



May 21, 2008

VIA FAX AND U.S. MAIL

The Honorable ~~THOMAS B. P~~
Judge of the Dakota County District Court
Dakota County Judicial Center
1560 Highway 55
Hastings, MN 55033

RE: State of Minnesota v. L. J. B.
Court File Number: K9-07-~~1000~~
State v. Florence Probable Cause Hearing

Dear Judge ~~P~~:

This letter brief constitutes my argument in support of the motion to dismiss in the above-mentioned case. Thank you for your consideration in this matter.

INTRODUCTION

The above-titled matter came before the Honorable ~~THOMAS B. P~~, Presiding Judge of the District Court for an omnibus hearing on May 16, 2008. Defendant, ~~L. J. B.~~, was present and represented by Ryan P. Garry, Esq., and the State was represented by ~~J. A. B.~~ Assistant County Attorney. Defendant seeks an order from the court dismissing the complaint pursuant to *State v. Florence*, 239 N.W.2d 892 (Minn. 1976), for lack of probable cause.

Defendant is charged with *Terroristic Threats* in violation of Minn. Stat. §§ 609.713, subd. 1; 609.101. The charge stems from a December 3, 2007 complaint to the Apple Valley Police Department made by Defendant's sister (and "victim" in this case), E.M.M. E.M.M. made the complaint based on a letter she received three months earlier and an e-mail that was sent from Defendant to her sister. Defendant did not send the email directly to E.M.M. When the letter and the forwarded e-mail are read in their entirety and *not* taken out of context it is plain to see that Defendant's intention was to sit down with his siblings to sort out family issues, not to threaten or terrorize. Under the standard set forth in *Florence*, it is not fair or reasonable to make Defendant stand trial.

FACTS¹

In August 2007, Defendant and his siblings had a disagreement about their elderly mother's care and the disposition of her property. Defendant had power of attorney for his

¹The following facts were derived from the criminal complaint and the exhibits in evidence.

mother and was the sole caregiver. One particular disagreement involved the attempted sale of some land by Defendant who is the executor of his mother's will. On August 31, 2007, three months before E.M.M.'s complaint, Defendant wrote a letter to his mother, his sister Punky (a.k.a. E. S.), his sister A., his brother D. and his sister E. (a.k.a. E.M.M.). That letter discussed several family issues and pointed out various in-fighting between the siblings regarding the disposition of their mother's property. In the letter, Defendant described a disagreement he had with his brother D.. The letter stated:

You also took in lies form [sic] a different sibling and tried attacking me instead. So did Punky. But I turned around and *blew your head* off because that is what you need and that is what everyone is afraid to say, but me. Come clean or the letters you wrote get exposed to all.

(In referring to "blew your head off" Defendant did not, in fact, use a gun or weapon to dismember anyone's head or other body part). Defendant went on to state that their mother would be living as she wished:

Everyone think this way from now on or I am going to *blow your heads off too*. Mom gets to live as she wishes not as you would like her to live.

More than three months later on December 3, 2007, Defendant wrote an e-mail to his sister A. who forwarded the e-mail to E.M.M.. The email, like the letter, discussed several family issues and stated:

My turn. You were not around for quite a few of the times *I blew dads* [sic] *head off*. Nothing compared to what I am going to do to Punky; D., and E.. I only wish I could do it when the three of them are all together.

(Defendant did not take a firearm or any other weapon to dismember his father's head). In addition, two other pieces of relevant correspondence exist in this case. The first is an e-mail from Defendant's brother, D., to Defendant. In that e-mail, D. discussed several family issues and made the following statement to Defendant:

You seem to be looking for a triumph day when you can '*blow my head off*', [sic] as you have written *many times* and now say you did to dad. Mom knows that I will not come visit as long as you are there.

The final piece of relevant correspondence is an e-mail dated December 3, 2007, sent from Defendant to his brother D.. In the e-mail, Defendant carried through with his statement that he would "blow D.'s head off," calling him a "piece of shit human being:"

M. (D.'s son) is hurt because [sic] of you D. and you don't care. I talk to the kid quite often, you do not. He is a good kid and you are a piece of shit father. You are a piece [sic] of shit human being. There, *I just blew your head off*.

Of course, Defendant never blew (as in shoot with a gun) anyone's head off. Defendant has no history of violence.

ARGUMENT

1. A motion to dismiss pursuant to *State v. Florence* is properly before the court.

Where it is believed that the record developed by the time of the omnibus hearing fails to demonstrate the existence of probable cause, the defendant is free to move the court for dismissal for lack of probable cause pursuant to Minn. R. Crim. P. 11.03. *State v. Florence*, 239 N.W.2d 892, 900 (Minn. 1976). Though a probable cause hearing should not be used as a substitute for discovery, a defendant has a legitimate concern to resolve a case lacking in probable cause before trial. *Id.* at 898. If the defendant supports his motion by producing witnesses who give testimony which, if believed, would exonerate him, the court will have to base its decision upon "substantial evidence that would be admissible at trial" and limited hearsay evidence as described in Minn. R. Crim. P. 18.06, subd. 1. *Id.* at 900. "Substantial evidence" means evidence adequate to support denial of a motion for a directed verdict of acquittal². *Florence*, 239 N.W.2d at 902 n.21.

Minn. R. Crim. P. 26.03, subdivision 17(1), provides that the court "shall order the entry of a judgment of acquittal of one or more offenses charged in the tab charge, indictment or complaint if the evidence is insufficient to sustain a conviction of such offense or offenses." *Id.* Thus, if the record before the trial judge consists of the complaint and the police report, and the defendant produces a witness subject to cross-examination whose testimony, if believed, would exonerate the defendant³ and the prosecutor presents no rebuttal testimony, the motion will be granted unless there is substantial evidence in the record that would be admissible at trial to justify denying a motion for judgment of acquittal. *Florence*, 239 N.W.2d at 903. Ultimately, the court must address whether, given all the facts disclosed by the record, it is fair and reasonable to require the defendant to stand trial. *Id.* at 902.

2. It is not fair or reasonable to make the Defendant stand trial.

Here, the issue is whether it would be fair and reasonable to make Defendant stand trial for *Terroristic Threats* where the record demonstrates that the family members, including the alleged victim, understood Defendant's use of the phrase "blow your head off" to indicate his intention to sort out various family disagreements verbally, not with physical violence.

A person who "threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in reckless disregard of the risk of causing such terror" is guilty of making terroristic threats. Minn. Stat. § 609.713, subd. 1. To carry its burden the State must prove that the defendant: (1) threatened to commit a crime of violence; and (2) made that

² Motions for a directed verdict are abolished and motions for judgment of acquittal are used in their place. Minn. R. Crim. P., Rule 26.03, subd. 17(1).

³ Such a witness would include a witness to the offense who describes it in terms which, if true, demonstrate the absence of one or more essential elements of the crime charged. *Florence*, 239 N.W.2d at 903. Two witnesses testified that they received the same correspondence from Defendant and knew Defendant was not threatening them or trying to cause fear because the family uses the same or similar phrases to those used by Defendant to indicate an intention to verbally sort out disagreements with each other, not to threaten or cause fear.

threat with either (a) specific intent to cause extreme fear in another, or (b) reckless disregard of the risk that it would have that effect. *State v. Schweppe*, 237 N.W.2d 609, 613 (Minn. 1975).

“A threat is a declaration of an intention to injure another or his property by some unlawful act.” *Id.* The *context* in which a phrase is used determines whether it is threatening or harmless. *Id.* Thus, whether a statement is a threat depends on whether the communication in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor. *Id.*

The statute does not “authorize grave sanctions against the kind of verbal threat which expresses *transitory anger* which lacks the intent to terrorize.” *State v. Jones*, 451 N.W.2d 55, 63 (Minn. Ct. App. 1990), (alteration in original) (quotations omitted), *review denied* (Minn. Feb. 21, 1990). Intent is subjective, but it may be inferred from the surrounding circumstances. *Schweppe*, 237 N.W.2d at 614. The victim’s reaction to the threat may provide circumstantial evidence of intent. *Id.*

The backdrop of this case involves a tangled family dispute regarding the care of an elderly mother and the disposition of her property. The critical factor is that E.M.M. knew Defendant’s use of certain phrases was in no way a threat to her, yet she filed a complaint with the Apple Valley Police Department stating that she felt threatened by Defendant’s letter and email.

The four pieces of relevant correspondence, when not taken out of context, illustrate Defendant’s intention to resolve certain disagreements between himself and his siblings through words, not threats or physical harm. A simple English lesson shows that a reasonable person placed in the circumstances of this case would not interpret the phrases as E.M.M. purportedly did. The fourth full paragraph of the letter dated August 31, 2007, stated:

[b]ut I turned around and blew your head off because that is what you need and that is what everyone is afraid to say, but me.

The word “blew” is a past tense verb. Defendant was directing this language at his brother, D■■■■, who is still alive and who has never been shot in the head by Defendant. Thus, “blew your head off” in this context was a reference to a previous disagreement Defendant had with his brother. It was not a threat to commit a crime of violence.

*In the seventh full paragraph of the same letter Defendant stated:
[e]veryone think this way from now on or I am going to blow your heads off too.*

The word “too” in this context means *also*. Defendant used this phrase to tell his siblings that, like the time before with D■■■■, there would be a *verbal* confrontation to resolve any issues related to the care of their mother.

What Defendant was conveying to his family members in this letter, perhaps with poorly chosen words, is twofold: (1) he disagreed with some of his brother D■■■■’s choices and he

verbally "blew his head off" in the past; and (2) he felt their mother should be allowed to make her own choices and those siblings who did not agree would be verbally confronted so the issue may be resolved. However offensive this language would be to the average family, this family regularly uses such language to indicate a desire to verbally confront one another to resolve disputes. It was not a threat. Defendant's sister testified that she had heard Defendant use this language at least 25 times before and in front of the victim. Defendant had no intention of terrorizing his siblings. Further, because he was familiar with his family's use of the phrase, Defendant was not acting recklessly when he used the phrase when writing to his family.

The effect this language allegedly had on E.M.M. carries little weight here for two reasons. First, the use of such language was not uncommon in the family and family members testified that they understood that Defendant was indicating his desire to sit down and verbally confront his siblings. It follows that E.M.M., as a member of the family, understood Defendant was not threatening her. Second, E.M.M. possessed this letter for more than three months before complaining to anyone! Her lack of urgency illustrates that she did not feel threatened by this letter and certainly was not scared for her life. Thus, the State cannot rest on E.M.M.'s alleged fear when attempting to establish intent.

The e-mail dated December 3, 2007, which was not sent to E.M.M. by Defendant, also shows that Defendant's use of certain phrases was not meant to be a threat of physical harm, nor would any reasonable person interpret them as such. The e-mail stated:

[m]y turn. You were not around for quite a few of the times I blew dads [sic] head off. Nothing compared to what I am going to do to Punky, D and E. I only wish I could do it when the three of them are all together.

If taken out of context, it would seem that Defendant shot his father in the head several times and that he would be doing the same to several siblings when they are all together. However, Defendant never shot his father in the head and it is impossible to "blow someone's head off" more than one time! The true meaning of this phrase is the same as it was in the letter: (1) Defendant had a several prior disagreements with his father and he verbally "blew his head off" in the past; and (2) he wanted to verbally confront his other siblings at the same time to sort out various family matters, not to physically harm or terrorize them. Again, the meaning of the term "blew your head off" was well understood within the family to indicate a desire to verbally confront a family member. It was not a threat.

The third piece of relevant correspondence is an e-mail sent to Defendant by his brother D. The e-mail discusses various family issues and in the last paragraph David wrote:

[y]ou seem to be looking for a triumph day when you can 'blow my head off', [sic] as you have written many times and now say you did to dad.

D understood that Defendant's use of the phrase "blow your head off" indicated that he wanted to prove something to his brother by arguing with him over family issues. In the e-mail, D pointed out that this was not the first time Defendant used this language, yet he was not

concerned about his safety and he did not go to the police; he knew Defendant was not threatening him.

The most telling piece of evidence in this case is an e-mail Defendant sent to his brother D■■■■ on December 3, 2007, the same day E.M.M. received the forwarded e-mail that is quoted in the criminal complaint. In the e-mail Defendant discussed several family issues including his opinion regarding D■■■■'s ability to be a good father. Defendant stated:

M■■■ is hurt becasue [sic] of you D■■■ and you don't care. I talk to kid quite often, you do not. He is a good kid and you are a piece of shit father. You are a pice [sic] of shit human being. There, I just blew your head off.

Obviously, it is impossible to shoot someone in the head via an e-mail message, yet Defendant stated "[t]here, I just blew your head off." This e-mail clearly establishes that Defendant's use of the phrase "blow your head off" meant that he was going to "blow off steam" and put his siblings "in their place" verbally, not by committing a crime of violence or causing extreme fear. In this e-mail he "blew D■■■■'s head off" by telling him that he is not a good father or a good person. The phrase has nothing to do with a threat to harm anyone, and Defendant's siblings knew this.

Not only do the exhibits establish the true meaning behind Defendant's use of the phrase "blow your head off," but the evidence produced at the omnibus hearing established that: (1) Defendant is not a violent person; (2) those in the family use the phrase "blow your head off," or similar terminology to refer to a verbal argument, nothing more; (3) E.M.M., as a member of the family, knew the language in the correspondence was not threatening, and had heard it many times before and (4) the siblings referred to in the correspondence understood Defendant's use of the terminology, as he had used many times in the past, and they were in no way threatened. The critical issue is the Defendant's intent, which is lacking, and not the victim's alleged fear.

Under the standard set forth in *Florence*, it cannot be said that there is substantial evidence in the record that would be admissible at trial to justify denying a motion for judgment of acquittal in this case. It would not be fair or reasonable to require Defendant to stand trial for a charge of *Felony Terroristic Threats* based on statements that were not threats, were not made with the intent to cause extreme fear and were not made with a reckless disregard that they would cause such fear.

CONCLUSION

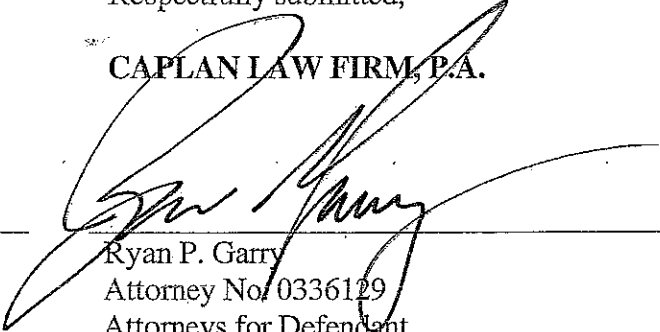
For the reasons stated above, it would not be fair or reasonable to make Defendant stand trial and this Court should grant Defendant's motion to dismiss pursuant to *Florence* for lack of probable cause.

Respectfully submitted,

CAPLAN LAW FIRM, P.A.

Dated: _____

5/21/08



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cc: ~~John B. Blomquist~~, Assistant County Attorney
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