

**IN THE COURT OF APPEALS
EASTERN DISTRICT OF MISSOURI**

IN THE INTEREST OF: D.J.M.,
A Minor

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Cause No. ED89744

APPEAL FROM
THE CIRCUIT COURT OF MARION COUNTY, MISSOURI
DISTRICT II, JUVENILE DIVISION
TENTH JUDICIAL CIRCUIT
Honorable David C. Mobley
Case No. 06MR-JU00069

Respondent's Brief

Responding to Brief of Appellant Parents

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Jurisdictional Statement

This is a juvenile case. The Trial Court determined that the child had committed an act which would be a violation of law if committed by an adult, and assumed jurisdiction. The case should not involve the validity of a treaty or statute of the United States, or a statute or provision of the constitution of this state, or the construction of the revenue laws of this state, or the title to any state, office or imposition of death penalty. Respondent will accept Appellants' position that it is not within the exclusive jurisdiction of the Missouri Supreme Court under Article V., Section 3 of the Missouri Constitution of 1945, even though Appellants attack Section 574.010 RSMo, on constitutional grounds. *Magenheim v. Board of Ed. Of School District of Riverview Gardens* 640 SW2d 619 (Mo. 1960).

Statement of Facts

At the jurisdictional hearing, the juvenile did not have an attorney; but his parents did have an attorney and also the juvenile chose to proceed without an attorney. No objection was raised by any party, nor was a request for appointment of counsel made by the juvenile. (Tr. 7, 14-25) The Trial Court considered whether there was a conflict between the juvenile and his parents. (Supp. Tr. 6, 3-6; 56. 3-21) The parents' attorney helped the juvenile understand the issues and the juvenile's position. (Supp Tr. 6, 18-24) The juvenile understood counsel waiver. (Supp Tr. 8, 1-10) The Trial Court evaluated the need for counseling for DJM (Supp Tr. 32, 33); and whether the juvenile understood the proceedings. (Supp Tr. 33) The Trial Court allowed the juvenile to speak and indicate whether he wanted to add anything to the proceedings. (Supp. Tr. 32, 33) The parents' attorney advocated releasing DJM from custody (Supp. Tr. 46, 3-11); and acted in DJM's best interest. (Supp. Tr. 49, 17-22; Supp. Tr. 6, 18-24) In doing so, counsel for the parents was an effective advocate for the juvenile, while representing the parents. (Supp. Tr. 50, 11-16; 53, 9-16; 79, 1-23; 86, 1-21; 89, 9-23; 106, 21-25; 114, 3-20; 121, 17-24; 133, 12-21; 82, 12- page 83m 1-11) Sometimes, more attorneys in a case can cause delay by virtue of schedules. (Supp Tr. 137, 19-25; 53, 21-25; 54, 1-10) A consensual search had been done on the juvenile's computer (Tr. 107, 22-24; Tr. 108, 1-7) The juvenile had messaged a fellow student, Carly Moore, telling her he was depressed. (Tr. 22, 8-13) The juvenile made statements that concerned Moore (Tr. 23, 7-9), including that the juvenile was planning to bring a gun to school and kill people, and

then kill himself. (Tr. 23, 18-22) The statements by the juvenile scared Moore. (Tr. 54, 4-22; Tr. 68, 3-4; Tr. 68, 19-20) Moore was 14 years old at the time. (Tr. 54, 21-22) The juvenile said he knew someone who had a gun he could get from them. (Tr. 36, 11-14, Tr. 41, 24-25) The juvenile was specific about the gun he could get, which was probably a .357 magnum. (Tr. 54, 9-14; Tr. 91, 17-22) Moore knew the juvenile could get a gun. (Tr. 55, 16-18; Tr. 92, 5-6) The juvenile had chatted with a friend about a gun. (Tr. 95, 13-14); and when depressed he had said he would bring guns to school to "...put Hannibal on the map." (Tr. 96, 25; Tr. 97, 3; Tr. 97, 25; Tr. 98, 3; Tr. 101, 8-11) It was the juvenile's friend's grandfather that had the .357 magnum. (Tr. 100, 18-20) The friend gave the juvenile a good deal of information about a .357 magnum. (Tr. 101, 2-6) There were specific people whom the juvenile said he was going to kill, including himself. (Tr. 31, 21-24; Tr. 32, 21-24; Tr. 32, 22-25; Tr. 33, 1) The juvenile was also planning to kill people of color. (Tr. 47, 11-13; Supp. Tr. 8, 11-20) Moore's concern was sufficient that she sought advice from an adult. (Tr. 24, 15-17) The adult said, any time someone threatens suicide, he should be taken seriously. (Tr. 53, 2-11) The adult took the conversation by the juvenile seriously. (Tr. 61, 2-4; Tr. 64, 10-12) Other adults took the conversation seriously too. (Tr. 90, 5-6) The juvenile said he had been hospitalized for depression. (Tr. 33, 10-17; Tr. 35, 1-6) At the time of the hearing, the juvenile had changed his appearance from one with dyed differently colored hair which was long on one side and shaved on the other. (Tr. 34; 5-19) The juvenile had been picked on at school. (Tr. 89, 1-5; Tr. 105, 3-11) The juvenile's parents presented expert testimony to aid their son. (Tr. 117, 22; Tr. 119, 16; Tr. 126, 12-21) The expert testified

that the juvenile could react impulsively, would have difficulty controlling his behavior, (Tr. 123, 22-25) and could get overly stimulated and do things that are outrageous. (Tr. 124, 10-12) The expert confirmed the juvenile's suicidal thought tendencies; (Tr. 133, 5-25) and that the juvenile would understand that saying he wanted to take a gun to school and shoot everyone and himself, would be a "startling statement". (Tr. 139, 13-19)

Points Relied On

I

The Trial Court did not err in failing to dismiss Count I of the First Amended Petition because the statute proscribing the peace disturbance of threatening to commit a felony against a person is neither over-broad nor constitutionally vague in violation of the 1st, 5th, and 14th Amendments to the United States Constitution or Article I, Sections 8 and 10 of the Missouri Constitution of 1945. There was no error by the Trial Court in failing to dismiss Count I because statements made knowingly which threaten to commit a felonious act against any person under circumstances which are likely to cause a reasonable person to fear that such threat may be carried out are not protected free speech.

Broadrick v. Oklahoma, 413 U.S. 601 (1973)

State v. Carpenter, 736 SW2d 406 (Mo. en banc)

State v. Helgoth, 691 SW2d 281 (Mo. banc 1985)

State v. Moore, 90 SW3d 64 (Mo. 2002)

Section 566.095

Section 574.010

18 U.S.C. § 875(c)

II

The Trial Court did not err in finding that DJM committed a peace disturbance by threatening as there was sufficient evidence to support the adjudication based upon the statements of the juvenile that he was going to bring a weapon to school and shoot others and then himself, declared his access to weapons with specificity, and identified individuals to be shot. These statements caused significant concern and frightened the recipient sufficiently to cause her to turn to a trusted adult for advice and council. There was sufficient evidence presented for the Trial Court to find that the juvenile threatened to commit a felonious act against any person under circumstances which are likely to cause a reasonable person to fear that such threat may be carried out.

In the Interest of D.W.P., 110 SW3d 863 (Mo.App. E.D. 2003)

State v. Elizer Chavez, 165 SW3d (Mo.App. E.D. 2005)

State v. Meister, 886 SW2d 485 (MoApp 1993)

State v. Wynn, 391 SW2d 245 (MoApp 1965)

Argument

Point I

The Trial Court did not err in failing to dismiss Count I of the First Amended Petition because the statute proscribing the peace disturbance of threatening to commit a felony against a person is neither over broad nor constitutionally vague in violation of the 1st, 5th, and 14th Amendments to the United States Constitution or Article I, Sections 8 and 10 of the Missouri Constitution of 1945. There was no error by the Trial Court in failing to dismiss Count I because statements made knowingly which threaten to commit a felonious act against any person under circumstances which are likely to cause a reasonable person to fear that such threat may be carried out are not protected free speech.

Standard Of Review

If Appellants' constitutional argument is not substantial, Juvenile Cases are civil proceedings in which the standard of review is the same as in other court tried cases. **In Re D.L.**, 999 SW2d 291 (Mo.App. E.D. 1999). The Trial Court's judgment will be affirmed unless there is no substantial evidence to support it or it is against the weight of the evidence or erroneously declares or applies the law. **Murphy v. Carron**, 536 SW2d 30, 32 (Mo. banc 1976). In the case at bar, if there is substantial evidence that supports the Trial Court's finding that the juvenile was subject to the jurisdiction of the Court, the judgment of the Trial Court should be affirmed. If Appellants' constitutional argument is substantial, then a review may be de novo. **Hodges v. City of St. Louis**, 217 SW3d 278 (Mo 2007)

The respondent questions whether a Constitutional claim of overbreadth has been preserved. To preserve appellate review, constitutional claims must be made at the first opportunity, with citations to specific constitutional sections. *State v. Chambers*, 891 S.W.2d 93, 104 (Mo. banc 1994). A constitutional question is waived if not raised at the earliest opportunity. *State v. Plummer*, 860 S.W.2d 340, 351 (Mo.App.E.D. 1993). Appellant's objection at trial only related to a motion to dismiss filed on January 5, 2007. (Tr. 7, 22-25) The only pretrial motion to dismiss reflected in the Legal File was filed November 6, 2006 (L.F. 85). The motion to dismiss filed November 6, 2006 makes no claim of over breadth of the statute. There was no oral objection to the over breadth of the statute at trial. Appellants' post-trial motion to dismiss (L.F. 54) made no claim as to over breadth of the statute. Appellants may be barred from raising the issue and argument on appeal.

Section 574.010 RSMo.

Should this Court determine that the issue of over breadth may be raised at this point, a historical review of Missouri Statute regarding Peace Disturbance reveals that the question of constitutionality due to over breadth and vagueness is not a new one. The pertinent portion of Section 574.010 RSMo, prior to amendment in 1993, read:

A person commits the crime of peace disturbance if he:

1. He unreasonably and knowingly disturbs or alarms another person by:
 - c. threatening to commit a crime against any person.

In *State v. Carpenter* 736 S.W.2d 406 (Mo. en banc), cited by appellants, the Missouri Supreme Court affirmed the judgment of the trial court, concluding that section 574.010.1(1)(c) RSMo was overbroad in its construction. The reason given was that as written the statute contemplated:

1. Punishing a person for any and all utterances that if carried out would constitute criminal offenses under Missouri law;
2. No distinction as to the degree of criminal activity, and;
3. There is no guarantee under the statute that a substantial likelihood exists that such threatened criminal conduct will occur.

In response to this ruling, the Missouri Legislature, in Senate Bill 180 addressed these issues and amended Section 574.010 RSMo in 1993 to read:

A person commits the crime of peace disturbance if:

1. He unreasonably and knowingly disturbs or alarms another person or persons by:

- c. threatening to commit a felonious act against any person under circumstances which are likely to cause a reasonable person to fear that such threat may be carried out.

The legislative intent of this amendment is clear. It was changed to address those specific issues found by the Missouri Supreme Court as being deficient in its prior version. The legislative intent of the statute goes only to proscribe speech that does not fall within the ‘protected speech’ category under the First Amendment of the United States Constitution. The First Amendment permits a State to ban a “true threat”. **United States v. Whiffen**, 121 F.3d, 18 (1st Cir. 1997) True threats encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.

As implemented, the amended version of Section 574.010(1)(c) RSMo only proscribes true threats made within a very limited scope. The actor must knowingly and unreasonably make a threat to commit a felonious violation against a person or persons under circumstances in which causes a reasonable person to fear that the threat may be carried out.

The wording added by the legislature is consistent with an approach to a determination of true threats under 18 U.S.C. § 875(c). This section criminalizes the transmission in interstate commerce of any threat to kidnap or injure another person. The elements of the charge are: (1) an intentional interstate or foreign transmission of a communication, (2) threatening to injure a person, (3) with the specific intent to threaten. *United States v. Twine*, 853 F.2d 676 (9th Cir. 1987). Arguably the Government is not required to prove that the defendant had the intent or ability to carry out the threat. *Id.* Nor is the Government required to prove that the defendant had the specific intent to injure, or that the threat ever reached the person who was threatened. *United States v. Holder*, 302 F.Supp. 296 (D.Montana 1969), aff'd & adopted, 427 F.2d 715 (9th Cir. 1970). The threat need not have been of such a nature as to have induced fear in the mind of the person threatened. *Id.* It is enough to show that the threat was of such a nature as reasonably to have induced fear. *Id.* ("The test is whether the communication 'in its context' would 'have a reasonable tendency to create apprehension that its originator will act according to its tenor.'") Even a vague threat is sufficient to sustain a conviction under this statute. *Roy v. United States*, 416 F.2d 874 (9th Cir. 1969).

Thus, an approach of the Federal Court was adopted by the Missouri legislature and incorporated into Missouri statutes, by the inclusion of the conditional element that the threat to commit the felonious act against any person was made “*under*

circumstances which are likely to cause a reasonable person to fear that such threat may be carried out.’

Vagueness

When reviewing a vagueness challenge, "it is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing; the language is to be treated by applying it to the facts at hand." *State v. Young*, 695 S.W.2d 882, 884 (Mo. banc 1985). *Cocktail Fortune, Inc v. Supervisor of Liquor Control*, 994 S.W.2d 955 (Mo 1999). Arguably, if a statute can be applied constitutionally to an individual, that person "will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *State v. Ellis*, 853 S.W.2d 440, 446 (Mo. App. E.D. 1993), quoting *U.S. v. Raines*, 362 U.S. 17, 21 (1960).

In the case currently before the Court, the wording in the violation is clear. The juvenile cannot threaten to commit offenses that would be murder and felony assault under conditions that one hearing or receiving the threat has reason to believe are genuine.

The Supreme Court has cited three "reasons why threats of violence are outside the First Amendment": "protecting individuals from the fear of violence, from the

disruption that fear engenders, and from the possibility that the threatened violence will occur.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)

A reasonable person with ordinary intelligence can understand that threatening to bring weapons into the school building and shoot people with the intent to kill or to cause serious physical injury to individuals is unacceptable behavior. It is clear that threats to do so would be contrary to the statute as written. The unacceptable behavior went further than simply making statements. The juvenile indicated to another that he had specific persons to target (Tr. 31, 21-24; Tr. 32, 21-24; Tr. 22-25; Tr. 33, 1) and named them. He discussed obtaining weapons (Tr. 36, 11-14; Tr. 41, 24-25) and described specific weapons he believed he could obtain (Tr. 54, 9-14; Tr. 91, 17-22); and stated specifics as to the reasons that he was going to engage in such action. (Tr. 22, 8-13; Tr. 96, 25; Tr. 97, 3; Tr. 98, 3; Tr. 101, 8-11) When taken in context of the discussion and the threats made, his statements served only to create the circumstances that were likely to cause a reasonable person to fear that such threat may be carried out. The statute is not vague. It provides both guidance, and its meaning is clear. *Connally v. General Constr. Co.*, 269 U.S. 385 (1926)

Over Breadth

The United States Supreme Court has held that a statute is substantially overbroad when it "reaches a substantial number of impermissible applications". *New York v.*

Ferber, 458 U.S. 747 (1992), 771; and that a statute should fall only if it is “substantially overbroad and not readily reconstructed to avoid privileged activity [because if it] is not substantially overbroad [it] is unlikely to have a drastic inhibitory impact.” The United States Supreme Court adopted this position in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) saying, “... where conduct and not merely speech is involved, we believe that the over breadth of a statute must not only be real but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Broadrick*, 413 U.S. at 615.

The Missouri Supreme Court adopted the over breadth standard announced by the United States Supreme Court in *Broadrick*. In *State v. Helgoth*, 691 S.W. 2d 281 (Mo. banc 1985) it was held that the over breadth doctrine is strong medicine and must be employed with hesitation, and then only as a last resort. *Helgoth* 691 S.W. 2d at 285. It further held that the function of the over breadth doctrine “attenuates as the otherwise unprotected behavior it forbids the State to sanction moves from pure speech toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.” *Id.*

In *State v. Moore*, 90 S.W. 3d 64 (Mo. 2002), the Missouri Supreme Court found that the first test for over breadth is whether the statute at issue involves conduct which the state can declare to be a crime, and speech.

The Moore case is on point to the claim before this Court. In Moore, the defendant was convicted of third-degree sexual misconduct for requesting sexual contact with a 13 year old female in a restaurant in violation of Section 566.095 RSMo. The elements of the offense in the Moore case were :

1. Soliciting another person to engage in sexual conduct;
2. under circumstances in which he knows that his request or solicitation is likely to cause affront or alarm.

Moore challenged the statute on its face as an unconstitutional infringement on the right of free speech. In its decision, the Court found that the circumstances of the case (specifically a 61 year old man soliciting or requesting sexual conduct from a 13 year old girl) did not violate the constitutional guarantee of freedom of speech, and thus was not overbroad in its application. The Court noted that: [T]he requested act, were it to occur, would constitute the crime of first-degree statutory sodomy. This solicitation or request is not just speech, but conduct that the defendant under the law is presumed to know is likely to cause affront or alarm.” *Moore* 90 S.W. 3d 64 (Sup. 2002)

A similar examination is required today. Although the specific allegations are different, the theory and the law are sufficiently similar as to have a direct correlation in result.

Peace Disturbance, under section 570.010(1)(c) RSMo and Sexual Misconduct-Third Degree under section 566.095 RSMo, prohibit similar conduct and action under the law. Both require:

1. A statement be made by an individual (in the case of the sexual misconduct offense a solicitation or request for sexual conduct; for peace disturbance, a threat);
2. That the statement be made knowingly by the one making it; and
3. That the circumstance of the statement would tend to have an undesired effect on a person hearing or receiving the statement. (in the case of the sexual misconduct it must be ‘likely to cause affront or alarm’; for peace disturbance ‘likely to cause a reasonable person to fear that such threat may be carried out’.)

In the Moore case, the Supreme Court found that “[i]n the circumstances here, Moore asked the 13 year old girl to participate in the crime of statutory sodomy. Regardless of how the conduct is characterized – in this statute “likely to cause affront or alarm” – an adult is deemed under the law to know that such conduct is likely to cause such an experience. *Moore* 90 S.W. 3d 64 (Mo. 2002)

In the case herein, the Trial Court found that the juvenile made the initial statements to bring weapons to school, shooting individuals and himself, and threatened

to shoot and/or kill specific individuals known to the recipient of the communication without prompting, suggestion, or encouragement of any party. (L.F. 20) The juvenile should know that these statements constitute a threat to commit the offenses which would be Murder and/or Assault in the First Degree. Appellants' expert witness confirmed that the juvenile would understand that saying he wanted to take a gun to school and shoot everyone and himself, would be a "startling statement". (Tr. 139, 13-19)

The Court received into evidence the text of the conversation between the juvenile and the witness Carly Moore. The juvenile knowingly made these threatening statements with full knowledge of the nature of the discussion, and the specificity of the threat to certain individuals. He engaged in conversations regarding where he could obtain weapons and communicated his research into specific weapons to use. He also discussed recruitment of other individuals to participate in the offense. The juvenile should know that such conduct is likely to cause a reasonable person to fear that the threat may be carried out.

While much was made over the nature of the conversation between the juvenile and Carly Moore during the testimony, what is unequivocal and unavoidable is the finding of the Trial Court that the juvenile made the initial statements to bring weapons to school, shooting individuals and himself, and threatened to shoot and/or kill specific individuals known to the recipient of the communication without prompting, suggestion, or encouragement of any party. (L.F. 20) The conversations that occurred afterwards,

whether appropriate or inappropriate communication, were the result of the initial threatening statements by the juvenile.

The Court heard testimony that the recipient of the messages was concerned and frightened. (T.R. 23, 7-9; T.R. 54, 4-22; T.R. 68, 3-4; T.R. 68, 19-20) She documented the threats and sought the advice of a trusted adult. (T.R. 24, 15-17) These actions are not the actions of an individual playing along with a ‘big joke’ or humorously discussing a ‘taboo subject’. These are the actions of a frightened 14 year old girl who feared violence in her school because of the statements of DJM. These actions provide the final piece of information required under the examination described in Moore: that the victim did in fact, fear that the threat may be carried out at the time the statements were made.

CONCLUSION

The Peace Disturbance statute as written in Section 574.010(1)(c) RSMo does not deny the juvenile due process of law. The provisions of the statute are sufficiently clear that an ordinary person of average intelligence would understand that it is wrong to communicate a threat to kill or seriously injure other people in a manner that causes the recipient of that communication to fear the threat to be legitimate. It is not written to be so overbroad that it proscribes constitutionally protected free speech. No limiting construction by the Trial Court was required as the statute itself goes only to proscribe speech that does not fall within the 'protected speech' category under the First Amendment of the United States Constitution.

Point II

The Trial Court did not err in finding that DJM committed a peace disturbance by threatening as there was sufficient evidence to support the adjudication based upon the statements of the juvenile that he was going to bring a weapon to school and shoot others and then himself, declared his access to weapons with specificity, and identified individuals to be shot. These statements caused significant concern and frightened the recipient sufficiently to cause her to turn to a trusted adult for advice and council. There was sufficient evidence presented for the Trial Court to find that the juvenile threatened to commit a felonious act against any person under circumstances which are likely to cause a reasonable person to fear that such threat may be carried out.

Standard Of Review

Juvenile Cases are civil proceedings in which the standard of review is the same as in other court tried cases. *In Re D.L.*, 999 SW2d 291 (Mo.App. E.D. 1999). The Trial Court's judgment will be affirmed unless there is no substantial evidence to support it or it is against the weight of the evidence or erroneously declares or applies the law. *Murphy v. Carron*, 536 SW2d 30, 32 (Mo. banc 1976). In the case at bar, if there is substantial evidence that supports the Trial Court's finding that the juvenile was subject to the jurisdiction of the Court, the judgment of the Trial Court should be affirmed.

In the Trial Court's Findings of Fact, Conclusions of Law, and Judgment (L.F. 18-31), the Trial Court assumed jurisdiction over the juvenile based upon specific findings

that DJM initially made the statements about bringing a gun to school and shooting individuals and himself of his own accord, without prompting or encouragement by any parties; and that on his own and without any prompting or suggestion, named the following individuals to be shot during the school assault: Shay Brown, Bryson Jarmin, Blake Jarmin, and Brad Spencer. (L.F. 20)

As stated by Appellant, Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) did establish a list of factors to be taken into account when determining whether a statement is a “true threat”, which did include (1) the context of the statement, (2) the conditional nature of the statement, and (3) the reaction of the listener. All three factors, when viewed in the totality of the circumstances, support the findings of the Trial Court in this case.

The Trial Court had the benefit of the testimony of Carly Moore, the recipient of the messages, regarding the knowledge she had of the juvenile who made the statements. The testimony of Carly Moore was that she had known DJM for four or five months, (Tr. 16, 7-8) and that she was friends with him. (Tr. 16, 10-11) She testified that she chatted with him on-line three to four times a week or more, (Tr. 16, 23-25) and that DJM talked about things that were personal and of concern to him. (Tr. 37, 22-24) She believed she was someone with whom he (DJM) placed confidence, talked about things that he might not talk with other people about, and entrusted with his feelings and information. (Tr. 38, 8-17) The Trial Court found, and the evidence supports, that Carly Moore had a

significant source of knowledge regarding DJM in that he had confided in her regarding the issues in his life in the past, including his prior suicidal thoughts and psychiatric hospitalization. (L.F. 19; Tr. 33, 10-22; Tr. 35 1-6) Moore's fear was reasonable, and supported by the evidence. *State v. Elizer Chavez*, 165 SW3d (Mo.App. E.D. 2005)

DJM messaged Carly Moore, telling her he was depressed. (Tr. 22, 8-13) The juvenile made statements that concerned Moore (Tr. 23, 7-9), including that the juvenile was planning to bring a gun to school and kill people, and then kill himself. (Tr. 23, 18-22) The statements by the juvenile scared Moore. (Tr. 54, 4-22; Tr. 68, 3-4; Tr. 68, 19-20) Moore was 14 years old at the time. (Tr. 54, 21-22) The juvenile said he knew someone who had a gun he could get from them. (Tr. 36, 11-14, Tr. 41, 24-25) The juvenile was specific about the gun he could get, which was probably a .357 magnum. (Tr. 54, 9-14; Tr. 91, 17-22) Moore knew the juvenile could get a gun. (Tr. 55, 16-18; Tr. 92, 5-6) The juvenile had chatted with a friend about a gun. (Tr. 95, 13-14); and when depressed he had said he would bring guns to school to "...put Hannibal on the map." (Tr. 96, 25; Tr. 97, 3; Tr. 97, 25; Tr. 98, 3; Tr. 101, 8-11) It was the juvenile's friend's grandfather that had the .357 magnum. (Tr. 100, 18-20) The friend gave the juvenile a good deal of information about a .357 magnum. (Tr. 101, 2-6) There were specific people whom the juvenile said he was going to kill, including himself. (Tr. 31, 21-24; Tr. 32, 21-24; Tr. 32, 22-25; Tr. 33, 1) The juvenile was also planning to kill people of color. (Tr. 47, 11-13)

Appellant claims that the Juvenile Office erroneously relied upon DJM's identity as a Goth in support of the "charge", and claiming a discriminatory attitude by the Juvenile Office and the Trial Court. The juvenile, DJM, chose an appearance and that appearance expresses an attitude. An attitude is relevant when assessing both the seriousness of the threat made and the effect upon the recipient of that threat. Far from relying on it to support the charge, it supports the reasons that Carly Moore took the threats seriously, and why other adults took the conversation seriously as well. (Tr. 64, 10-12; Tr. 90, 5-6)

This knowledge that Carly Moore had of DJM is the 'context of the statement' considered under Watts. Carly Moore knew that DJM had a history of depression and hospitalization for mental instability. The threats were based upon his being depressed due to being dumped by his girlfriend. It was Carly Moore's understanding from the context of the statements made by DJM that "he is just so depressed and he wants to take a gun to school and shoot everyone he hates then shoot himself." (Def. Ex. B) She communicated again with him and asked if he was "seriously thinking about this" and DJM said "Yeah". (Tr. 54, 1-2) Carly Moore knew that DJM displayed the 'goth' attitude in dress and mannerism, wearing extensive amounts of black, being non-communicative with other people, and being hard to approach. (Tr. 33, 2-4)

All these factors were already present in the context of the recipient's knowledge upon which she assessed the statement made for its validity and seriousness at the time

the statement was made. Based upon that context, Carly Moore was scared ‘because she didn’t know what was going to happen ... and she really thought he was going to do this’. (Tr. 54, 4-8)

It is not necessary to show that defendant intended to carry out the threat, nor is it necessary to prove he had the apparent ability to carry out the threat. *The question is whether those who hear or read the threat reasonably consider that an actual threat has been made.* It is the making of the threat and not the intention to carry out the threat that violates the law. *United States v. Leaverton*, 835 F.2d 254, 257 (10th Cir. 1987).

The best assessment of whether a threat has been made can be determined by considering the reaction of the listener to the statement made. Moore’s concern was sufficient that she sought advice from an adult. (Tr. 24, 15-17) The adult said, any time someone threatens suicide, he should be taken seriously. (Tr. 53, 2-11) The adult took the conversation by the juvenile seriously. (Tr. 61, 2-4; Tr. 64, 10-12) The Trial Court heard testimony that the recipient of the messages was concerned and frightened. (T.R. 23, 7-9; T.R. 54, 4-22; T.R. 68, 3-4; T.R. 68, 19-20) She documented the threats and sought the advice of a trusted adult. (T.R. 24, 15-17) These actions are not the actions of an individual playing along with a ‘big joke’ or humorously discussing a ‘taboo subject’. These are the actions of a frightened 14 year old girl who feared violence in her school because of the statements of DJM.

As indicated in Point I, much has been made of the conversations regarding the initial threat in an effort to mitigate or discredit the validity of the threat made. These arguments ignore the causation factor of the initial statement itself. Much that followed the initial statement occurred because the witness was frightened by the initial statement itself. The issue before the Trial Court was whether the initial statements made by the juvenile regarding the threat to do a Columbine-style school shooting were sufficient to cause fear in the mind of Carly Moore.

While appellant focuses on what was learned and occurred later to dismiss the seriousness or severity of the act, that was not information known to the recipient at the time statement was made. At that time she took it as a serious threat, one significant enough to cause her to turn to a trusted adult for advice and counsel. The Trial Court did obviously recognize that distinction and made findings related to the initial threat, and did not use the end result of the conversation to dismiss the initial fear.

Additional evidence was received by the Trial Court, including the Mirandized statement of DJM and his admission that he “was pissed off and mentioned shooting people at our school”; and that he asked “Duncan if he had a gun and he told me several different guns he had, including a 357 Magnum”. Additionally DJM admitted telling “Duncan to get a bunch of pistols and get some guys to do it, school shooting, with me”; and specifically mentioned Shay Brown, Bryson Jarmin, Blake Jarmin, and Brad Spencer as individuals to be shot. (App. Index, A28)

There are examples of actions and behaviors by individuals which contravene statutes and are prosecutable even though the actions and behaviors involve ‘mere speech’. One cannot yell “fire” in a crowded movie theater, nor communicate a bomb threat by phone, mail, or other communication. One cannot point a gun in an individual’s face, or even imply that they have a gun, and state “give me all your money”. Each of these actions are ‘speech’, and each are clearly proscribed under the law.

Although appellant has made issue over the juvenile’s words at the end of his statement “I do not plan on shooting anyone at school and I was saying it as a joke”, appellants should not allow DJM to escape the consequences of his actions simply because he stated ‘I was joking’. Carly Moore did not know he was joking and took it seriously, as did the adults she turned to for help. It is that fear which was engendered by the statement of the juvenile, which is one basis of the allegation against the juvenile. It was his own unprompted statements which caused the fear, and DJM should be held accountable for creating it, even if he now says he was joking.

The Supreme Court cited three “reasons why threats of violence are outside the First Amendment”: “protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur”, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). Clearly, the fear and disruption caused by DJM’s statements were amply demonstrated to the Trial Court and supported the Trial Court’s findings that the juvenile committed the offense of peace disturbance by

threatening to commit a felonious act against any person under circumstances which are likely to cause a reasonable person to fear that such threat may be carried out.

A fact finder is not required to believe any witness's testimony even if it is uncontradicted. *State v. Glessner*, 918 SW2d 270 (MoApp 1996). A fact finder may believe all, part or none of a witness's testimony. *State v. Bryan*, 60 SW3d 713 (MoApp 2001). See also *State v. Meister*, 886 SW2d 485 (MoApp 1993) and *Flowers v. Roberts*, 979 SW2d 465 (E.D. 1998). A fact trier may believe all testimony of any witness or none of it; the trier may accept it in part or reject it in part; the trier may find the testimony to be true or false, in relations to other testimony and facts and circumstances in a particular case. *State v. Wynn*, 391 SW2d 245 (MoApp 1965).

In this case, the Trial Court obviously believed the juvenile officer's witnesses, including Carly Moore's indicating that she was scared by DJM's comments (Tr 54, 4-22; Tr. 68, 3-4; Tr. 68, 19-20); an adult's taking the comments seriously, (Tr. 61, 2-4; Tr 64, 10-12; Tr. 90, 5-6); and an expert's opinion that DJM would understand that DJM's words would be a "startling statement". (Tr. 139, 13-19) DJM was specific about the gun he could get. (Tr. 54, 9-14; Tr. 91, 17-22) Moore knew he could get a gun. (Tr. 55, 16-18; Tr 92, 5-6) DJM was specific about targets. (Tr. 47, 11-13).

The Trial Court had ample evidence which met the elements of the behavior alleged by Respondent.

CONCLUSION

This is a case where DJM made statements about bringing a gun to school and shooting individuals and himself of his own accord without prompting or encouragement by any parties; and that on his own and without any prompting or suggestion, named the following individuals to be shot during the school assault: Shay Brown, Bryson Jarmin, Blake Jarmin, and Brad Spencer. The statements were taken seriously by both the recipient and adults with whom she turned to for advice. The statements frightened the individuals, and the juvenile would know that the statements would be ‘startling’. The facts of the case, when viewed in the totality of the circumstances, support the finding of the Trial Court that DJM violated state law as set out in Count I of the juvenile officer’s petition and committed what would be a class B misdemeanor of Peace Disturbance by threatening to commit a felonious act against any person under circumstances which are likely to cause a reasonable person to fear that such threat may be carried out.

Appellant’s comparison of adult penalty ranges and periods of incarceration are not relevant to the issue before this Court. Juvenile proceedings are in the juvenile’s interest.

Ultimately, this is a case about accountability and rehabilitation. During the course of this case Appellants have placed responsibility for DJM’s actions elsewhere rather than on DJM. The juvenile office has been blamed for handling the matter as a

delinquent violation rather than a status offense. The school has been blamed for allegedly failing to educate the juvenile properly and the students for picking on him. The juvenile's mental health status has been blamed for his 'failure to recognize social cues', although his therapist indicates he would be aware that his statements would be 'startling'. The complaining witness has been blamed for her manner of following directions of trusted adults and playing along with DJM in trying to determine the seriousness of his threats. Appellants at no time hold DJM accountable for his actions. At best, they state that they 'do not condone his messages'.

When a potentially harmful situation is presented, the juvenile court is authorized to act in order to prevent the deterioration of the child's situation, and is not required to wait until harm is done. *In the Interest of D.W.P.*, 110 SW3d 863 (Mo.App. E.D. 2003).

The action of the Trial Court was proper.

Respectfully Submitted,

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Certification of Scanned Disk

Comes now, Thomas P. Redington and certifies that the disk containing Respondent's brief has been scanned for viruses and it is virus free.

Certification of Word Count of Respondent's Brief

Comes now Thomas P. Redington and certifies that this Brief complies with the limitations contained in Rule 84.06(b), in that the Word Count for the Respondent's Brief is 7008 words, as calculated by the word count of the word-processing system used to prepare the Brief, and the number of pages of monospaced type is 32.

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**IN THE COURT OF APPEALS
EASTERN DISTRICT OF MISSOURI**

IN THE INTEREST OF: D.J.M.,	}	
A Minor	}	
	}	Cause No. ED89744
	}	
	}	

Affidavit of Service

Thomas P. Redington, being first duly sworn, deposes and states upon his oath that true and accurate copies of the annexed Respondent's Brief were served upon the juvenile at #9 Marcia Lane, Hannibal, Missouri 63401 (573) 406-0671; and counsel for the parents Branson L. Wood, 1001 Center Street, Hannibal, Missouri 63401 (573) 221-4255, by depositing two (2) copies of the same in the United States Mail, properly addressed to his business office and postage fully paid, also the disks were so served.

Affiant further states that the annexed documents were so served on the _____ day of _____, 200__.

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STATE OF MISSOURI }
 } ss
COUNTY OF MARION }

Subscribed and sworn before me this _____ day of _____, 200__.

Notary Public

Appendix

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