IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

STATE OF FLORIDA,

Appellant,

v. Case No. 5D19-681

BLAKE MICHAEL COWART,

Appellee.

_____/

Opinion filed February 14, 2020

Appeal from the Circuit Court
for Marion County,
Anthony M. Tatti, Judge.

Ashley Moody, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellant.

James S. Purdy, Public Defender, and Steven N. Gosney, Assistant Public Defender, Daytona Beach, for Appellee.

PER CURIAM.

The State appeals the trial court's order granting Blake Cowart's motion to dismiss the amended information charging Cowart with sending a written threat to kill or do bodily injury to a child.[1] We reverse.

[1] § 836.10, Fla. Stat. (2018).

Cowart, a former student at North Marion High School ("NMHS"), sent a Snapchat photograph ("the Snap") to Z.M., a current student at NMHS, which depicted a scoped AR-15 rifle with an extended, large capacity magazine and had the caption, "Show and Tell @NM on Monday." Z.M. saved the Snap and reposted it on his own Snapchat account.

The following day, several students at NMHS saw the reposted Snap and voiced their concerns to the school resource officer. That officer contacted Z.M., who explained that Cowart sent him the Snap. Z.M. told the officer that he responded to Cowart and asked, "WTF that mean?" Cowart advised Z.M. that the message was a joke.

Cowart was subsequently arrested and charged by amended information with sending written threats to kill or do bodily injury to a child pursuant to section 836.10, Florida Statutes (2018). At the time Cowart sent the Snap, section 836.10 provided:

> Written threats to kill or do bodily injury; punishment.—Any person who writes or composes and also sends or procures the sending of any letter, inscribed communication, or electronic communication, whether such letter or communication be signed or anonymous, to any person, containing a threat to kill or to do bodily injury to the person to whom such letter or communication is sent, or a threat to kill or do bodily injury to any member of the family of the person to whom such letter or communication is sent commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Cowart filed a sworn motion to dismiss the charge, arguing that the Snap did not specifically threaten to kill or do bodily harm to Z.M. or any member of his family. He also claimed that section 836.10 unconstitutionally infringed on his right to free expression.

The State filed a traverse and response, asserting that the Snap was a threat and noting that Z.M. testified under oath that he was a student at NMHS, he did not take the Snap as a joke, he felt on edge and concerned after receiving the Snap, and the recent

school shootings across the United States made him feel more on edge. Specifically, Z.M. stated that he believed Cowart "was going to do something. . . . [and] made it seem like he was going to bring a gun and shoot up the school [the] next Monday." The State also noted that the high school shooting in Parkland, Florida, occurred merely two weeks before Cowart sent the Snap. Additionally, the State denied that section 836.10 was unconstitutionally vague or overbroad.

The trial court granted Cowart's motion to dismiss, reasoning:

> [T]he electronic communication upon which the instant charge is based contains no "threat to kill or do bodily injury" to [the victim] or any member of his family and therefore the "undisputed facts" do not establish a prima facie case of guilt against [Cowart].[2]

This Court reviews a trial court's ruling on a motion to dismiss de novo. State v. Avella, 275 So. 3d 207, 208 (Fla. 5th DCA 2019). "A rule 3.190(c)(4) motion should be granted only when the trial court determines that the most favorable construction of the facts does not establish a prima facie case of guilt; if there is any evidence upon which a reasonable jury could find guilt, a motion to dismiss must be denied."[3] State v. Bell, 882

[2] The trial court did not address Cowart's constitutional challenge.

[3] Cowart filed his motion to dismiss the charge pursuant to Florida Rule of Criminal Procedure 3.190(b), which provides that "all defenses available to a defendant by plea, other than not guilty, shall be made only by motion to dismiss." The State argued that because Cowart alleged facts in his motion, the trial court should treat the motion as one filed pursuant to Rule 3.190(c)(4), which provides that a trial court may grant a motion to dismiss if "[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant." Fla. R. Crim. P. 3.190(c)(4).

Although the trial court never specifically stated that it was treating Cowart's motion to dismiss as a Rule 3.190(c)(4) motion, it acknowledged in its order that the parties disputed only whether the Snap was a threat. Accordingly, the motion should be treated as a Rule 3.190(c)(4) motion because the trial court found there were no material disputed facts and the undisputed facts did not establish a prima facie case of guilt.

So. 2d 468, 470 (Fla. 5th DCA 2004) (citing State v. Reese, 774 So. 2d 948 (Fla. 5th DCA 2001)). "[T]he State is not only entitled to receive the most favorable construction of the evidence but also to have all inferences resolved against the defendant." Id. (citations omitted). "[T]he trial judge must look only to the prima facie sufficiency of the alleged facts; the trial judge may not evaluate the evidence." State v. Atkinson, 490 So. 2d 1363, 1365 (Fla. 5th DCA 1986) (citations omitted). Moreover, "[t]he State is not obligated to produce evidence sufficient to sustain a conviction." Brinkley v. State, 874 So. 2d 1199, 1201 (Fla. 5th DCA 2004) (citing State v. Bonebright, 742 So. 2d 290 (Fla. 1st DCA 1998)).

In order to ascertain whether the trial court erred in determining that the State failed to make a prima facie showing that the Snap was a threat, we must determine what constitutes a "threat" under section 836.10. The statute does not define "threat." However, at least one court has discussed whether a written communication constituted a threat pursuant to section 836.10 and determined that the answer depended on how the message was interpreted by a reasonable recipient.[4] See Smith v. State, 532 So. 2d 50 (Fla. 2d DCA 1988).

In Smith, the defendant appealed his judgment and sentence for sending threatening letters pursuant to section 836.10, Florida Statutes (1987), as well as threatening harm to a public servant pursuant to section 838.021(3)(b), Florida Statutes (1987). Id. at 51–52. The defendant had sent the letters, which purported to come from the governor's office, to the wives of county judges and attorneys. Id. at 52. The letters praised the spouses, yet stated that the paper they were printed on contained a "rare, lethal toxin for which there [was] no antidote." Id. The defendant claimed that the letters

[4] The State is not required to prove that the defendant had the actual intent to do harm or the ability to carry out the threat. Saidi v. State, 845 So. 2d 1022, 1026–27 (Fla. 5th DCA 2003).

were a hoax and that he believed that "an underlying tone of humor was recognizable from the face of the letters." Id. The Second District found that the evidence presented at trial was sufficient to sustain the convictions. Id. It admitted that "the letters' wording, at least when viewed in the cold light of objective assessment, might even contain a measure of twisted wit." Id. However, it explained that the victims' reactions to the letters ranged "from mild concern to near panic," and concluded that "[t]he jury obviously believed his threats of imminent poisoning were alarm in reasonable persons." Id. at 53.

Here, under the most favorable construction of the facts, a reasonable jury could find that Cowart threatened Z.M. because the State made a prima facie showing that the Snap was "sufficient to cause alarm in reasonable persons." Smith, 532 So. 2d at 53; see Bell, 882 So. 2d at 470. It was undisputed that the Snap was a photograph of a scoped AR-15 rife with an extended, large-capacity magazine and was captioned, "Show and Tell@ NM on Monday." The State noted in its traverse that Z.M. testified under oath that he felt on edge after receiving the Snap and did not believe that the Snap was a joke; he was concerned, especially given the recent school shootings in the country, and believed Cowart was going to bring a gun to the school and shoot it up the following Monday. The reasonableness of Z.M.'s alarm was further supported by the fact that several other NMHS students who saw the Snap were also concerned and contacted the school resource officer regarding the matter. Accordingly, in the light most favorable to the State, and resolving all inferences against Cowart, the State made a prima facie showing that the Snap was a threat because it was "sufficient to cause alarm in reasonable persons."

We reject Cowart's argument that the trial court's findings are in accordance with the ruling in J.A.W. v. State, 210 So. 3d 142 (Fla. 2d DCA 2016), because that case is inapposite. In J.A.W., the issue was whether posting a Twitter "Tweet" constituted sending

a communication pursuant to section 836.10. Id. at 144. Here, it is undisputed that Cowart sent the Snap directly to Z.M. The reasonableness of Z.M.'s perception of the post as a threat is a matter for a jury to determine.

REVERSED and REMANDED.

COHEN, WALLIS and HARRIS, JJ., concur.