COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2018 CR 00930**
vs.	:	**Judge McBride**
JACOB A. BRAGG	:	**DECISION/ENTRY**
Defendant	:	

Robert D. Barbato, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Soroka & Associates LLC, Roger Soroka, Joshua Bedtelyon, and Aaron Jones, counsel for the defendant Jacob A. Bragg, 503 South Front Street, Suite 205, Columbus, Ohio 43215.

This case came before the court for a bench trial on February 19, 2019. At the conclusion of the trial, the court took the issues raised in the case under advisement.

The defendant Jacob A. Bragg was indicted in Case No. 2018 CR 00930 on October 4, 2018 on one count of telecommunications harassment in violation of R.C. 2917.21(B)(2), a misdemeanor of the first degree.

On February 19, 2019, before the trial began, the defendant knowingly, intelligently, and voluntarily waived his right to a jury trial.

Upon consideration of the record of the proceedings, the evidence presented for the court's consideration, the oral arguments of counsel, and the applicable law, the court now renders this written decision.

FINDINGS OF FACT

The charge in this case arises from a post made to the social media platform Facebook on September 15, 2018. The defendant Jacob Bragg is a social worker in Columbus, Ohio who works in his job with children. He read an article concerning State Representative John Becker, who resides in Union Township, Clermont County, Ohio. The article included commentary from Becker about an eleven year old girl who had been tased by police for shoplifting. Becker was quoted as saying that the girl must have been a punk or somehow deserved to be tased.

The defendant was angry and disappointed that a state representative would make such a statement about children. The defendant did not know Becker and had never previously had any conversations or contact with him.

While at work on a break, the defendant posted the article to his own Facebook page, which was viewable to the public.[1] The post featured the article with a picture of Becker. The defendant included his own commentary at the top: "Someone please kill this piece of shit. Y'all want me to believe in a government where people like this are put in power?"[2]

At the time the defendant made the Facebook post, he was not Facebook friends with Becker. Because Becker also used Facebook, and his privacy settings were set to "public," the defendant could have tagged Becker in his post. Had he tagged Becker, Becker would have received a notification that the defendant made the post, and then he could have clicked a link to see it. The defendant also could have directly messaged

[1] State's Ex. 1.
[2] State's Ex. 1.

Becker on Facebook, or could have communicated directly with him in another manner, but he did not do so.

The defendant then resumed his work duties. About a half an hour to an hour later, the defendant sent Becker a friend request. He noticed that Becker engaged in some political dialogues with persons, including persons that he disagreed with, on his Facebook page. The defendant wanted to have a dialogue about the article he read, to see if Becker actually meant what he said about police brutalizing children.

At the time, Becker was at his home in Union Township. Shortly after the defendant sent him a Facebook request, Becker noticed it. As is customary for Becker, before adding the defendant to be his friend, he looked at the defendant's Facebook page. Becker saw at the top of the defendant's Facebook wall the post concerning the article and the statement the defendant made. According to Becker, he immediately became alarmed and interpreted the post to be a solicitation to have him assassinated. Becker took a screen shot of the post and contacted Union Township Police Department. Becker blocked the defendant on Facebook, and the two did not have any further contact.

On October 4, 2018, the defendant was indicted for telecommunications harassment in violation of R.C. 2917.21(B)(2), misdemeanor of the first degree.

STANDARD OF REVIEW

In a criminal case, it is the state's burden to prove the defendant's guilt beyond a reasonable doubt.[3] R.C. 2901.05(E) describes reasonable doubt as follows:

[3] R.C. 2901.05(A).

> "'Reasonable doubt' is present when the [triers of fact], after * * * carefully consider[ing] and compar[ing] all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs."

Further, "[i]t is axiomatic that the state must prove each and every element of an offense * * *."[4]

As the trier of fact, the court "* * * makes the determinations of credibility and the weight to be given to the evidence."[5] The trier of fact is in the best position to take into account any inconsistencies of evidence, "along with manner and demeanor to determine witness credibility," and is free to believe or disbelieve all or any of the testimony.[6]

LEGAL ANALYSIS

The defendant has been charged with one count of telecommunications harassment in violation of R.C. 2917.21(B)(2), a misdemeanor of the first degree. R.C.

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[4] *State v. Jones*, 91 Ohio St. 3d 335, 347, 744 N.E.2d 1163 (2001). *See State v. Brown*, 12th Dist. Warren No. CA2006-10-120, 2007-Ohio-5787, ¶ 29 ("The state has a duty to present evidence, beyond a reasonable doubt, as to each and every element of the crime as set forth in the indictment.")

[5] *State v. Burrell*, 12th Dist. Fayette No. CA2016-04-005, 2016-Ohio-8454, ¶ 22, citing *State v. Clements*, 12th Dist. Butler No. CA2009-11-277, 2010-Ohio-4801, ¶ 20. *See State v. Shaver*, 12th Dist. Butler No. CA90-12-241, 1991 WL 170164, *3 (Sept. 3, 1991), citing *State v. Thomas*, 70 Ohio St.2d 79, 434 N.E.2d 1356 (1982) (stating that "it is the accepted rule in Ohio that the weight to be given evidence and the credibility of the witnesses in a criminal proceeding are primarily for the trier of fact.").

[6] *State v. Cope*, 12th Dist. Butler No. CA2009-11-284, 2010-Ohio-6430, ¶ 47, citing *State v. Johnson*, 10th Dist. Franklin No. 10AP-137, 2010-Ohio-5440, ¶ 18.

2917.21(B)(2) criminalizes telecommunications harassment as follows: "No person shall knowingly post a text or audio statement or an image on an internet web site or web page for the purpose of abusing, threatening, or harassing another person."[7] "Since at least 2008, Ohio courts have found that definition of telecommunication to encompass posts on the internet."[8]

R.C. 2917.21(B)(2), as quoted, requires two different mental states. First, the telecommunication must have been posted knowingly. The mental state "knowingly" is described as follows: "* * * A person has knowledge of circumstances when the person is aware that such circumstances probably exist. * * *"[9] "To act knowingly, a defendant merely has to be aware that the result may occur."[10]

Second, the telecommunication must have been made with the purpose to harass, intimidate, or abuse. "A person acts purposely when it is the person's specific intention to cause a certain result * * *."[11] "The critical inquiry of telecommunications harassment is not whether the recipient of the communication was in fact threatened, harassed, or annoyed by the communication, but rather, whether the purpose of the person who made

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[7] R.C. 2917.21(B)(2).
[8] *Plunderbund Media, L.L.C v. DeWine*, 6th Cir. No. 18-3270, 2018 WL 6179539, *5 (Nov. 27, 2018).
[9] R.C. 2901.22(B).
[10] *State v. Fox*, 12th Dist. Fayette No. CA2008-03-009, 2009-Ohio-556, ¶ 13, citing *State v. Nutekpor*, 6th Dist. Wood No. WD-5-062, 2006-Ohio-4641, ¶ 15.
[11] R.C. 2901.22(A).

the communication was to abuse, threaten, or harass the person called."[12] Thus, "R.C. 2917.21(B) must be proven in terms of the defendant's purpose."[13]

"In the absence of direct evidence, a defendant's purpose or intent to threaten, harass, or abuse may be established by the facts and circumstances surrounding the communication."[14] "Although intent can be inferred from relevant circumstantial evidence, such an inference will not support a conviction if it is based on the mere stacking of inference upon inference."[15]

In *State v. Klingel*, 2017-Ohio-1183, 88 N.E.3d 455 (9th Dist.), the defendant was convicted of telecommunications harassment under R.C. 2917.21(B) for Facebook posts. In *Klingel*, the defendant had a grudge against a police officer in the Lorain Police Department following an investigation of him. He posted on his own Facebook page: "This is to any law enforcement agent looking at my page we will not back down we demand you to take off your badges your weapons you will comply or be compelled to comply."[16] He then posted a status update that stated, "Death to the police." Subsequently, Klingel posted a status update asking, "So who is down to kill some cops

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[12] *City of Hamilton v. Combs*, 12th Dist. Butler No. CA2018-02-026, 2019-Ohio-190, ¶ 20, citing *State v. Kronenberg*, 8th Dist. Cuyahoga No. 101403, 2015-Ohio-1020, ¶ 15. *See State v. Patel*, 7th Dist. Belmont No. 03 BE 41, 2004-Ohio-1553, ¶ 7, citing *State v. Bonifas*, 91 Ohio App.3d 208, 211–212, 632 N.E.2d 531 (3d Dist. 1993) (opining that "the key issue is not whether the alleged victim is annoyed or otherwise affected" by the communication, but rather "the purpose" of the defendant "is at the heart of the offense."); *State v. Jervis*, 5th Dist. Licking No. 13-CA-97, 2014-Ohio-3218, ¶ 21 (holding same).

[13] *State v. Davidson*, 12th Dist. Preble No. CA2009-05-014, 2009-Ohio-6750, ¶ 17, citing *Bonifas*, 91 Ohio App.3d at 211-212.

[14] *Combs*, 2019-Ohio-190 at ¶ 20, citing *Kronenberg*, 2015-Ohio-1020 at ¶ 13. *See State v. Harshbarger*, 3d Dist. Auglaize No. 2-09-19, 2010-Ohio-4413, ¶ 23, quoting *State v. Treesh*, 90 Ohio St.3d 460, 484-85, 2001-Ohio-4, 739 N.E.2d 749 ("Because the intent of an accused dwells in his or her mind and can never be proved by the direct testimony of a third person, it must be gathered from the surrounding facts and circumstances.").

[15] *Harshbarger*, 2010-Ohio-4413 at ¶ 23, citing *State v. Cowans*, 87 Ohio St.3d 68, 78, 717 N.E.2d 298 (1999).

[16] State v. Klingel, 2017-Ohio-1183, 88 N.E.3d 455, ¶ 13 (9th Dist.).

I want to arrange where we can all kill some at a certain time hit me up if you want in lets make a statement that they cannot do this shit anymore[.]"[17] Klingel also posted several messages directed toward the FBI wherein he asked for "help," gave a phone number, and suggested that communicating with him might help to save lives.[18] A Facebook friend of the defendant's reported the posts to the FBI.

On appeal, the defendant argued that he had no idea that his comments would reach the police or FBI.[19] However, the appellate court found this argument unavailing: "The language used by Klingel in his posts evidences the fact that Klingel made these telecommunications with the assumption that law enforcement officials were looking at his page. Given the grave nature of the statements, it is readily apparent that Klingel acted with purpose to threaten the lives of law enforcement officials."[20] As such, the appellate court affirmed the conviction.

By contrast, in *State v. Ellison*, 178 Ohio App.3d 734, 2008-Ohio-5282, 900 N.E.2d 228 (1st Dist.), the court found that a defendant's conviction for telecommunications harassment under R.C. 2917.21(B) for a post on the social media platform MySpace was not supported by sufficient evidence. In *Ellison*, the defendant posted on her MySpace page a picture of the victim that she captioned, "Molested a little boy," and she stated in her personal profile that she hated the victim.[21] The defendant's MySpace profile was public, rather than private, and direct messages could be sent on MySpace.[22] The

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[17] Id.
[18] Id.
[19] Id. at ¶ 18.
[20] Id. at ¶ 19.
[21] *State v. Ellison*, 178 Ohio App.3d 734, 2008-Ohio-5282, 900 N.E.2d 228, ¶ 3 (1st Dist.).
[22] Id.

defendant never directly communicated with the victim over the internet, but the victim felt harassed by the post.[23]

On appeal, the defendant argued that the lack of direct communication with the victim contradicted the assertion that she intended to harass the victim in her post.[24] The court observed that R.C. 2917.21 "creates a specific-intent crime: the state must prove the defendant's specific purpose to harass. The burden is not met by establishing only that the defendant knew or should have known that her conduct would probably cause harassment. The legislature has created this substantial burden to limit the statute's scope to criminal conduct, not the expression of offensive speech."[25] The court resolved that the state had failed to prove specific intent, in part because the defendant never directed the telecommunication to the victim, despite her opportunity to do.[26] As such, the conviction was reversed.[27]

In turning to the present case, the court concludes that the state has failed to prove each and every element of telecommunications harassment beyond a reasonable doubt. The defendant readily admitted that he knowingly posted on Facebook about Becker in connection with the news article. However, he testified that he did not do it for the purpose of abusing, threatening, or harassing Becker. Instead, he testified that he was angry and frustrated. Also, the defendant did not think the post would be construed as a threat, although he understands in hindsight why it was.

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[23] Id. at ¶ 6.
[24] Id. at ¶ 14.
[25] Id. at ¶ 15.
[26] Id. at ¶ 16.
[27] Id. at ¶ 18.

It was a half hour or an hour later when the defendant, according to his testimony, sent Becker a friend request, and according to the defendant, it was for the purpose of being able to write on Becker's Facebook page and to have a dialogue with him about why he made certain comments in the article. It should be noted that this time frame was unrebutted in the evidence presented by the state.

After considering all of the evidence, the court finds the defendant's testimony credible and believes that, at the moment the defendant posted on Facebook about Becker, he did not have the specific intention to abuse, threaten, or harass Becker. Without question, the defendant did not give adequate consideration to the effect and alarm his words might have if they were later seen by Becker or someone else. However, under the statute, the crucial time in determining the defendant's specific intent is when he made the post to his Facebook book page, not a half-hour or an hour later.

At the time of the Facebook post, the defendant was not Facebook friends with Becker, and the court is not persuaded that the defendant intended for Becker to see the post at the time he made it. If in fact the defendant intended to abuse, threaten, or harass Becker in posting the article and the picture of Becker, he could have tagged Becker in the post or could have sent him a direct message to ensure that he would see the comment. Instead, the defendant made a disturbing comment that Becker discovered upon receiving the defendant's friend request, which understandably alarmed Becker for his safety. However, as explained, the critical inquiry of telecommunications harassment is not whether the victim was in fact threatened, harassed, or annoyed by the communication, but rather, whether the purpose of the defendant, at the time of the

posting, was to abuse, threaten, or harass the victim.[28] Because the state has failed to prove the defendant's intent beyond a reasonable doubt, the court finds him not guilty of telecommunications harassment under R.C. 2917.21(B).

CONCLUSION

For the foregoing reasons, the court finds that the state has not proven the defendant guilty beyond a reasonable doubt of committing telecommunications harassment under R.C. 2917.21(B)(2). The defendant is hereby acquitted of the charge against him.

IT IS SO ORDERED.

DATED: 3-19-19

Judge Jerry R. McBride

[28] *Combs*, 2019-Ohio-190 at ¶ 20, citing *Kronenberg*, 2015-Ohio-1020 at ¶ 15.

CERTIFICATE OF SERVICE

I certify that copies of the within Entry have been provided on this 19th day of March 2019 by e-mail to Robert D. Barbato, Assistant Prosecuting Attorney, at rbarbato@clermontcountyohio.gov, and to Aaron M. Jones, Attorney for the Defendant, at Aaron@sorokalegal.com.

Judicial Assistant to Judge McBride