STATE OF CONNECTICUT *v.* STEPHEN J. KRIJGER
(AC 31216)

Harper, Lavine and Alvord, Js.

Argued January 6—officially released August 2, 2011

(Appeal from Superior Court, judicial district of New London, geographical area number ten, Frechette, J.)

Richard E. Condon, Jr., assistant public defender, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's

attorney, and *Sarah E. Steere*, senior assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Stephen J. Krijger, appeals from the judgment of conviction, rendered after a jury trial, of threatening in the second degree in violation of General Statutes § 53a-62 (a) (3) and breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (3). The defendant claims that the evidence was insufficient to establish that the statements on which his conviction was based constituted "true threats" as required for conviction under §§ 53a-62 (a) (3) and 53a-181 (a) (3), rather than protected speech under the first amendment to the United States constitution, as applied to the states through the fourteenth amendment. We disagree and affirm the judgment of conviction.

The jury reasonably could have found the following facts. The defendant's conviction arises out of statements that he made to the victim, Nicholas Kepple, the town attorney for Waterford, outside the New London Superior Court on July 21, 2008. The defendant had been involved in a legal dispute with the town of Waterford (town) since the mid-1990s due to various zoning violations relating to the accumulation of debris on his property located at 18 Totoket Road in the Quaker Hill section of Waterford. In 1996, the town obtained a permanent injunction barring the defendant from violating the town's zoning regulations. Subsequently, the town obtained a court order granting it permission to enter the defendant's property to clean up the debris. The court granted the town a $17,000 lien in order to obtain payment from the defendant for the cleanup costs. Kepple first became involved in the dispute in 2000 while representing the town during the defendant's appeal from the court's order granting the lien. See *Waterford* v. *Krijger*, 66 Conn. App. 903, 786 A.2d 544 (2001). In 2003, the town foreclosed on the judgment lien and a lien for unpaid taxes, and the defendant paid the full amount owed, $32,000, representing $25,000 for the cleanup fees and interest, and the remainder for unpaid taxes.

After paying the judgment lien, the defendant continued to violate the injunction from 2003 until 2008, prompting Kepple to file a motion for contempt. The defendant's continued noncompliance resulted in multiple occasions where both Kepple and the defendant appeared in court. In addition, Kepple and various zoning enforcement officers visited the defendant's property forty to fifty times in regard to his continued noncompliance with the permanent injunction. Kepple testified that during his interactions with the defendant on these occasions, the defendant had always been "pleasant and cooperative . . . ."

On July 21, 2008, the defendant, representing himself, appeared in court in response to Kepple's request, on

behalf of the town, that the court hold the defendant in contempt and fine him $150 per day for violations of the permanent injunction that occurred between September, 2007, and July, 2008. Kepple represented the town at the hearing, and Michael Glidden, a zoning enforcement officer for the town, testified regarding the zoning violations. At the conclusion of the hearing, the judge did not make an immediate ruling but did indicate that he would be imposing fines on the defendant for violating the permanent injunction and failing to comply with the zoning regulations. The defendant was upset by this outcome, as he was under the impression that the town would not seek fines as long as he agreed to comply with the zoning regulations.

After the hearing, the defendant followed Kepple out of the courtroom, and the two men exchanged words. During this exchange, the defendant expressed his anger over the town's decision to seek fines and called Kepple a "liar" and an "asshole." The defendant continued to follow Kepple and Glidden as they exited the courthouse. The defendant appeared angry; his face was red and there was spit in the corner of his mouth. The defendant then stated to Kepple, "More of what happened to your son is going to happen to you," to which Kepple replied, "What did you say?" to which the defendant responded, "I'm going to be there to watch it happen."[1] Kepple then responded by saying, "You piece of shit," prompting the defendant to respond by calling Kepple a "piece of shit." Kepple then stated, "But who has got your $25,000, bitch?"[2]

To place the defendant's statements in context, the following facts regarding Kepple's son are relevant. Kepple's only son had been injured in a car accident several years prior while he was an officer with the Groton town police department. The accident left Kepple's son with broken ribs and broken teeth as well as severe brain damage resulting in an inability to use the right side of his body as well as cognitive and motor impairments.[3] The accident was highly publicized in local newspapers at the time it occurred. Additionally, local newspapers published articles after the accident reporting on the progress of Kepple's son's recovery. Kepple testified that he did not recall if he had ever discussed his son's accident with the defendant; however, he opined that it was entirely possible, given the years of interactions with the defendant and the fact that "hundreds and hundreds" of people had asked Kepple about his son's condition in the years following the accident.

Kepple believed that the situation would escalate quickly if he did not leave the scene, so he and Glidden crossed the street. Once out of earshot of the defendant, Glidden stated to Kepple: "I think he just threatened you." Glidden testified that in response to his statement, "[Kepple] sort of didn't say anything to me, like, no,

no, no, not really." The two then briefly discussed other zoning enforcement cases they were working on and parted ways. The defendant, however, proceeded to follow Glidden to his vehicle in the parking garage. Although the defendant was apologizing to Glidden, Glidden nonetheless felt concerned for his safety and kept his hand on his cell phone until he got in his car, feeling that he may need to quickly dial 911.

On July 23, 2008, Kepple filed a complaint with the New London police department. The defendant was arrested and, on May 15, 2009, after a jury trial, was found guilty of threatening in the second degree in violation of § 53a-62 (a) (3) and breach of the peace in the second degree in violation of § 53a-181 (a) (3). On May 20, 2009, the defendant was sentenced to a total effective term of eighteen months imprisonment, execution suspended after 150 days, followed by two years of probation. This appeal followed.

The defendant claims that there was insufficient evidence to establish that his statements to Kepple constituted "true threats" as required for conviction under §§ 53a-62 (a) (3) and 53a-181 (a) (3), rather than constitutionally protected speech.[4] We begin by setting forth our standard of review. "The standard of review we [ordinarily] apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In [*State* v.] *DeLoreto*, [265 Conn. 145, 827 A.2d 671 (2003)] however, [our Supreme Court] explained that [t]his [c]ourt's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated. . . . In cases [in which] that line must be drawn, the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the [f]irst [a]mendment . . . protect. . . . We must [independently examine] the whole record . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. . . . *New York Times Co*. v. *Sullivan*, 376 U.S. 254, 285, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). [Our Supreme Court] . . . reiterated this de novo scope of review in free speech claims in *DiMartino* v. *Richens*, 263 Conn. 639, 661–62, 822 A.2d 205 (2003) . . . ." (Citation omitted;

internal quotation marks omitted.) *State* v. *Cook*, 287 Conn. 237, 254–55, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). "Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the opportunity to observe the demeanor of the witnesses . . . the reviewing court must examine for [itself] the statements in issue and the circumstances under which they were made" to determine if they are protected by the first amendment. (Citation omitted; internal quotation marks omitted.) *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 688, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989).

"The First Amendment, applicable to the States through the Fourteenth Amendment, provides that Congress shall make no law . . . abridging the freedom of speech. The hallmark of the protection of free speech is to allow free trade in ideas—even ideas that the overwhelming majority of people might find distasteful or discomforting. . . . Thus, the First Amendment ordinarily denies a State the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence. . . . The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech. . . .

"The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. . . . The First Amendment permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (Internal quotation marks omitted.) *State* v. *DeLoreto*, supra, 265 Conn. 153–54.

So-called "true threats" are among the limited areas of speech which properly may be restricted without violating the protections of the first amendment. "True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. . . . *Virginia* v. *Black*, 538 U.S. 343, 359–60, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). . . .

"[A]s expansive as the first amendment's conception of social and political discourse may be, threats made with specific intent to injure and focused on a particular individual easily fall into that category of speech deserv-

ing no first amendment protection. . . . Thus, we must distinguish between true threats, which, because of their lack of communicative value, are not protected by the first amendment, and those statements that seek to communicate a belief or idea, such as political hyperbole or a mere joke, which are protected. . . .

"In the context of a threat of physical violence, [w]hether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . A true threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment. . . . Moreover, [a]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." (Citations omitted; internal quotation marks omitted.) *State* v. *DeLoreto*, supra, 265 Conn. 153–56.

After a thorough and independent review of the statements and the circumstances under which they were made, we conclude that the defendant's statements to Kepple constituted true threats and as such were not protected by the first amendment. In light of the circumstances, a reasonable speaker would foresee that the statements, "[m]ore of what happened to your son is going to happen to you," and, "I'm going to be there to watch it happen," when spoken to a listener whose son had suffered serious and life-altering physical injuries, would cause the listener to believe that he will be subjected to physical violence upon his person. A reasonable speaker would foresee that Kepple would interpret these words to mean that the defendant was going to take a series of actions that would culminate with the defendant "be[ing] there to watch it happen" when Kepple suffered severe physical injuries similar to those that were suffered by his son.[5]

The defendant contends that his statements cannot be considered true threats because they were not as direct as those statements that this court and our Supreme Court have held to be true threats in prior cases. See *State* v. *Cook*, supra, 287 Conn. 255 (holding that " '[t]his [table leg] is for you if you bother me anymore' " was true threat); *State* v. *DeLoreto*, supra, 265 Conn. 145 (holding that "I'll kick your ass"; "I'm going to kick your ass, punk"; "Come on, right now"; and, "I'm going to kick your ass," constituted true threats [internal quotation marks omitted]); *State* v. *Gaymon*, 96 Conn. App. 244, 899 A.2d 715 (holding that " 'I'm going to kick your fucking ass' " was true threat), cert. denied, 280 Conn. 906, 907 A.2d 92 (2006). We do not agree with the defendant's contention that his decision to threaten Kepple by referencing Kepple's

son's tragedy, rather than overtly describing the injuries he would witness Kepple suffer, removes his statement from the realm of true threats. A reasonable speaker would nonetheless foresee that Kepple would interpret the statements as a serious expression of an intention to harm or assault.

The entire factual context surrounding the defendant's statements, including the reaction of listeners, supports our conclusion that the defendant's statements were true threats, and not a mere joke or hyperbole. The defendant's statements were a specific threat, directed at a specific individual to whom the defendant was speaking. The defendant followed Kepple and Glidden out of the courtroom after a hearing where, due to what the defendant perceived to be Kepple's decision to seek fines, the defendant would be losing a substantial amount of money. After directing obscenities toward Kepple, the defendant, who appeared to be enraged, made his statements directly to Kepple. Thus, the statements were made by a visibly angry speaker who had just lost a legal dispute, which would cost him a significant amount of money, directly to a listener who was the focus of the speaker's anger and was, in no small part, responsible for the defendant's loss. As such, the factual context surrounding the making of the statements indicates that a reasonable speaker would foresee that the statements would be perceived as a serious expression of an intention to harm, rather than a mere joke or hyperbole.

The defendant claims that Kepple's reaction to the defendant's statements, including Kepple's reply, "[b]ut who has got your $25,000, bitch?" and the fact that he did not immediately report the incident to police, indicates that he did not genuinely feel threatened. In light of those facts, the defendant claims that the reaction of listeners indicates that his statements were not true threats. We do not agree. First, the defendant's argument is contrary to the clear precedent of our Supreme Court, holding that such evidence does not preclude a finding that statements constitute true threats. See *State* v. *Cook*, supra, 287 Conn. 255 (holding that defendant's statements were true threats despite noting that "[i]t is true . . . that the [victim's] reaction to the defendant's conduct suggests that he was not genuinely concerned for his safety"). Moreover, Kepple's decision not to file a complaint until two days after the incident does not indicate that he did not take the defendant's statements seriously. Kepple specifically testified that he waited before filing a complaint because he and his wife were struggling to decide the best course of action due to their fear that filing a complaint would anger the defendant further and put their family at a greater risk. Given the circumstances, such a course of action was reasonable and does not detract from our conclusion. The fact that Kepple did not feel that he needed to contact the police immedi-

ately does not indicate that the defendant's statements could not reasonably be perceived as true threats. See *State* v. *DeLoreto*, supra, 265 Conn. 158 ("[i]mminence . . . is not a requirement under the true threats doctrine").

Moreover, contrary to the defendant's assertion, there was ample evidence in the record to demonstrate that the reaction of the listeners indicated that they had, in fact, perceived the defendant's statements as true threats. Specifically, immediately after hearing the defendant's statements, Glidden stated to Kepple: "I think he just threatened you." Additionally, Kepple testified that he believed the situation would escalate quickly if he did not promptly leave the scene and that he was "shocked," "scared" and "terrified." Thus, this is not a situation where the factual circumstances and the reactions of the listeners indicate that the defendant's statements were a mere joke or hyperbole. Compare *Watts* v. *United States*, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969) (alleged threats found to be constitutionally protected political hyperbole when spoken at political rally to crowd of listeners who laughed in response to hearing statements).[6] Rather, the content of the defendant's statements, the factual context in which they were made and the reaction of the listeners indicate that a reasonable speaker would foresee that the defendant's statements would cause the listener to believe he would be subjected to physical violence. Thus, we conclude that the evidence was sufficient for the jury to find that the defendant's statements constituted true threats that were not protected by the first amendment.

The judgment is affirmed.

In this opinion ALVORD, J., concurred.

[1] At trial, the jury was presented with testimony and evidence of varying accounts of what the defendant said to Kepple. Kepple testified that the defendant stated, "More of what happened to your son is going to happen to you," and, "I'm going to be there to watch it happen." Kepple's police report contained the same account of the defendant's statements. Glidden also testified regarding his recollection of the defendant's statements. Glidden testified that "[the defendant] said he wished ill upon [Kepple's family] and [Kepple] and that he would be there present to see that." Two hours after the incident, Glidden returned to his office and wrote down his recollection of what had occurred. In these notes, Glidden wrote that "[the defendant] told [Kepple] that he . . . wished harm and misfortune upon him and his family just like what happened to [Kepple's] son. [The defendant] then told us that he hoped that he would be present when such misfortune befalls the Kepples." Glidden also gave a statement to the police that contained the following description of the defendant's comments: "[The defendant] told . . . Kepple that he wished harm and misfortune upon him and his family just like what had happened to . . . Kepple's son. [The defendant] then told . . . Kepple that he will be present when that happens." Thus, the jury was presented with versions of the defendant's statements that differed in one relevant respect, namely, the presence or absence of precatory language.

For purposes of review, we assume that the jury credited Kepple's account of the defendant's statements, as Kepple's account is the most damaging, and, thus, is most consistent with the jury's guilty verdict. See, e.g., *State* v. *Torres*, 111 Conn. App. 575, 587, 960 A.2d 573 (2008) ("we . . . evaluate the evidence in light of the jury's guilty verdict [and therefore] must evaluate the evidence consistent with a finding of the defendant's guilt"), cert. denied,

290 Conn. 907, 964 A.2d 543 (2009). Moreover, as we will explain, although we engage in de novo review of the statements and the circumstances surrounding their making to determine whether they constituted "true threats," we review the jury's credibility determinations under a clearly erroneous standard of review. *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 688–89, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989) ("[a]lthough credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the opportunity to observe the demeanor of the witnesses . . . the reviewing court must examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect" [citation omitted; internal quotation marks omitted]). In light of the evidence before the jury, we conclude that the jury reasonably could have credited Kepple's version of the events as the true depiction of the defendant's statements. As such, we review those statements and the circumstances under which they were made to determine whether they are protected speech under the first amendment.

[2] Apparently, Kepple was referring to the $25,000 the defendant previously had paid the town for cleanup costs and interest.

[3] Kepple's son suffered a spontaneous intracranial hemorrhage while driving, causing him to black out and the car he was driving to hit a tree. The severe brain injuries were caused by the intracranial brain hemorrhage, not by the accident itself. The newspapers covering the accident, however, presented the story in a manner that made it appear as though the accident caused all of the son's injuries.

[4] After the state rested, the defendant made an oral motion for a judgment of acquittal on the ground that the evidence was insufficient to establish that his speech was not protected by the first amendment. The court denied the motion. Subsequently, the defendant filed a written request to charge, requesting that the court instruct the jury on the definition of "threat" and "threaten," as used in §§ 53a-62 (a) (3) and 53a-181 (a) (3), in accordance with the meaning of "true threats" as set forth in *State* v. *DeLoreto*, supra, 265 Conn. 145. The court granted the request, and the jury properly was instructed on the definition of "true threats."

[5] The dissent asks whether we have concluded "that the defendant was threatening that he would cause Kepple to suffer an intracranial hemorrhage? Or to experience a car accident, presumably caused by the defendant's sabotaging of the vehicle? Or some other sort of physical harm?" We do not make any conclusions about the specific means by which the defendant threatened to harm Kepple or the exact type of physical harm that he threatened to inflict. We do not believe that any such conclusions are necessary to our resolution of this appeal. Rather, we limit our inquiry to determining whether a reasonable speaker would foresee that the statements, "More of what happened to your son is going to happen to you," and, "I'm going to be there to watch it happen," when spoken to a listener whose son had suffered severe life-altering physical injuries, would be interpreted by the listener as a serious expression of intent to harm or assault. We answer that question in the affirmative. The fact that the listener is left to speculate as to the exact type of serious life-altering physical injuries the speaker threatened to cause and the specific means by which that harm would be inflicted does not remove the statements from the realm of true threats. Just as the statement, "I'm going to kill you," can constitute a true threat despite the fact that the speaker did not specify which of the myriad of possible ways that harm would be inflicted; see *State* v. *Cook*, supra, 287 Conn. 237; *State* v. *DeLoreto*, supra, 265 Conn. 145; the defendant's statements to Kepple are true threats despite the fact that the defendant chose not to specify the exact type of physical harm he was threatening or the manner with which it would be inflicted.

[6] The dissent contends that the statement in *Watts* v. *United States*, supra, 394 U.S. 705, was "significantly more threatening than the language at issue in this case." Respectfully, we conclude that *Watts* is distinguishable from the present case, and we do not agree that, considering their context, the statements in *Watts* were "significantly more threatening" than those in the present case. Given both the statements themselves and the context in which they were spoken, the statements in *Watts* were significantly less threatening than the defendant's statements. As the dissent notes, the defendant in *Watts* was arrested for stating: "*If* they ever make me carry a rifle the first man I *want* to get in my sights is L.B.J." (Emphasis added; internal quotation marks omitted.) *Watts* v. *United States*, supra, 706. First, the statements are, on their face, less threatening than the defendant's state-

ments. The statements in *Watts* were conditional and expressed only what the defendant wanted to do, not what he would do. The United States Supreme Court stated that the "expressly conditional nature" of the statements was one of the factors that indicated that they were not true threats. Id., 708. Conversely, in the present case, the defendant's statements were not conditional, and contrary to the dissent's interpretation of the statements, did not express what the defendant wanted to happen but rather what would happen. Second, unlike the statements in the present case, the context of the statements in *Watts* strongly supported the conclusion that they were political hyperbole. The statements in *Watts* were spoken at a political rally. Id. The statements were not spoken to the subject of the threat but rather to a group of other rallygoers who laughed in response to hearing the statements. Id., 707. Thus, the statements and context in *Watts* stand in stark contrast to those in the present case. Here, the defendant's statements were spoken directly to the subject of the threat after the defendant followed him out of court appearing "hot" and "upset." The listeners did not respond with laughter to the defendant's statements. Rather, Kepple indicated that he was "shocked," "scared" and "terrified." Glidden testified that he thought the defendant had just threatened Kepple and that he kept his cell phone in his hand, fearing he would need to dial 911 quickly. Thus, *Watts* v. *United States*, supra, 705, supports our conclusion that the defendant's statements were true threats, not protected speech.