

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

State of Minnesota,

District Court Files No. K9-07-3872

Plaintiff,

v.

ORDER

L. J. B.

Defendant.

The above entitled matter duly came on for contested omnibus hearing before the undersigned Judge of District Court at the Dakota County Judicial Center, Hastings, Minnesota, on May 16, 2008, pursuant to Defendant's Notice of Motion and Motion to Dismiss the Complaint in District Court File No. K9-07-3872 for Lack of Probable Cause and pursuant to *State v. Florence*, 239 N.W.2d 892, 896 (Minn. 1976).

J. B., Assistant County Attorney, appeared for and on behalf of the State of Minnesota. Ryan P. Garry, Esq., appeared with and on behalf of Defendant.

The Court heard testimony from Defendant L. J. B. ("Defendant") and one of his sisters, E. M. S., who traveled to Minnesota from New Hampshire to testify in this omnibus hearing. The Court admitted into evidence four items of correspondence, including letter dated August 31, 2007 from Defendant to his Mother, his sister E. (also known as "Punky"), his sisters A. and EMM (the complainant herein), and brother D. ("Exhibit 1"); another e-mail dated December 3, 2007, containing correspondence between Defendant and his sister A. ("Exhibit 2"); an undated e-mail from Defendant's brother D. to Defendant ("Exhibit 3"); and e-mail dated December 3, 2007 from Defendant to his brother D. ("Exhibit 4"). The

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CAROLYN M. RENN, Court Administrator

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BY  DEPUTY

Court also admitted into evidence the affidavits of two of Defendant's sisters, namely, A. M. [REDACTED] J. [REDACTED] ("Ms. J. [REDACTED]") and Ms. S. [REDACTED]. Finally, the Court received into evidence the affidavit of Defendant's maternal aunt, J. M. [REDACTED] ("Ms. M. [REDACTED]"). The Court carefully reviewed and considered all testimony and exhibits.

The Court left the matter open for submission of additional briefs and took the matter under advisement May 23, 2008.


NOW, THEREFORE, the Court, having considered all of the testimony, exhibits, files, records and proceedings herein, together with the argument of counsel, and being fully advised in the premises, makes the following:

ORDER

1. That Defendant's motion to dismiss the Complaint in District Court File No. K9-07-3872 is **GRANTED**.
2. That all charges brought against Defendant by the State in District Court File No. K9-07-3872 are hereby **DISMISSED**. There is insufficient probable cause to proceed.
3. That the attached Memorandum is incorporated by reference herein and constitutes the Findings of Fact, Conclusions of Law, and rationale for this Court's Order.

DATED: June 20, 2008

BY THE COURT:



TERRANCE P. [REDACTED]
Judge of District Court

MEMORANDUM

Defendant has been charged by Complaint with one count of Terroristic Threats in violation of Minnesota Statutes section 609.713, subdivision 1, which provides, in pertinent part:

Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, vehicle or facility of public transportation or otherwise to cause serious public inconvenience, or in a reckless disregard of the risk of causing such terror or inconvenience may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both.

The Complaint states that Defendant's sister, EMM, arrived at the Apple Valley Police Department on December 3, 2007 and presented officers with two pieces of correspondence. One was a letter sent to EMM at her home by Defendant and addressed to EMM and her various siblings; it referred to family problems and indicated that everyone should "think this way from now on or I'm going to blow your head off too." EMM also presented law enforcement with an e-mail forwarded to her by another of her siblings, who had been the original recipient of the e-mail. The forward contained the language, "You were not around for quite a few of the times I blew dad's head off. Nothing compared to what I am going to do to P____, D____ and E____ (victim). I only wish I could do it when the three of them are all together." EMM informed the officers that Defendant has an extensive gun collection and that she is frightened of him.

The Court has carefully reviewed all of the applicable facts and law and is compelled to conclude that this case must be dismissed and that it would be unfair and unreasonable to require Defendant to stand trial.

A threat is a declaration of an intention to injure another or his property by some unlawful action. The test of whether words or phrases are harmless or threatening is the context in which they are used. Thus, the question of whether a given statement is a threat turns on whether the "communication" "in its context" would "have a reasonable tendency to create apprehension that its originator will act according to its tenor.

State v. Schweppe, 237 N.W.2d 609, 613 (Minn. 1975). In applying this standard, and in examining the context of the statements made by Defendant, there can be no question that the evidence admitted shows that the phrase employed by Defendant, while inelegant and thoughtless, was nonetheless harmless.

Defendant and his siblings are embroiled in an internecine struggle over their mother's care, with Defendant holding power of attorney over his mother's affairs. Defendant, angered over various family issues, mailed to four of his siblings, including EMM, a strongly worded letter expressing his outrage. The letter was dated August 31, 2007. (*Exhibit 1*) In it, Defendant

specifically referenced his anger over the actions of his brother D■■■■ and sister E■■■■, and said, "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." Two things are made clear in reading this statement. First, Defendant wrote this remark in the past tense; D■■■■ and E■■■■ are still alive, and EMM is well aware of this. Second, Defendant used the phrase, "what everyone is afraid to say, but me" *after* referencing the allegedly threatening statement, thus clarifying that Defendant's reference to "[blowing] your head off" actually referred to Defendant making a statement, or reading his siblings the proverbial riot act.

Shortly thereafter, the August 23, 2007 letter adds, "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." The State urges that this, too, constitutes threatening language. But the Court must read the letter in its totality and will not read isolated statements without giving them context, and when it does so, it is clear that the statement is not threatening, but is harmless. Defendant is not threatening to commit a crime of violence with the intention of terrorizing his siblings; *he is telling them that he will not hesitate to tell them exactly what his opinion of them truly is!* (Emphasis added.) The communications cited in the Complaint speak for themselves and do not establish probable cause for the Complaint. As for the State's assertion that EMM was frightened by the communications and that Defendant has an extensive gun collection, the Court notes that one of the communications relied on was over four months old at the time of charging, and further, "The effect of a terroristic threat on the victim is not an essential element of the statutory offense." *Id.* at 614.

The State also asserts that the perceptions of family members are unimportant, and that is true to an extent. However, the Court is commended by *Schweppe* to examine communications in their context, and thus cannot overlook entirely the testimony and affidavit evidence which establish that it was known to family members *generally* that Defendant commonly employed the phrase "blow your head off" as an unusual and inflammatory synonym or substitute for saying that he intended to dress someone down. (Emphasis added.) Given the context, history and course of communication between and among all of these siblings, the Court cannot conclude that the communications cited in the Complaint had a reasonable tendency to create in EMM an apprehension that he would act according to their tenor. Defendant's sister E■■■■ testified specifically to this fact, testifying that she had heard Defendant use the term "blow your head off" on numerous occasions and that she understood it to be a harmless phrase. E-mail between Defendant and his sister Ann shows that on December 3, 2007, Defendant wrote, "You were not around for quite a few of the times I blew [sic] dad's head off." (*Exhibit 2*) EMM was not privy to this particular e-mail, the Court will look to it in the most general sense for context. First, it is clear that Defendant could not have murdered his father by "blowing his head off" on multiple occasions, although that is what a literal reading of the text – urged by the State as to the August 30, 2007 correspondence – would indicate with the usage of the term "quite a few of the times." Second, the Defendant's father died of an aneurism; Defendant did not murder him.

Further, in an undated e-mail written in response to Defendant's inflammatory August 30,

2007 letter, Defendant's brother D■■■ wrote, "You seem to be looking for a triumph day when you can "blow my head off," as you have written many times and now say you did to dad." (*Exhibit 3*) Defendant's brother therefore acknowledged that Defendant had used the phrase "blow [your] head off" many times and that the phraseology was not one of violence; "that you now say you did to dad" implies that Defendant's father was not harmed by Defendant, and that the "triumph day" sought by Defendant is one wherein he can confront his siblings in some verbal fashion. Defendant later composed an e-mail to his brother D■■■ as well, in which he first wrote, tellingly, "I have told others this so it is public knowledge [sic] to, I don't ever want to see you guys again." He later added, "You are a [sic] pice of shit human being. There, I blew your head off." Again, this statement clarifies that the phrase "blew your head off" refers to an oral or written blitzkrieg and not a crime of violence. Defendant concluded the letter – again, revealingly – with the statement, "If it makes you guys feel better, tell me when you are going [to see Defendant's mother] and I will avoid it." Again, EMM was not privy to this particular e-mail, but the Court can look to it in the most general sense for context while relying on the communications cited in the Complaint to provide the framework and the bulk of the its analysis.

One thing that is certain in this case is that Defendant chooses his words poorly. It is inadvisable to tell people that you are going to "blow their heads off" when you intend to dress them down. But given that the context of Defendant's communications did not and could not have had a reasonable tendency to create an apprehension that he would act according to their tenor, and because his actions reflected neither an intentional nor a willful disregard of the risk of causing terror to EMM, the Court must grant Defendant's motion and dismiss all charges for utter lack of probable cause.

TP