask to stop the interrogation at any point?

A No, ma'am, he did not.

Q Other than his statements regarding the victim's attempts to contact him, were any of his other statements unusual at all?

A No, nothing unusual.

MS. ROBILOTTA: No further questions, Your Honor.

THE COURT: All right, sir, you may step down. Thank you for coming in.

From the People?

[33] MS. ROBILOTTA: Your Honor, we have no further witnesses.

THE COURT: Any evidence from defense?

MS. ARCHAMBAULT: No, thank you.

THE COURT: All right. Let me hear argument from defense on the motion to suppress.

MS. ARCHAMBAULT: Your Honor, I think it's clear that Mr. Counterman was obviously arrested and subjected to custodial interrogation. And the real issue is whether his waiver of Miranda was voluntary, intelligent and knowing, and whether his statements were voluntary.

First, there was no testimony about what may have been told to Mr. Counterman during the transport to the jail by the Denver police officer, so we don't have that information or how that may have been coercive to Mr. Counterman's willingness or understanding of his ability to make statements.

THE COURT: That assumes there was some sort of communication with him. I don't know that there was. I don't know that there wasn't. I just have nothing. So I can't really factor in nothing, can I?

MS. ARCHAMBAULT: Well, there was certainly a transport, and there has been no testimony to say that there was no coercive information. It's the [34] People's burden to show that there wasn't.

THE COURT: But the agent's testimony was he's not aware of any questioning that took place or anything.

MS. ARCHAMBAULT: Right. Because he didn't have any personal knowledge. So I do think it's the People's burden to show that there was no coercion. And having a gap in time during a transport is a problem.

Apart from that, Mr. Counterman was interrogated at the Denver police station in a holding cell with the door closed by two detectives. Mr. Counterman, some of his responses seem to not be in keeping with the reality of the situation, showing websites that didn't reflect what he thought that they were showing.

And so it's for those reasons that we are maintaining that his waiver of Miranda was not voluntary, intelligent and knowing, and also that his statements were not made voluntarily.

THE COURT: All right. Can you point me to any case where there's been this gap and there's been a reliance on the gap for a finding of involuntariness?

MS. ARCHAMBAULT: No, I can't point you to a case that says that. I would just base that argument [35] on the general burden of the People to show that there was no coercion.

THE COURT: All right. From the People?

MS. ROBILOTTA: Your Honor, with regard to the waiver being voluntary, the inquiry for the Court is whether the police conduct – whether the police did anything to overbear his will. There's been no evidence to anything like that. And to make an argument to the contrary would be purely speculative.

You know, any time a defendant is in custody and interviewed, there could certainly be the argument that some police officer in the jail at some point could have said something to him, but there's just no evidence here in the record of that.

It was a transport from his home in Denver to the Denver police department. Agent Tolman testified that he has no reason to believe that anybody interviewed him or said anything to him, any threats or promises.

With regard to the – what was said to the defendant prior to the Miranda advisement, Agent Tolman told him what he was arrested for. After he was arrested, prior to the Miranda advisement, he didn't ask him – he didn't interrogate him. There were no questions asked about the facts of the case. All of [36] that occurred after a waiver of Miranda.

With regard to the knowing and intelligent waiver with regard to his mental health, it's one of the facts that the Court can consider, but it's not the entire inquiry. It's the totality of the circumstances. And when mental competence or intoxication is reviewed by the Court, one of the subfactors the Court is to consider – and I am relying on *People v. Ferguson*, which is 227 P.3d 510, which is –

THE COURT: Colorado Supreme Court 2010.

MS. ROBILOTTA: Thank you, Your Honor. Whether the defendant seemed oriented to his or her surroundings and situation. Whether the defendant's answers were responsive and appeared to be the product of a rational thought process. Whether the defendant

was able to perceive the seriousness of his or her predicament, including the possibility of being incarcerated. Whether the defendant had the foresight to attempt to deceive the police to avoid prosecution. Whether the defendant expressed remorse for his or her actions. And whether the defendant expressly stated that he or she understood their rights.

The questions that I was asking Officer – or Agent Tolman were that the defendant’s responses, [37] they were – they did track the questions. He seemed to understand what was going on. He was told what he was charged with. There is nothing to indicate that his mental health prevented him from making a knowing and intelligent waiver of his rights under Miranda.

I am looking also at *People versus Kaiser*, which is 32 P3d 480, which is another Colorado Supreme Court case that is from 2001 where the Court states that, “Moreover, we have previously ruled that diminished mental capacity does not automatically make the defendant’s waiver unknowing and unintelligent.”

In that case, the Court states that even if some of the responses seem to be a bit strange, but everything else is not, that it’s not an unknowing or unintelligent waiver.

So based off the totality of the circumstances, I would ask the Court to find there has been a knowing, intelligent and voluntary waiver of the Miranda rights.

THE COURT: What about the challenge to the overall voluntariness of the statements?

MS. ROBILOTTA: Your Honor, I would also ask the Court to find that overall, they were voluntary. You heard the beginning of the recording, as well as Agent Tolman's testimony about the tone of his voice [38] throughout. That he did not make any threats. That he did not make any promises, either express or implied. It lasted about 45 minutes. It was about the substance of this. That he does not believe that he told the defendant that his parole would be affected based off his cooperation or lack thereof.

So I would also ask the Court to find that his statements were voluntary.

THE COURT: All right. Anything further from defense on the motion to suppress?

MS. ARCHAMBAULT: No, thank you.

THE COURT: All right. He clearly was in custody. We don't have an issue there. I think defense is correct when they say the initial thing I need to consider is whether the waiver of his Miranda rights is valid.

It's well settled, and I did, in preparation for this hearing, review *People versus Ferguson*, which has been cited previously, as well as *People versus Knedler, K-n-e-d-l-e-r*, 2014 CO 28. There's no question that defendants can waive their Miranda rights. The issue is in order for a waiver to be valid, the waiver must be voluntary, knowing and intelligent.

Now, the first prong, whether the waiver was [39] voluntary, requires that it be free of governmental coercion. And the focus really is looking at if there was some

coercive governmental conduct. That can be physical, psychological. Just something that played a significant role in inducing the defendant to make statements.

It essentially is, Did law enforcement do something that overcame the defendant's will and caused him to waive Miranda rights that he would not otherwise have waived.

Now, *Ferguson* notes that voluntariness is an objective inquiry, reviewing the record for outwardly coercive police action. Not a subjective analysis attempting to arbitrarily surmise whether the defendant perceived some form of coercive influence.

I think I do need to look at the totality of the circumstances, including this suggestion that defendant may not be totally in touch with reality in terms of what was going on regarding communications between him and [C.W.], or his view that she was trying to contact him through third-party websites where law enforcement looking at the websites could not see any indication of any such attempt to contact.

But it still needs to focus on whether there was coercive governmental activity. There's nothing I [40] see that suggests that his waiver of his Miranda rights was in any way the result of coercive law enforcement activity. He was in the interrogation room with Agent Tolman and with Detective – I just put it down as “Detective D” – Denke. And every indication is that the conversation was cordial in tone.

He described it as cordial. Friendly. That he seemed to be aware of his surroundings. He seemed to know what he was doing. No indication that he didn't – feel that he was being forced in any way to waive these rights. So I find that the waiver was voluntary.

However, I also have to consider whether the waiver was knowing and intelligent. And a waiver is found to be knowing and intelligent if made with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. And it is a totality of the circumstances analysis.

I've considered all of the factors discussed in the *Ferguson* case, including, again, this issue of what I should make out of defendant's reference to these third-party websites that he believed showed one thing, that law enforcement looked at and didn't feel that it suggested what he thought they were suggesting or saying he was suggesting.

[41] In this regard, I think that there's nothing, again, that suggests any confusion by defendant regarding the nature of his Miranda rights, the position he was in, whether he could waive or not waive any of that.

It seems every indication I have from the evidence is that he was aware of his circumstances, he was oriented in time, his questions or his answers were responsive.

Now, in some respects, he did make reference to these third-party websites that he felt showed something, but that law enforcement didn't agree with what

he thought they were showing. That to me, though, doesn't suggest that he didn't understand his Miranda rights in any way. It – or the circumstances that he was in. It shows to me that he fully understood the situation he was in, and that he was trying to refer to these sites to explain his conduct.

So I find that there's no issue or nothing that would support a finding that the knowing was not – or the waiver was not knowing and intelligent. I find that the waiver was valid.

That gets me to the overall voluntariness of the situation. And I've reviewed and considered all of the general voluntariness factors. We usually call [42] them the *Gennings* factors. Those include, as part of a totality of the circumstances analysis, whether the defendant was in custody or free to leave. Here, he clearly was in custody. Whether he was aware of his situation. The evidence supports that he was aware of his situation.

Whether Miranda warnings were given before interrogation. I find that's present here. Whether the defendant understood and waived his rights. I find that he did understand them and validly waived them. Whether the defendant had had the opportunity to confer with counsel or anyone else prior to the interrogation. He did not in this case.

Whether the defendant's statement was made during interrogation or volunteered. Here, he clearly was being questioned, so it's in response to interrogation. Whether any overt, implied threat or promise was directed toward the defendant. There's no evidence before

me suggesting any sort of express or implied threat or promise.

Now, defense has noted that I don't have any indication of what, if anything, was said to him during the course of him being transported from his home to the jail, but there's no indication, or nothing that I've been directed to regarding the questioning itself [43] that suggests any such coercive activity he was engaged in during transport.

The method and style employed in the interrogation is appropriate. Again, I think the agent referred to it as cordial and friendly throughout. The length and place of the interrogation is not unusual, 45 minutes is not unusual. And doing it in an interrogation room is certainly not unusual. There's nothing inherently coercive with that.

The defendant's mental and physical condition immediately prior to and during the interrogation. Again, I've looked at all the – I generally refer to them as the *Platt* factors, 81 P3d 1060, a Colorado 2004 case. And there's nothing about any of those factors that suggest that the defendant was confused, didn't understand the questions. His responses were responsive to the question. He was making an effort to show why he felt she was contacting him. So every indication is he fully understood what was going on throughout the interrogation.

I don't know anything about his educational background or his employment status. He has had law

enforcement contact and criminal justice issues in the past, but there's nothing that tells me anything about those.

[44] Ultimately what I have to look at on voluntariness is under the totality of the circumstances, did law enforcement engage in coercive conduct that overcame the defendant's will and basically cause him to make statements that he would not have otherwise made.

In this case, I find that that just simply isn't true. And I find that all of his statements are voluntary. So I'll deny the motion to suppress.

Now, we have someone here from probation on another matter. Are we ready on the Autrey matter?

PROBATION OFFICER: Sure.

THE COURT: I don't want to keep her waiting here. She's doing us a favor by coming over this afternoon. So I'm going to take a break on the Counterman case.

(A break was taken in the within proceedings in order for the Court to hear another matter.)

THE COURT: We'll recall People versus Counterman, 16CR2633. The record should reflect that counsel are present, as is Mr. Counterman. We have resolved the motion to suppress. We have resolved the defense motion in limine. We now have defense motion to dismiss Counts 1 and 2.

MS. ARCHAMBAULT: Your Honor, I realize when [45] the Court said that earlier, it should be 1 and

3. I did the right citation down below, but it's the charges that require a threat.

THE COURT: Okay. So 1 and 3. We'll correct the record in that regard. Now the People have dismissed Count 1.

MS. JARAMILLO: Yes, that's correct.

THE COURT: I'll ask you to follow up with a written motion to dismiss and nunc pro tunc the date to today so we have the paper in the file.

MS. JARAMILLO: I will do that.

THE COURT: So that leaves us with Count 3. Is Count 3 also stalking?

MS. ARCHAMBAULT: It's a harassment charge.

THE COURT: I had listed stalking, so I need help on the elements of harassment.

MS. ARCHAMBAULT: It requires an intent to harass, annoy or alarm the named victim, unlawfully, directly or indirectly. Do you want me to approach with the complaint? It's sort of long.

THE COURT: Well, I should be able to call it up on the system. Okay. We still have the stalking on Count 2; is that correct?

MS. ARCHAMBAULT: That's right.

MS. JARAMILLO: Yes.

[46] THE COURT: All right. So we have Count 3, harassment. So it requires contact in a manner intended to harass or threaten bodily injury or property damage.

Okay. All right. Let me hear anything further from defense. And I have gone through the responses and all the attachments that I was provided.

MS. ARCHAMBAULT: Nothing further. Well, I lied. One thing further. Your Honor, the only thing that I'm not real clear on, as far as the procedure goes, is that the Court has to review the record. And I don't know if that is supposed to be the trial record or the underlying facts of the case.

For this case, the evidence is sort of still. It's just these messages. That's not going to change. But that's one caveat that I wanted to raise to the Court, in candor, that I just wasn't aware of how the procedure goes for these First Amendment challenges.

THE COURT: That was a little unclear to me, as well, in the sense that I reviewed everything that I was given, but obviously I can only make a ruling based on what I've been shown to date.

I can see a situation where I'm provided information. I look at it and say, "No, that [47] information couldn't possibly result in a jury finding him guilty on this. It couldn't be viewed as a true threat or true harassment." And the People indicate, "Well, that's all there is." And then I think I could do it pretrial.

I can also see a situation where I say, “No, based on what I’ve seen, I think I can make a determination that this is sufficient,” not dismiss, but then at half time, when I’ve heard the evidence that actually is presented to the jury, revisit that question. Because it may come out differently at trial than it came out in terms of how the information presented when I just read it.

So it looks to me like what I need to do is make a determination now based on what I’ve seen, rule on the motion to dismiss, but recognize that we may very well end up revisiting this issue after the People have presented their evidence at trial if I don’t grant the motion to dismiss now.

Does that make sense to the People, in terms of the procedure?

MS. JARAMILLO: Yes, Your Honor.

THE COURT: And does that make sense to defense?

MS. ARCHAMBAULT: It does. I don’t have [48] anything other to suggest.

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

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

I would note that the elements of harassment say obviously, as the Court stated, that the intent to – or that

they do, in fact, harass or threaten bodily injury. And I think that that “or” is a distinction that needs to be made so it’s not only a credible threat that is protected, but it’s harassing speech that’s also protected or also prohibited by the harassment statute.

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

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

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

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

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

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

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

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

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

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

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

Now, in *People in the Interest of R.D.*, the [51] Court of Appeals found it was not a true threat. In that case, there were a number of Tweets involved. The Tweets did involve some violent and explicit threatening language, but they found this was mitigated, because the defendant did not know the victim personally and did not know even where Thomas Jefferson High School was located. And he didn't address the victim by name. It was all very general.

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

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

Now, in contrast, in *People versus Chase*, the Court of Appeals found that the language did constitute true threats. They focused on the forceful and violent language and imagery, and the fact that the defendant expressly referred to the named victims. E-mails were sent directly to them. The defendant knew where they lived and the victim subjectively felt threatened and took precautionary measures.

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

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

I think this reasonably could suggest that the defendant was watching the alleged victim, [C.W.] Even though she didn't own a white Jeep any more, she had previously owned a white Jeep and it's suggesting that defendant is specifically tying it in with her, as opposed to just a general statement.

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

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

I find that troublesome, because "this isn't healthy that I'm being talked to," that suggests to me that, "Wait

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

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

There's another reference at some point to, "How can I take your interest in me seriously if you [54] keep going back to my rejected existence?" This ties into to what I'll refer to as, for lack of a better word, almost delusional references in various statements that suggest that he's thinking things are taking place that aren't taking place.

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

It goes – another statement is, "Fuck off permanently," which shows anger and, again, what I would

view as a somewhat irrational escalation of statements, which I think to a reasonable person would be frightening.

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

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

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

The next day – I think that was on February 13. The next day, he apologizes and says he didn't ask for this life. I'm concerned with that, because it shows a shift that could suggest a loss of control. Then on, I think it was February 19, he starts up again. That's where you

have, “Staying in cyber life is going to kill you. Come out for coffee. You have my number.”

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

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

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

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

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

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

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

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

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

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

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

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

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

All right. Then we get to the People's motion in limine to preclude any evidence or argument pertaining

to defendant's mental health. People responsibility is that they'll comply with CRS 16-8-107(3)(d), which requires them to give notice if they intend to introduce expert testimony regarding defendant's mental health.

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

I had a case where someone tried to have someone testify that the defendant had been diagnosed with certain mental issues. I mean, that seems to me pretty clear it was hearsay and needed expert testimony on that.

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

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

Although we may need to see websites, but I don't view that as requiring expert testimony, because that's someone that they factually observed this and they're

not saying, “Oh, he’s delusional,” or, “Oh, he has a mental health issue” as an expert opinion. They’re just talking about what they observed and what [61] went through.

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

Any questions on that from the People?

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

The other issue is in her response, counsel indicates that it may be offered for other reasons. And I appreciate the Court asking to approach beforehand, but I guess what I’m concerned about is if we are going to go down this road where his mental health is brought up, then I want to have the opportunity to litigate it beforehand to see if there’s been some kind of waiver of his medical privilege under 13-90-107(1)(d) by inserting it as some kind of defense, whether pleaded or not.

[62] THE COURT: All right. I haven’t seen any waiver at this point, and I think she’s entitled to ask law enforcement, “What did you observe with him. Was

that a concern to you?” And I think the answer she’s going to get is, “No. We didn’t understand why he was doing this, but overall he seemed perfectly aware of what he was doing.”

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

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

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

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

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

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

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

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

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

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

THE COURT: That's fine.

MS. ARCHAMBAULT: Your Honor, for – I guess a supplemental motion in limine is that the prosecution has conceded that it's not relevant that [C.W.]

found out that Mr. Counterman was on probation. They are going to have to show that [C.W.]’s severe emotional distress is as a result of Mr. Counterman’s actions, not as a result of her finding out that he was on probation.

And so my request is to in limine out the statements that she made as a result of finding out that he was on probation, which it sounds like from her statements to police is different than what she did as a result of just the messages themselves.

THE COURT: Well, what she did as a result of the messages was go to an attorney. They’re not [65] going to talk about what she found out as a result of the attorney’s investigation. But they are going to testify that after going to an attorney, she then reported it to law enforcement.

MS. ARCHAMBAULT: But then subsequent to that is when she canceled her shows and I guess started drinking a lot. And it was those changes that she made as a result of finding out that he was on probation, not as a result of the messages themselves.

THE COURT: Well, I think they’re inextricably intertwined is the problem I have. Now, the People have said they’re not going to tell the jury about why she started doing that, but certainly it wasn’t the sole reason she was doing that. This is, as I said, sort of an escalation of her reaction based on certain things. And I think that the jury’s entitled to hear what she did.

Now, if you want to go into it on cross examination to tell them the fabled “Rest of the story,” I guess you’re

free to do that. But I view this as being part and parcel of a building reaction to him, and I'm not going to exclude that evidence. I'm not going to keep that from the jury.

MS. ARCHAMBAULT: My position is that it's not a reaction to him.

[66] THE COURT: I understand your position. I disagree with it.

MS. ARCHAMBAULT: And the other thing is that I intend to then, on cross examination, elicit the fact that there was a stop in the messages. There was no further contact and yet she continued this progression of her response.

THE COURT: I think that's fair.

MS. ARCHAMBAULT: I don't think that opens the door to them saying, "Well, this is what happened in the interim."

THE COURT: From the People?

MS. JARAMILLO: Your Honor, I guess we'd have to see kind of how it comes out. But I think if that's all defense counsel is going to do, then I would most likely tend to agree. I think it's going to be one of those things that we'll have to see as testimony comes out and exactly what [C.W.] is cross examined about by defense counsel. But before I go into that, I would ask the Court to approach.

THE COURT: It seems to me she is saying she wants to be able to cross examine that, "Wait a sec.

You went to your attorney. You didn't have any more messages." I can't remember. Were there any more messages that come in after she went to her attorney?

[67] MS. ARCHAMBAULT: No.

MS. JARAMILLO: No.

THE COURT: "So you didn't have any more messages. Then you went to police however many period of time later and then you say you started canceling shows and then you say you started doing all this." Do the People agree that that's – if that's what she goes through and shows this passage of time and you did this and you did this, that that doesn't open the door?

MS. JARAMILLO: Yes, Judge.

THE COURT: Okay. If the People take the position that doesn't open the door, I would agree. I'm frankly thinking that the jury may want to know why she did all that, but I'll accept the People's tactical decision that that does not open the door.

MS. ARCHAMBAULT: And the other thing –

THE COURT: And we should reflect that in the minute order, that that line of questioning –

THE CLERK: Okay.

MS. ARCHAMBAULT: The other thing that came up on testimony is I would ask for witnesses to be admonished not to characterize the nature of the messages as harassing, since that's ultimately the issue that

the jury's going to have to reach. And they'll see the actual text messages themselves.

[68] THE COURT: Right. I think the agent did a couple of times speak in conclusory language. And I don't know that it's appropriate for him to be drawing those conclusions unless there's a specific tie into it. For example, "Why did you do this?"

"Well, because" . . .

But I think you need to admonish witnesses not to be characterizing statements. He can say, "Here's what the statements said." He can talk about, "Here's what I observed in the way of her reaction." But the fact of whether he thought they were harassing or threatening is not relevant.

MS. JARAMILLO: Your Honor, I agree as far as any law enforcement. My concern would be if [C.W.] gets up and says, "I was getting these harassing Facebook notifications," because that's based on her feelings of being harassed. And that is something that obviously is relevant in order to show serious emotional distress and how they were making her feel. So I think that might be difficult –

THE COURT: I think you can admonish her not to characterize them that way. "What was happening?" "I was getting these messages."

"And how did that make you feel?"

And she can say, "I felt harassed. I felt [69] intimidated," or however she felt. My concern is more third

parties characterizing things. Does that address defendant's concerns?

MS. ARCHAMBAULT: Yes.

THE COURT: Anything else from defense?

MS. ARCHAMBAULT: No.

THE COURT: Anything else from the People?

MS. JARAMILLO: No, Your Honor. Thank you.

THE COURT: I appreciate Stephanie and Erik staying late. What's the next date on this matter? The pretrial.

MS. ARCHAMBAULT: March 17.

THE COURT: All right. So we'll see you all back here for the pretrial on March 17 at 3:30.

(The within proceedings were concluded.)

* * *

[Reporter's Certificate Omitted]

DISTRICT COURT,
ARAPAHOE COUNTY, COLORADO

Court Address: Arapahoe District Court
7325 South Potomac Street
Centennial, Colorado 80112

PRETRIAL CONFERENCE

April 14, 2017

PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

vs.

COURT USE ONLY

BILLY RAYMOND COUNTERMAN,

Defendant.

CASE NO. 16CR2633

COURT REPORTER'S
TRANSCRIPT OF PROCEEDINGS

WHEREUPON, the hearing in this matter commenced April 14, 2017, in Division 408, before the **Honorable Judge F. Stephen Collins**, District Court Judge in the County of Arapahoe, State of Colorado.

APPEARANCES

For the People: Danielle Jaramillo, Esq.
Registration No. 43542

For the Defendant: Elsa Archambault, Esq.
Registration No. 44065

* * *

[5] Any preliminary matters from the People?

MS. JARAMILLO: No, Your Honor. Defense did file a motion. I think the Court may have gotten that.

THE COURT: Yes, I have it.

MS. JARAMILLO: I've conferred with defense again, and I'm actually going to not object now to defense Paragraphs 3 and 4. It's the first two issues in the motion. So I'm okay with redacting those out of the exhibit. So the only one at issue would be the last one.

THE COURT: All right. So you'll be redacting the information set forth in the motion for ruling on proposed redactions for Paragraphs 3 and 4. That gets us to Paragraph 5.

MS. JARAMILLO: Yes, Judge.

THE COURT: So it's difficult for me, because I don't really know the context of this. Basically defense is objecting on the basis of relevance and 403. Let me hear from the People.

MS. JARAMILLO: Your Honor, the other times in the interview where the defendant is talking about his history with his family, I did not object to taking those out. I agree it's not relevant. On this one, [6] though, he's specifically talking about the fact that he believes that the victim – one of the reasons that she's recording or that she's been sending him messages is because she's in cahoots with his ex-wife that lives in New York.

So this is specifically talking about the messages in relation to the victim in this case and his belief that that's one of the reasons why she is sending messages to him. I think it's relevant. I think the jury's going to hear information that the defendant may have believed that this woman had been responding to him. And in order to show the jury that this was not a true belief, that this actually was not happening, that she was only receiving messages, which would go towards her reasonableness as far as severe emotional distress if she was not responding at all and still receiving messages.

So I believe it's relevant as to that specific intent to rebut that she was actually sending him messages. I think this shows that this defendant's beliefs are incorrect, the fact that he is going so far as to talk about his ex-wife being in cahoots with this victim, who's never met his ex-wife.

THE COURT: From defense?

MS. ARCHAMBAULT: Your Honor, one of the [7] motions the People filed was to point out the case law that says that really for a defendant in a stalking case, their mental state really isn't at issue. What they're believing. It's really the reasonable person standard of the person receiving the messages and that reaction.

The only mental standard necessary is the knowingly communicated. And so that's why I think this information is irrelevant. It suggests a disfavorable break in the marriage between him and his ex-wife that I think

is irrelevant to this. And for those reasons, it would be overly prejudicial.

THE COURT: Again, it's hard for me with just this isolated blurb here. But it seems like defendant's statements could be interpreted as saying, "No, I'm not the one communicating with the victim. It's my ex-wife or my mother-in-law who are communicating with the victim." Is that a fair reading in the context of the tape?

MS. ARCHAMBAULT: My interpretation of what's being said is that it's the belief that the ex-wife and mother-in-law are communicating with [C.W.] But there's no denial that he also is communicating with [C.W.] It's like that's the basis for her communication with him that there's no [8] evidence of.

THE COURT: I don't understand that last statement, "That's the basis for her communication with him that there's no evidence of."

MS. ARCHAMBAULT: So the interview makes clear that Mr. Counterman is under the belief that [C.W.] is communicating back with him through these other websites, but there's no actual physical evidence of that or evidence of that except for Mr. Counterman's statements that that is happening.

So I think this statement goes to his belief that the reason that [C.W.] is communicating with him is his ex-wife and mother-in-law are communicating with her.

MS. JARAMILLO: So the victim's in cahoots with ex-wife in order to send him these messages. Basically that is not really happening.

THE COURT: So what difference does that make? What's it probative of?

MS. JARAMILLO: Your Honor, the reason it's probative, the jury's going to hear – without this, the jury's going to hear that the defendant believes that the victim is sending him messages. I believe if the jury believes that if she's sending messages to him, that maybe the reasonableness of her severe [9] emotional distress is not reasonable if they're both communicating back and forth.

So in order to show that she's not communicating with him at all and she's only receiving these messages, I think it's important to show that some of the things he says are obviously not true. The fact that he believes she's friends with his ex-wife and that's why they're in cahoots to do this, in order for her to send messages to him, and that's why he's sending some back.

So I think it goes towards whether or not the jury believes that she's actually communicating back with him. And I think the statement he made specifically in Paragraph 5 makes it less likely that that's actually true that she's communicating back, because it is so far-fetched.

THE COURT: Anything further from defense?

MS. ARCHAMBAULT: No, thank you.

THE COURT: All right. I'm going to deny the requested redaction on Paragraph 5. I think the reasonableness of her reaction to being contacted by Mr. Couterman is one of the issues in the case. I think it is an issue that if she were communicating back with him, that would provide a reasonable juror an opportunity to say, "Well, she couldn't be that upset [10] if she's communicating back with him."

And I think the issue of whether she was actually communicating back with him either directly or indirectly is pertinent to that and potentially probative. So I'll deny it. I don't think there's any risk of unfair prejudice, and I think the probative value is not substantially outweighed by the risk of unfair prejudice.

I don't think they're going to read into this, "Oh, gee, let's talk about what happened with his marriage," which seems to be the concern the defense raised. So the requested redactions set forth in Paragraph 5 of the motion are denied.

Any other preliminary matters from the People?

MS. JARAMILLO: No, Your Honor.

THE COURT: From defense?

MS. ARCHAMBAULT: No, thank you.

THE COURT: All right. Then we will see you back here for trial on Tuesday the 25th at 8:30.

(The within proceedings were concluded.)

* * *

[11] [Reporter's Certificate Omitted]

DISTRICT COURT,
ARAPAHOE COUNTY, COLORADO

Court Address: Arapahoe District Court
7325 South Potomac Street
Centennial, Colorado 80112

JURY TRIAL

April 25, 2017

PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

vs.

COURT USE ONLY

BILLY RAYMOND COUNTERMAN,

Defendant.

CASE NO. 16CR2633

COURT REPORTER'S
TRANSCRIPT OF PROCEEDINGS

WHEREUPON, the hearing in this matter commenced April 25, 2017, in Division 408, before the **Honorable Judge F. Stephen Collins**, District Court Judge in the County of Arapahoe, State of Colorado.

APPEARANCES

For the People:

Danielle Jaramillo, Esq.
Registration No. 43542

For the Defendant:

Elsa Archambault, Esq.
Registration No. 44065

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[227] THE COURT: Ladies and gentlemen, we'll now move to that portion of the trial that we refer to as opening statements. So do the People wish to present an opening?

MS. ROBILOTTA: Yes, Your Honor. Thank you.

[C.W.] was terrified. She was terrified because for two years, the defendant stalked her. A man she did not know. A man she had never met. A stranger to her. A man who she didn't even know what he looked like, which increased the emotional distress she suffered, because she didn't even know who to be looking out for.

[228] For two years, the defendant sent [C.W.] Facebook message after Facebook message, day after day, week after week, month after month, season after season, year after year for two years. And she never once responded to him.

[C.W.] was not terrified the first time she got a message from the defendant. It was weird in the beginning. The messages got creepy. The messages got scary. And the messages didn't stop.

[C.W.] had blocked the defendant from sending her Facebook messages. Blocked his profile. But that didn't deter him. He sent her a new Facebook profile and sent her more messages, so she blocked that profile. This didn't stop him. He created a new Facebook profile and sent her more messages and she blocked him again. And this went on and on. Him creating profile after profile. Her blocking him and blocking him. But the messages didn't stop.

He sent about a thousand messages to her in the span of two years without her ever once responding. He e-mailed the website of the band that she sings in. He sent messages to one of her best friends, Kimberly O'Hara, asking about her.

You will hear from [C.W.] about the escalation that occurred over the years. The messages [229] got creepier. The messages got scarier. You will see some of the messages. He mentions seeing her at shows. She's a singer. He asks her about her mother when she had just seen her mother. He asks, "Was that you in the white Jeep?" And [C.W.] had a white Jeep. He tells her to die. He tells her, "Staying in cyberspace is going to get you killed."

[C.W.] kept hoping the messages would stop, but they didn't. And the emotional distress that she suffered, it increased as the number of messages went on,

the intensity of the messages increased and the amount of time that he messaged her increased.

Ladies and gentlemen, this case, it is not a who done it. It is the defendant that did it. You will hear that the messages that were sent were sent from profiles that had different variations of the name Billy Counterman. You will also hear from Agent Tolman, the detective that handled this investigation, that he spoke with the defendant about what was going on. The defendant admits to having more than one Facebook account and he admits to messaging [C.W.]

You're going to hear about the effect that this had on [C.W.] and the serious emotional distress she suffered as a result of the defendant's [230] conduct. You're not going to hear that she was hospitalized from a nervous breakdown. You're not going to hear that she was running down the street exclaiming to every stranger, "I'm suffering from emotional distress. I'm being stalked."

You will hear that it affected her musical career. She stopped singing for a long period of time. She put her singing career and her reputation in jeopardy. She canceled shows due to this fear. She stopped booking shows due to the defendant's conduct that caused her this fear. Because she canceled shows, she missed out on money. She missed out on opportunities to build her reputation as a singer.

When she did sing, she was nervous. She didn't make that connection with the crowd that she usually does, because she was looking, wondering if he was there. She hired a bodyguard for her show. You will hear

how it affected her work outside of music. She has an additional career, and you will hear that she had co-workers looking out to see if he came by. To see that no one was following her to her car.

She changed where she parked so that it would be visible. She missed work to deal with this. And you will hear the effect that it had on her personal life.

[231] While driving, she would check her rearview mirror to make sure she wasn't being followed. She covered her windows in her home to make sure no one was looking in. She would turn the lights on in both her bathroom and bedroom as a grown woman to sleep with the lights on due to the fear caused by this man.

She didn't want to go out alone. She got self-defense spray. She looked into getting a gun and got a permit to carry a weapon. She would drink to fall asleep. She started using marijuana to deal with her stress. She would shake and she would cry.

The evidence in this case in the form of testimony that you will hear from the witness stand, as well as the exhibits that get admitted in trial will show beyond a reasonable doubt that the defendant committed stalking when he knowingly contacted [C.W.] and had communication with Kim O'Hara, one of her good friends. And that contact and communication was in a manner that would cause a reasonable person to suffer serious emotional distress. And that, in fact, [C.W.] did suffer serious emotional distress as a result of that man's conduct.

It is that simple of a case. At the end, I will ask you to return a verdict that is supported by the evidence in this case. And that verdict is a [232] verdict of guilty that the defendant committed the act of stalking. Thank you very much.

THE COURT: Does defense wish to present an opening?

MS. ARCHAMBAULT: Yes, please.

The charge here is stalking. What Bill Counterman did was annoying, but it wasn't stalking. Over the course of several months, Mr. Counterman sent [C.W.] dozens of messages over Facebook. You will get these messages. Over the course of about eight months, there's maybe 125 messages. And you'll get them all.

And they are weird. Just some snippets here. Mr. Counterman says, "[C.W.], are you available later? I'd like to talk. Just home from work. Need to do some things. I'll be back on Facebook a little later. Better yet, no one can be sure who's on the other end of an e-mail. How about call me." And he gives his phone number.

This is back in September of 2015. He sends a flower. "Best color available in the garden." Asks if she would like some tomatoes. He has plenty. Sends weird memes. He asks her in October of 2015, "[C.W.], I'm going to the store. Would you like anything?" Another random meme.

[233] Now, mind you [C.W.] does not respond to anything. He sends a photo of an ankle tan and says, "Look

at this messed up tan line.” These are conversations without anybody on the other end.

You’ll notice that the profile changes from Billy Counterman to Bill Counterman. And he says, “Staying in cyber life is going to kill you. Come out for coffee. You have my number.”

“Not feeling it. Love. Listening to Super Tramp. What you doing?”

Throughout the course of these several months, there are messages that would probably cause somebody to hesitate. They get weird. They get weirder. At one point he says, this is in October of 2015, “Was that you in the white Jeep?” [C.W.] drove a white Jeep at one point in 2011 and so that concerned her.

“Knock knock. Five years on Facebook. I miss you. Only a couple physical sightings. You’ve been a picker upper for me more than I can count.” Froggy face, froggy face.

This is in October of 2015: “Friend, are you? You have my number. Say, I am not avoiding you. That was opped.”

“You are not being good for human relations. [234] Die. Don’t need you.” That’s in February of 2016.

“Fuck off permanently.” February 2016.

The last messages that [C.W.] gets are in April 2016, and these are them. On April 8, he says, “That is you. Nothing else.” On April 10, he says, “True blue. Not

glued. Beautiful you. Are you there? Straight. You have my address. I am all here.”

That’s it. That’s the totality of the communication. Facebook messages sent from one computer to another computer. [C.W.] doesn’t call the police during the course of this several months. Eventually on April 13, she e-mails her aunt, who’s also an attorney, copies of the messages and on April 15, together they call the police and report this.

[C.W.] didn’t know what Mr. Counterman’s voice sounded like. She didn’t get any phone calls from him. He didn’t leave her any voicemails. She wasn’t getting even phone calls from a blocked number with breathing on the other end.

After this case was filed, she got a photograph of Mr. Counterman. She had never seen him before. It wasn’t something like, “Oh,” and it jogged her memory. “This is that guy that’s been hanging out [235] at all my shows. This is the guy who’s somehow always at the grocery store when I am.”

She – it was a perfect stranger. He hadn’t gone to her work. He hadn’t gone to her home. For all she knew, he had never been to her shows.

The charge here requires that a reasonable person would suffer serious emotional distress. This was annoying. This was weird. It’s not stalking.

THE COURT: Thank you. Ladies and gentlemen, that completes opening statements. We’ll now move to that stage of the trial that involves the actual

presentation of evidence. Because the People have the burden of proof, the People are allowed to present their evidence first. So we'll begin with the People's witnesses.

MS. JARAMILLO: Thank you, Judge. The People call [C.W.], or [C.W.]

[C.W.],

being first duly sworn in the above cause, was examined and testified as follows:

THE COURT: Please be seated. Once you get settled in there, what I'm going to ask you to do is slide that microphone around. It should twist and bend as you need it. I know it's a little bit awkward, but we don't have the best acoustics here. I want to make [236] sure everyone can hear you.

That's fine. Thank you.

MS. JARAMILLO: If I may, Judge?

THE COURT: You may.

MS. JARAMILLO: Thank you.

DIRECT EXAMINATION

BY MS. JARAMILLO:

Q If I can get you to state your first and last name and spell both for the court reporter.

A My name is [N.], [spelled], last name [W.], [spelled]. But most people calls me [C.], [spelled].

Q I was just about to ask you that. What do you do for a living?

A I am a singer/songwriter, producer, musician, performer. And as a second career, I ran, for the best years, the marketing and sales department for a company that sells tiny houses.

Q Do you still do that, the tiny houses?

A No, I left that company in February.

Q February of 2017, this year?

A Yes.

Q During the time period between 2014 and 2016, were you running the marketing department at [237] that tiny houses?

A I started with them in March of 2015.

Q During the time period before you were running the tiny houses marketing, were you still a singer/songwriter?

A Yes.

Q How long have you done that for?

A Twelve years.

Q And during that time period between 2014 and March of 2015, besides doing singing and songwriting, did you have another job?

A No.

Q Tell the jury a little bit about what kind of music you play, where you play, those sort of things.

A I play pop music. I play acoustic guitar and piano primarily. Also some other instruments badly, like accordion. And I play pop music with a folk feel. I lived in Nashville for a while, so I've got some country to it as well. I tour nationally, but primarily I live here in Colorado, so I play here in Colorado more frequently than any of the other states.

Q Do you play by yourself or in a band?

A I play by myself a lot. I would say 50 [238] to 60 percent of my shows are as a duo. So my best friend is also my percussionist. She plays with me. And occasionally I play with a band, which is a four piece ensemble.

Q When you play in a duo, you say you play with one of your friends. Tell the jury what your friend's name is.

A My friend's name is Kim O'Hara.

Q When you play by yourself, do you have a band name or do you go by [C.W.]?

A No, I just go by my name, [C.W.]

Q What about when you play in a duo?

A Every now and then, they call it the [C.W.] Duo, which makes Kim really excited. But really it's just [C.W.]

Q Okay. And then I think you said you play also with a quartet; is that right?

A Yes.

Q What do you go by when you do that?

A Same. Just my name.

Q When you play in a quartet, is Kim also part of that?

A Yes, she place bass typically in the quartet. Percussion if we're a duo.

Q What kind of venues do you typically [239] perform at? Are they smaller bars? Are they bigger concert venues?

A When I started performing, it was mostly coffee shops. I've been doing it for so long, I've gotten into much larger venues. I would say on average it's about 150 people in the crowd. Indoor/outdoor bars, festivals, lots of different types of performance venues.

Q Between the years of 2014 and 2016, were you getting paid for these shows?

A Yes.

Q How much would you typically get paid per show?

A It depends. Some of the shows, they calculate what they pay you by how many people show up. In other words, they take a cover at the door and you get paid a percentage of the cover. Some of the shows are a flat fee.

So the flat fees for my solo shows are between 700 and 1,000 dollars. For group shows, they're – I mean, I'm averaging \$2500. So maybe \$5,000.

Q And when you play with either Kim or with the quartet, do they also get part of that money?

A Yes, employees.

[240] Q When you play these shows, how long does the show usually last?

A The shortest set is probably 45 minutes. The long ones, the grueling ones are about four hours.

Q Have you ever played at an extremely large concert venue where there's been more than the typical 150 people or 50 people?

A Yes. The largest show that I played was the opening show for Joan Jett, 30,000 people. That's the largest. But not too infrequently I'll play for 2,500 or 3,000 people.

Q During the time period between 2014 and we'll just go with even now, does part of your income rely on you booking and playing these shows?

A Yeah, usually.

Q And how significant is that income to your being able to afford just normal living wages?

A It's significant.

Q Okay. I want to talk to you now specifically about why you're here. So I want to turn back to 2014.

At some point did you start receiving Facebook messages from someone who went [241] by the name of Billy Counterman?

A Yes.

Q Do you remember when the exact time was that you started receiving these messages?

A It's hard to remember the exact day, but I would say about three or four years ago.

Q When you first started receiving the messages, did you think anything of them?

A They were not typical.

Q What do you mean by that? What do you mean by "not typical"?

A Many messages in a specific day. Dozens and dozens in a particular day. Not particular to music. Kind of conversational, although I was never responding. I think just the frequency and the semi intimacy of them. I mean, it's not how people typically communicate with me over social media.

Q When he first started communicating with you, do you remember if he started communicating with you to your public page, your [C.W.], the band, page or whether he was communicating to your personal Facebook page?

A I know the very, very first message was in regards to a festival that he claimed he was [242] organizing. And I can't remember if that came to my personal

page or my professional page. I just remember that the content was professional. But I think after that, most of them came to my personal page.

Q So I want to back up and kind of talk about that. Did you have both a professional as well as a personal page?

A Yes, I always have.

Q Now, I want to talk to you a little bit about the differences there are between the upkeep of a personal and professional page. Can you explain to the jury kind of the main difference that you realize between those two sort of pages and why you have both.

A Yeah. I mean, when you're starting out as a performer it's a good idea to get as much publicity as possible. It's how you make your money and how you make your contacts. So I had a personal Facebook page and I had a professional Facebook page that was intended to be dedicated just to my career.

So my personal Facebook page had lots of my personal friends on it, but it also had many, many people on it who are not my personal [243] friends, because that's how I distributed information about my tours and my schedule, as well as my professional badge.

The difference on the back end of those is anyone could message or what you call "like" a professional page. You don't have as much – you don't have as many controls over who becomes a follower of your professional page. It's out there and it's a public resource. Personal pages are intended to be more for – I think more

for your private relationships. Although I never utilized mine that way, because I was trying to build a career.

Q When you first started on Facebook, did you just have a personal page or did you have both a professional and a personal page?

A I don't know. I'm pretty sure that you have to have a personal page to make a professional page. I'm almost positive that that's the policy, but I'm not quite sure.

Q In your personal page and your experience with it, when somebody wants to follow you or to follow things that you're doing, to look at your page, what do they have to do in order to do that? Does that question make sense or was [244] that confusing?

A I'm a little confused.

Q If someone wants to follow your personal page, if they want to get updates of your shows in that case, those sort of things, how do they become able to have you send notifications or –

A To my personal page?

Q To your personal page.

A Send a friend request, which needs to be approved by me or somebody else who's managing the page.

Q Okay.

A And then you can sign up to get notifications to when I post or you can check it regularly on your own time.

Q So personal page, they have to send you a request and you have to accept; is that right?

A That's correct.

Q So your professional page, is that the same way?

A No.

Q Okay. Explain to the jury how your professional page works if somebody wants to follow you or get updates.

[245] A Professional page, as I said, is an open resource to anybody that wants to follow. You just look up the professional page, you do what's called liking. There's a button on the page and then you're signed up. And it doesn't require any approval from me and you get updates about content that's posted there.

Q When somebody likes your public page, do you get notifications that they've liked it?

A Yes. There is a notification on the public page where you can keep up with people who've liked the page. Although I don't frequently check that, because especially when I was really popular, there were so many at once.

Q Would you get multiples in a week?

A You know, I'm not sure. Likely it – again, I don't keep up with that, because it's not the purpose of the page. It's really meant to be a free resource where anyone can get updates about what I'm doing and where the music is.

Q On your professional page, did you know most of the people that were liking that page?

A No.

Q Was it even – would it even have been helpful to you to look and see, Oh, who's this [246] name on your professional page? Would you have recognized most of those names?

A I don't believe that I would have.

Q Do you know about how many followers of people that liked you on your professional page that you had back in 2016?

A How many followers?

Q Yes.

A About 3,500, I think.

Q Okay. So let's talk now about your personal page. You said somebody would have to send you the request and you would have to accept it back in 2014. So before you ever heard from this person named Billy Counterman, did you routinely accept anybody who friend requested you?

A Yes.

Q And why would you do that?

A It was in an effort to grow a career that I was anticipating supporting myself with. So spread awareness about my music, my tours, my album sales. Anything that was going on with my professional career.

Q If you were just accepting everybody at that point, why did you have two pages? Why the difference between a public and a private page?

[247] A It was just an attempt to spread more awareness. I think two pages gets more landscape than one.

Q Would you post the exact same thing on both pages all the time?

A No.

Q What was the difference in how you would post on those?

A Sometimes on my personal page, I would – on my professional page, I would tend to stick specifically to music. On my personal page, I would sometimes try to have a little more personality. So I didn't post that many things about my private life, but certainly a few more on my personal page than I would have on my musician's page.

Q It sounds like this is kind of the way that you would allow people to get to know you on a personal level?

A I would think that's correct.

Q I want to talk about another difference between your personal and your professional page. On your personal page, when somebody wanted to get in touch with you and they wanted to message you, is there the capability to do that on your [248] personal page?

A Yes.

Q Is there also the capability for someone to not only privately message you, but also put something public on your personal page?

A Yes. Around this time, there was a Facebook Friends that had the capability to approve comments before they posted. So around this time, I checked that box so that means you would not go directly to my page without my approval. But that's not the way that it is with private messaging. If you're a friend on Facebook, the message comes through.

Q So it's my understanding that based on that, if somebody wants to privately message you, all they have to do is message you and you will get it?

A That's my understanding also.

Q As long as they're your friend?

A Yes.

Q Are people who are not your friends -if somebody is not your friend on your personal page, are they able to privately message you?

A I don't think so. Although I vaguely recall now if you message somebody on Facebook, it [249] goes to a

non friend area. But at the time, I do not believe that they had that capability if they were not a friend.

Q Now, let's talk about your public page. On your public page, would people be able to privately message you?

A Yes.

Q On your public page, could anybody privately message you or did they have to like your page or follow your page before they messaged you?

A Anybody can message you on a public page.

Q On your public page, could people post things for others to see?

A Yes.

Q Was it similar to your personal page in that you would have to accept those first?

A No, it's an open forum.

Q Is there any way for you to remove something that somebody posts on a public page?

A Yes. As an admin of the page, once it's been posted, you can take it down. You can flag it. You can also report it.

Q I want to turn back to these messages [250] that you were receiving from this person, Billy Counterman. How were you receiving those messages? Was it posting so that everybody else could see on this public forum or was it privately messaging you?

A Private message.

Q This first time that he began to message you, I know you said that they were kind of strange. That they seemed intimate. Tell the jury what you mean by “they seemed intimate.”

A Very every-day life. “I’m going to the store. Would you like anything?” Using pet names. A conversation about what was going on. His day to day. References to my every day. Although I’m not sure how anyone – it was just lots of details.

Nothing – I mean, a typical message -I think that a normal one would just be, you know, asking a question or something related to business, and these are were not anything like that. And they were also multiple messages throughout the day as if we had been going back and forth conversationally, although we weren’t.

Q Now, being someone who’s more public, I mean, you’re more public than just a regular [251] person, you do shows, people are going to see you, strangers are going to see you and potentially remember your name, were you receiving messages like these ones a lot?

A No.

Q Were these different than other messages that you would normally see, even being a public figure?

A Yes, that’s why it was so alarming.

Q Do you remember at what point you thought, “This is enough. I don’t want to hear from this guy”?

A I remember when the messages started to get a little more aggressive. So now it wasn't just invasively intimate, it was more aggressive, and blame oriented, like I was doing something wrong. That's when I thought, "This has gone too far."

Q Why not just block him on Facebook?

A I did.

Q Do you remember when the first time was you decided "I'm going to block it"?

A I wish I could remember specifically. I don't.

Q Do you remember how long this went on [252] before you blocked him the first time? Months? Weeks? Days?

A I would say a couple years probably before the messages started to get to a point where I thought that they were aggressive.

Q Did you save all these messages?

A No. Unfortunately. I saved quite a few, but there was so many and they were – they were distressing. I think living in – living in constant fear of that is something that I would not have been able to function doing. So I just ended up deleting them without reading them at some point along those years.

Q Did you delete them multiple times or was it just like you deleted once?

A There were so many messages in one string, if you don't open the string on Facebook and you delete it, they're all gone. So it's impossible for me to stay how many messages were in the ones that I deleted, but I can only assume that they were very similar to the ones that I got before I got those.

Q Do you recall approximately how many messages you received over this two- or three-year period from this person who called himself Billy [253] Counter-man?

A Hundreds.

Q Do you think it was a thousand?

A I don't know.

Q Do you remember telling the police officer when you first reported this that you think it was thousands of messages?

A I can see that I would have said that. It's many multiples of hundreds of messages.

Q During this time period, did you ever respond to any of these messages?

A I was reminded in the very beginning of this process, that yes, I did respond to the very first message about a performance. After that, no.

Q Okay. I want to talk a little bit about that one. After that initial time when you did respond, did you respond to any of his messages?

A Not to my knowledge, no.

Q Were there times when he would ask you questions?

A Yeah. As I said, “Do you want to go on a date? What do you want from the store? How are you feeling today? Do you want any bedtime [254] stories?” All kinds of questions, yes.

Q Why didn’t you respond?

A Because I felt like engaging in any way was making the situation worse. Would have made the situation worse.

Q Were there time periods during this two- to three-year time period when he would stop messaging you for a little while?

A Yes.

Q Okay.

A A few weeks at a time, and then another several days of lots of messages. And then, yeah, there would be a time period between where there would be no messages, so then you definitely don’t want to engage, because you’re hoping it stopped for good. And then it’s not. So it made it very difficult to figure out.

Q On these days when he would message you, how many messages would you receive in a day?

A Dozens.

Q Now, were these messages that were -were they all sent at the same time? Was it 12:43 to 1:02, he sends a whole bunch of messages?

A Usually not. Usually it would start early in the day and continue throughout several [255] days (sic) until the end and the next day and the next day.

Q Were they constant or were they hours apart or do you remember?

A I think the majority were spread out throughout the day. And I would typically get them after – you know, after – I wouldn't get them on the spot.

Q Why wouldn't you just tell him to stop?

A Again, I just – I wanted the contact to stop, and I felt like the best way to achieve that was everything that I did up until – up until now, without actually directing asking him to stop.

I felt like engaging in any way would just make this person more aggressive and cause more dangerous messaging towards me. And so in my opinion, not engaging at all was the way to get it to stop.

And then there would be periods in between where there would be no messages which, of course, makes me think it's working. He's not going to message me any more. So it was hard to decide if direct contact would even be – would even do anything.

[256] The messages were so garbled, you don't really think someone that's sending a message like that is going to respond well to an intelligent message from you.

So the best thing that I thought to do to protect myself was to not engage.

Q At some point, did you stop deleting the messages?

A Yes.

Q Okay. And why did you do that?

A Because I opened up a string – there’s a window on Facebook when you get a long string of messages that you can read the first one. The first one that I saw was alarming to me, so then I opened the rest and I was like, “The tone of these messages has definitely escalated.” And I started to get worried. Concerned for myself. So I kept them in case I ever needed them.

Q Did you report those messages right away?

A No.

Q At some point did you finally decide, “Enough is enough. I need help. I can’t do this alone. It’s not working”?

A Yes. I decided enough is enough and maybe I should ask someone if I need help.

[257] Q Okay. We’ll talk a little bit about that in a second, but I want to talk specifically about what the tone of these messages were. Did any of these messages ever directly threaten you?

A Some of them said that, yeah, like staying in cyber life would kill me. Some said die. But – is that a direct threat?

Q I want to talk to you about some of the messages that you did end up saving.

MS. JARAMILLO: And, Your Honor, permission to approach with People's Exhibit 1?

THE COURT: Granted.

Q (By Ms. Jaramillo) [C.W.], I want you to look through – flip through all the pages of People's Exhibit 1, and let me know when you're done doing that. I'm going to ask you some questions.

A Sorry it's taking me a second.

Q No, that's fine. Are these all of the Facebook messages that you saved between the dates of September 2015 and then – I believe it's 2015. Is that the first one?

A '14.

Q September 2014. Excuse me. And then between that and when you received, like, a [258] personal photograph in 2015?

A It looks like it.

Q Are these a fair and accurate representation of the messages that you were receiving between that time period?

A Yes, I'd say so.

Q Did you eventually present these messages and give them to law enforcement?

A I gave them to legal counsel and they turned them over to law enforcement, yes.

Q When you turned them over, did you turn them over in one format or multiple formats?

A In multiple formats, because the first meeting, I didn't – I just copied and pasted all of these messages from my computer which I had open in front of me. And then eventually I took screen shots from my phone, because there was a bunch of pictures on these messages that don't come up on a computer. So I had to send them in multiple batches.

Q So when you provided them over the computer, it sounds like you only sent the content of the wording, but not any photographs?

A Yes.

Q So the reason you provided the second [259] format was so that you could present the photographs?

A Yes, that's correct.

Q Does this appear to be a fair and accurate representation of the messages that you turned over and provided?

A Yeah.

MS. JARAMILLO: Your Honor, the People move to admit People's Exhibit 1.

MS. ARCHAMBAULT: May I voir dire?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MS. ARCHAMBAULT:

Q Hi, [C.W.] So is what you're looking at the actual screen shots that you yourself took?

A Some of these are screen shots and some of them are a copy and paste from the computer.

Q And for the ones that are the copy and paste, did you just not take a screen shot of that portion or do you know what happened there?

A It looks like they mixed together, the computer text capture in with the screen shots, to gather all the dates in chronological order.

Q And these are the screen shots that you [260] then sent to legal counsel?

A Yes.

MS. ARCHAMBAULT: I don't have any objection. Thank you.

THE COURT: All right. Exhibit 1 will be admitted.

(People's Exhibit 1 was admitted into evidence.)

MS. JARAMILLO: Your Honor, permission to publish Exhibit 1 on the screen?

THE COURT: Granted.

Q (By Ms. Jaramillo) [C.W.], I'm going to put these up on the screen for the jury, but you can follow along from there. If you can tell the jury a little bit about, if anything, on this first page was alarming to you or any thoughts or feelings you had when reading this first page?

A Well, I think it's difficult to tell. Just the first message, it's hard to tell if that's a personal sighting or a Facebook sighting. And especially that they continue to happen. "I'm available to talk to you. I'm home from work." We don't conversate, so even just the fact that there are these multiple messages leaving a phone number, it all makes me pretty uncomfortable.

[261] Q That's a good point to bring up. Did you know anybody by the name of Billy Counterman that you were aware of?

A No.

Q Did you know what this person looked like?

A No, I didn't.

Q Did that affect how these messages made you feel?

A Yeah. I think what may be hard to tell is that it's hard to know if they're seeing you in person, where they're seeing you, how often they're seeing you, or if this is just – if this is just contained to the Internet. It's almost impossible to tell.

Q Okay. On this first page, you said it's hard to tell whether or not they're seeing me in person. Was there something on this first page that kind of made you concerned that he saw you in person?

A I would say just the first message about being five stars.

Q What did that mean to you? What did you think that meant?

A That someone's seeing you and they [262] think you're attractive enough to write five stars.

Q It looks like he includes – there's a phone number on there. Did you ever call that phone number yourself?

A No.

Q Did you know that phone number?

A No, I didn't.

Q Did you put it in your phone to see if you knew anybody or knew who it was?

A No.

Q All right. So we're going to go to Page 2. It looks like that's just kind of the end of that – that last Facebook message from September 17, 2014; is that right?

A Yes.

Q Page 3. Page 3, this message that you received, it starts with, "A reasonable response." Anything in that

Facebook message affect you or stand out to you in any way?

A Well, I think it's kind of easy to see that these are becoming a little bit not like a direct conversation. They're starting to sound kind of rambling and crazy at this point. Especially with the, "I'm not able to tune into [263] ideals right now." I don't have any idea what that means. It doesn't even mean anything. But it does mean that somebody is trying to continue a conversation with me, which I clearly am not -which I am not engaging in.

And, "I think a reasonable response is respected." I mean, what is a reasonable response to this? I don't have any idea.

Q At this point, September of 2015, how long had he been attempting to contact you?

A A couple years. A year.

Q And during that time period, were the messages similar to what we're seeing here?

A Yes.

Q During that time period, did you save those messages?

A That probably was within the time period where I was - was not reading them entirely. So, no. I believe that everything I had saved was turned over.

Q On this there's a part that says, "Removing friend request. I won't be putting any block up. I expect

you will.” At this point had you already attempted to block this person by the name of Billy Counterman?

[264] A I don’t know. I would imagine yes. I didn’t track the dates that I blocked him. But I’m sure that by that point I had.

Q Do you know whether or not by this point he had contacted you – your personal page, your professional page or both?

A Again, it was such a long period of time that it’s really difficult to remember exactly what I did, but I would imagine both. It’s been a pretty consistent pattern.

Q Did he, in fact, message you on both?

A I believe so. You mean ultimately?

Q Ultimately, yes.

A Yes.

Q You talked about blocking him. How many times did you block him during this two- or three-year time period?

A At least four. I think it was between four and eight. Six. Something like that.

Q Every time, would he again start messaging you from the name Billy Counterman?

A Sometimes Bill and sometimes Billy Counterman. I don’t know if you guys understand that as soon as you block someone, all they have to do is create a new

account, send a friend [265] request or like your professional page and they're in communication with you again.

At this point I wasn't policing any of the friend requests that I was getting. I was just, as you've heard, trying to gather as much momentum as I could. And so anybody who friend-requested me would automatically be able to send messages.

Q Let's go to the next page. This page looks a little different than the other pages we looked at. The other pages up until this point, Pages 1 through 3, were those screen shots of your phone?

A The previous pages?

Q The previous pages.

A Yes.

Q And then this page, what is this?

A This is a copy and paste from my computer screen, which for some reason this happened the day that I reported all of this. And so they were trying to gather as much information from me on the spot as they could, and the fastest way to communicate was to grab a whole screen shot, paste into probably Word and print it out. And the copy and paste did not capture any of the [266] photos.

Q Is any portion of this message that you received from the name Billy Counterman, is this chronologically in order from Page No. 3 that we just saw the screen shot

to the next page, Page No. 5, as far as dates are concerned?

A Yes, it appears that they are.

Q Based on your knowledge of the messages that you received, do these messages appear to be in order? Page No. 3 coming, then this page and Page No. 5 of the screen shot?

A Yes.

Q So let's turn to this page, then, Page No. 4 that we were looking at. Is there anything on this page that stood out to you again or made you feel any certain way?

A Yeah. I think this message down here about someone that had a striking resemblance doing a double take. This is, as I recall, one of the messages that made me really fearful that he was following me.

Q Later on on October 2 at 8:22, it says something like, "Janice has nothing on you on stage." Do you know who he was talking about, Janices?

[267] A I don't know, because we never engaged in conversation. If I had to guess, I would think Janice Joplin.

Q It wasn't any sort of Janice that you routinely played with, though?

A No. But that message definitely also, I think – I think it's pretty safe to assume that maybe he was there. I mean, I don't know if he was there or not. It's hard to

know if somebody sees you on stage if they were actually at the show or not.

Q You keep saying “I think,” “I thought.” Did you actually think he may have seen you?

A I didn’t know. Which is part of the scariest part. I mean, not knowing is very similar to thinking yes.

Q Now, this next page, was there anything on this that particularly stood out to you or was this just more of his regular messaging?

A I think it’s just kind of indicative of, like, the general don’t make a lot of sense is the timbre of the messages. Also, it’s so weird if he’s asking if I’m awake and he’s wishing me a happy Sunday. We’re not friends. We don’t even know – I don’t even know this person. So, yeah. [268] Just that.

Q On this next page, there’s a couple different messages. Anything on this page that really stood out to you or caught your attention? Did you know what he was talking about?

A I don’t understand what he’s talking about. I think that the “Nothing is too big. . . .” I don’t know what that means. And the last message, I don’t even know if that’s – I mean, it doesn’t make any sense to me. I don’t even know if that’s English.

Q Did the fact that it wasn’t making sense to you, did that affect what you were thinking about who was sending these messages?

A Yes, it did. Because I think that the less somebody makes sense in messaging, the less they probably make sense in real life. And the feeling that somebody was messaging you in this way and possibly showing up in places where you are is not well. It's terrifying. So this is a good example of something that made me feel that way.

Q Going to the next page, did you know what he was saying there?

A No. The first two messages don't make [269] any sense. "If you're the wrong choice," that seems so intimate. I mean, I don't even know how to – how to tell you how terrifying that becomes to feel. And then "This is real," is just – it's just more of the same. I mean, it's getting -becoming more intimate and a little bit more demanding.

Q Why did that terrify you? He said, "If you're the wrong choice." Why did that even matter?

A Because I think it connotes that we're in a relationship, which has just never happened. Never will happen. I don't know this person. I never had any communication with this person. And the fact that it seems that he believes we're in a relationship is – it means he's not well. And it's scary.

Q So it sounds like you took that message as you're a choice for a relationship basically. A choice for someone he should go after?

A I did.

Q Did you want him to continue messaging you?

A All I wanted and all I've ever wanted was for it to stop.

[270] Q Turn to this next page. Anything on this page that stood out to you?

A I think this one, the reference to the white Jeep. And then the fact that I, whoever it was, it seems like this person saw them, thought they were sophisticated, but they left. And, you know, he wishes there was more direct communication. This is a reference to the kind of car that I drove, and so these kind of intimate details become – make the situation seem a lot more real.

Q You said this was the kind of car you drove. So I'm guessing at some point, you had a white Jeep?

A A white Jeep Cherokee.

Q Did you drive a white Jeep Cherokee during this time period in October of 2015?

A No.

Q When did you own that white Jeep?

A I think I got the Element four years ago, so it was my car prior to that. So that would be 2013. 2012. 2013.

Q The white Jeep that you had, were there any photographs on your personal or professional page that showed this white Jeep that he could [271] have easily seen?

A I don't know.

Q This next page. He keeps doing these two frogs. Did that mean anything to you at all? Does that mean anything to you?

A No idea. No.

Q Do you have any particular interest in frogs?

A Me?

Q Yeah.

A I do not have any particular interest in frogs.

Q So this wasn't something that he knew or something about you?

A I don't think so.

Q Anything on this page that made you nervous?

A So this "knock knock" message is kind of creepy in general. I think that's just like -I don't know a better way to describe that.

"Okay. Only a couple physical sightings." That seems like a pretty direct reference that he's following me around and seeing me in person.

And then this "covert response" message is crazy, because there was no responding at all [272] by me. And then saying that he's being talked about, I mean, I don't know how anybody would know that. I'm not even – so all of it is just becoming a little bit more hard to, you know, hard to get a handle on all of this.

Q He says, “It seems like I’m being talked about.” At this point had you told any friends or relatives about these messages?

A I told Kim, who is my friend who plays in the band with me. She also administrates the Facebook page, so she was also already aware. And, yes, at this point we were discussing them.

Q Were you aware of any person that would have known that you were talking about Billy Counterman other than you and your friends that you were talking about it to? Were you telling any strangers about these messages?

A No.

Q He says that in there, “This isn’t healthy. Just like covert communication.” Did that stand out to you in any way?

A Yeah. Again, I think it just referenced – to me, it seems like it’s referencing the fact that we’re in a relationship and this isn’t a healthy way to pursue our [273] relationship.

So, again, I don’t know how many times I need to say it. That’s just not the case. We never contacted each other. I don’t know this person. My behavior or nonresponsiveness to him is not healthy or healthy. It’s just not a thing. So to have someone saying that it is is, yeah, it’s scary.

Q Going to the next page, it appears to kind of play out the rest of that message. Anything on this message, the end of it, that made you concerned?

A I think just the “tapped phone lines” and “what do you fear” is – again, I don’t know how to say that it’s a little bit more scary to feel like somebody is pursuing you who is mentally unwell. It’s a really terrifying position to be in.

Q Why?

A What was that?

Q Why?

A Because I think that crazy people do crazy things. And the typical recourse is maybe not effective on somebody who does not understand regular communication. So “what do you fear” is [274] starting to get a little bit dangerous for me. And then coupled with all the rest of this, it’s just is a scary message.

Q Again, at this time period, how long had you been receiving messages for?

A In 2015, a couple years.

Q Let’s go to the next page. So here he’s talking about his niece getting married. From what you knew, did you have any knowledge of who his niece was?

A No.

Q Do you know why he was telling you this?

A I don’t.

Q Let's go to the next page. It looks like this is some photographs. There's a photograph of a flower up top. Was there anything that meant anything to you about this flower? Do you know why he sent it to you?

A No.

Q Let's go to the next page. Anything about this next message that stood out to you?

A Just the "hot date." Along the same lines of inappropriate intimate conversation.

Q Go to the next page. Do you know why [275] he was sending you either of these?

A I don't know.

Q Anything on that page that made you concerned?

A Beyond the number of contacts, not particularly.

Q All right. The next page. Anything that stands out to you about either of these things?

A Yes. I think this first quote clearly talks about a man and that man's woman. Again, that's not a relationship that I ever had or will have with this person. And the other one is just a very intimate – a very intimate photo, as well.

Q From what you knew, had you ever spoken to him that he would know your voice?

A No.

Q But I guess he could have heard you sing. Is that kind of how you took it?

A Yes. And I speak on stage as well, of course.

Q It talks about, you said, a man and his woman. You said that caused you concern, because you thought that he thought you were in a relationship. Why did that concern you?

[276] A It's concerning because I think when people feel they're in an intimate relationship, they become attached and they – and it's especially concerning if you're not in one. It means that one person is – I mean, I don't know how to say why it concerns me, except for the fact that it just is not true. Which means he thinks that things that are not true are true. And that's very scary to be on the other end of that.

Q Go to the next page. Anything about that page that stood out to you in particular?

A I mean, I think this first cat photo is just more of the same. A lot of strange, intimate stuff. And this second message is, again, kind of – I mean, I don't – I don't know why it's me that needs to be shared with. It's just not -not a – not the kind of relationship that I've had with this person.

And “Now isn't timely,” I didn't know what – “how long is this going to go on?” What does that even mean? Is that going to be an in-person thing? Is this going to continue to happen? I think just the vagary of not knowing when or where the next thing is going to happen is a little scary.

[277] Q The next page, what about this page?

A So I think the “Good morning sweetheart” is – it’s pretty obvious that there’s some disconnect between what he’s thinking and what kind of response he’s getting. And, again, this conversational thing, like as if I was responding, although I haven’t, is alarming.

Q This next page?

A I think this is just more of the same. I don’t know if this makes sense to anyone else in here, but it didn’t make sense to me. And that -it just becomes more terrifying when it’s illegible and not – you can’t make any sense of it. It’s like, Why is this happening to me? Why are you still communicating? There’s nothing going – you know, it’s just – it’s distressing. It’s scary.

Q The next page, is it kind of the same general –

A I don’t know. “Read backwards through the messages I’ve sent you.” It’s clearly like he’s aware that there are a ton, and I still at this point haven’t engaged. So . . .

Q The next one?

A I think this is, again, just more of [278] the same. I don’t – “this third party talking for someone, not in my world,” again, they don’t make sense. And there’s so many of them that I think just that, by itself, is enough to make them very, you know, very – very scary.

Q This last page.

A Yeah, so this is a photo of him, I would assume.

Q At this point, what did that make you think?

A I just think it's, at this point, crossing one more line. Who sends photos of body parts, any body parts, to anybody you don't know? It's just inappropriate.

Q Is this different from any of the other photographs you've been receiving? The pictures?

A Yeah, those are – as you guys can probably tell, those are generic photos somewhere from a line. This is not. I can only assume.

Q At this point, do you block him? Do you know if you block him?

A Um-hum.

Q Is that a yes?

A Yes. I blocked him, yes.

Q When you blocked him, did he again try [279] to contact you?

A Yes.

Q Or anybody that you know?

A Yes. He did – I also had a professional website, not related to Facebook, which has a contact form on it. And so there were a few messages that came through that contact forum. And as I mentioned, my friend, Kim, it's very easy to see she's related to my professional life online, because we play together all the time and she's always posting stuff. So there were some messages sent to Kim, as well, through Facebook.

Q I want to talk a little bit about those messages.

MS. JARAMILLO: And, Your Honor, if I can approach with People's Exhibit 3?

THE COURT: You may. Then be mindful of when you reach a point where we can stop today.

MS. JARAMILLO: Okay. Probably after this exhibit.

THE COURT: That's fine.

Q (By Ms. Jaramillo) What is People's Exhibit 3? What I just handed you. If you can look through each page, let me know what that is, [280] if you know.

A Let you know what?

Q Let me know what that is.

A I see. I see. So Bandzoogole is the company that I created my band website through. These are copies of submission contact forms as they appear in our e-mail after we've gotten a contact through the contact forum.

Q So are these messages that someone would have attempted to send you through your website?

A Yes.

Q Do they say who these messages are from?

A It says, "Name - Billy," and it has an e-mail address.

Q Is this a fair and accurate representation of the messages that you received directly after blocking the

Billy Counterman on Facebook after receiving that photograph of a leg?

A Yes.

MS. JARAMILLO: Your Honor, at this point the People would move to admit People's Exhibit 3.

MS. ARCHAMBAULT: No objection.

THE COURT: Exhibit 3 will be admitted.

[281] (People's Exhibit 3 was admitted into evidence.)

MS. JARAMILLO: Your Honor, permission to publish to the jury?

THE COURT: Granted.

Q (By Ms. Jaramillo) All right, this first page is probably pretty hard for the jury to see. Was there a message that was sent on this first one, this first page?

A Just asterisks in the message field.

Q Just asterisks, okay. On the message field. Okay. Page No. 2, what was the next message that you received on the website?

A This someone is an asterisk with parentheses on both sides. Squiggly parentheses.

Q Did you know what that meant?

A No.

Q What does the message say to you or to your website?

A It says in the message field, “[C.W.], will you please take me off block. I will never expose my leg again. Sorry.”

Q Are all three of these messages that you received, do they have to be separately sent through the website?

[282] A Yes.

Q Were they all from the same e-mail address?

A Yes.

MS. JARAMILLO: Your Honor, I think since I already talked about the next exhibit, I would ask the Court to allow me to do one more before we break.

THE COURT: That’s fine.

MS. JARAMILLO: The People would ask to approach with People’s Exhibit 4.

Q (By Ms. Jaramillo) You talked about your friend, Kim, then started to receive some Facebook messages. Do you know if these were posted publicly on her page or were they sent to her via private message?

A Private message.

Q Who are they from?

A It says they’re from Billy Counterman.

Q Does this appear to be the same person that had been contacting your page?

A Yes.

Q From what you're aware of, were these messages sent again after you blocked Billy Countermand once he sent you the photograph of a leg?

[283] A Yes.

Q Are these a fair and accurate representation of those messages sent to Kim back in 2015?

A Yes.

MS. JARAMILLO: Your Honor, the People move to admit People's Exhibit 4.

MS. ARCHAMBAULT: I would object on foundation.

THE COURT: I'll overrule – well, lay a little bit more foundation regarding how she knows of them.

Q (By Ms. Jaramillo) How did you become aware that Billy Countermand had sent messages to Kim?

A She told me first.

MS. ARCHAMBAULT: Objection on hearsay.

THE COURT: Overruled as to hearsay.

A So Kim told me about these messages and then she showed me these messages. On Facebook you can assign a profile picture to your account. Anyone can. It's the same.

Q (By Ms. Jaramillo) So it's the same profile picture for Billy Counterman as the person who had been sending you messages; is that right?

[284] A Yes. And the same name.

MS. JARAMILLO: Your Honor, at this point the People move to admit People's Exhibit 4.

MS. ARCHAMBAULT: Same objection.

THE COURT: Overruled. Exhibit 4 will be admitted.

(People's Exhibit 4 was admitted into evidence.)

MS. JARAMILLO: Permission to publish?

THE COURT: Granted.

Q (By Ms. Jaramillo) Again, these are a little hard for the jury to read. So if you can read the messages that were sent by Mr. Counterman to Kim.

A "[C.W.], I really want to talk with her. WTF. Going to work tomorrow. My leg is an issue. Ask, please. Peace. Rude of me. Control of what?"

Q From what you saw on Kim's Facebook page, was she responding to Mr. Counterman?

A No.

Q Were these the messages as you saw them back on that date?

A Yes.

Q Did you know what these meant?

[285] A I mean, it appears that the first message means that he wants to talk to me. The others are – no, I don't. I don't know what those mean.

Q After you blocked him this time, did he continue to message you?

A Me or Kim?

Q You.

A Yes.

Q We'll talk a little bit about those then tomorrow.

MS. JARAMILLO: Your Honor, this would be a good time to stop.

THE COURT: Ladies and gentlemen, we're going to break for the day now. I know this has been a long day for you. I'd ask that you come back tomorrow, get here by 8:25 with the goal of getting started at 8:30.

Ma'am, you may step down. Before you go, it's important that you obey the following instructions with reference to the recesses of the Court:

You are not to discuss the case amongst yourselves except when the entire jury is together in the jury room for deliberations. You should also not discuss this case with anyone else.

[286] In fairness to the parties of the lawsuit, you should keep an open mind throughout the trial and you

should reach your decisions only during your final deliberations.

You may not permit any third person to discuss the case in your presence. If anyone attempts to do so, report that back to the court staff immediately.

Do not talk with any witness or with any party or with any of the lawyers in this case. Do not attempt to gather any information on your own. Do not engage in any outside reading or Internet searches on anything regarding this case. Do not attempt to visit any places mentioned in this case.

Finally, do not attempt in any other way to try to learn about the case outside the courtroom. Do not read about the case in the newspapers or listen to radio or television broadcasts about the trial. You must base your verdict solely on the evidence and the law presented at trial.

With that, I hope you have a very pleasant evening. We'll see you tomorrow morning.

(The jury exited the room.)

THE COURT: All right. The record can reflect that the jury has left the courtroom. Please [287] be seated.

Anything we need to address from the People before we recess?

MS. JARAMILLO: Not from the People.

THE COURT: Anything from defense?

MS. ARCHAMBAULT: No, thank you.

THE COURT: All right. How are we doing timing-wise from the People's point of view?

MS. JARAMILLO: Your Honor, I think we're on time. Most of our other witnesses are fairly short, so I think we're doing well.

THE COURT: And when do you anticipate resting, then?

MS. JARAMILLO: I think probably tomorrow afternoon.

THE COURT: Okay. All right. Then we will be in recess. Why don't you all be here by 8:20 tomorrow morning. I'll need to talk to you then about what you feel in terms of the jury instruction conference. Again, it doesn't seem like there are major issues, but take a look at the jury instructions again. I'll ask defense to take a look at the extra one that the People e-mailed this morning and let's see where we are.

With that, I hope you all have a very [288] pleasant evening.

MS. JARAMILLO: One other thing. I would just request if defense has any other instructions, obviously other than theory of the case, if they can do that tonight, that way we can research and be able to discuss tomorrow.

THE COURT: Are you anticipating any other instructions?

MS. ARCHAMBAULT: I don't know, Judge. One of my colleagues just sent me an e-mail today and I haven't looked at them. So potentially.

THE COURT: Take a look at them. If they are instructions that you know you're going to be offering, please do get them to the People tonight and maybe send them to me as well so we have a chance to look at them ahead of time. And then we'll take it from there. All right. We're in recess.

(The within proceedings were concluded.)

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[289] [Reporter's Certificate Omitted]
