

Stalking and Free Speech:

What Prosecutors Need to Know About *Counterman v. Colorado*

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Introduction

In June 2023, the United States Supreme Court issued its ruling on the case of *Counterman v. Colorado*. Billy Counterman was convicted by a Colorado jury of stalking under Colorado Revised Statutes §18-3-602(1)(c). The conviction was based on Counterman's unlawful communications that "would cause a reasonable person to suffer serious emotional distress and does cause that person...to suffer serious emotional distress."1

Facts of the *Counterman* Case

From 2014 to 2016, Billy Counterman repeatedly attempted to communicate with C.W., a local musician. C.W. had never met Counterman and did not respond to any of the messages. The communications at issue in the litigation involved hundreds of Facebook messages sent by Counterman. C.W. was aware of the communications and repeatedly tried to block Counterman on the social media messaging platform, but Counterman would create new accounts and send additional messages. Several of the messages mentioned violent acts Counterman wished would happen to his C.W.

Holding of the *Counterman* Case

This conviction revisited the long-held legal restriction of speech applicable to true threats. When words contain threats or "serious expressions conveying that a speaker means to commit an act of unlawful violence,"2 courts have found this to be a permissible restriction of speech under the First Amendment. The *Counterman* court looked more specifically at the "subjective" understanding of the threats and found that the state of Colorado prosecuted the Defendant under an "objective" standard. Specifically, the prosecutors failed to demonstrate the Defendant "consciously disregarded a substantial risk that his communications would be viewed as threatening violence"3 and therefore violated the Defendant's right to free speech.

¹ *Counterman v. Colorado*, 143 S.Ct. 2106, 2109 (June 27, 2023)

² *Id.* At 2110

³ *Id.* At 2111

Counterman's messages were sent over a period of 2 years and the recipient never responded. The messages mentioned surveillance ("was that you in the white Jeep?"), requests to meet ("Staying in cyber life is going to kill you. Come out for coffee. You have my number"), and escalated language ("Fuck off permanently" and "You're not being good for human relations. Die. Don't need you").⁴ The Supreme Court's decision requires prosecutors to prove an additional element: the defendant's awareness of how their threatening language would impact the victim. Proving that a defendant expressed wishes for someone's death is no longer sufficient; prosecutors must also demonstrate that the defendant understood the threatening nature of such statements.

Prosecutors now face the additional challenge of finding corroborating evidence that demonstrates a defendant understood the threatening nature of their communications. The Minnesota statute on stalking requires prosecutors to prove the actor knows or has reason to know their actions would cause the victim under the circumstances to feel terrorized or to fear bodily harm, and that these actions did cause such a reaction in the victim.⁵ At the time of publication, Minnesota courts have addressed *Counterman* only in unpublished opinions, making it difficult to assess the decision's full impact on state law.⁶ However, prosecutors must now develop innovative approaches to evidence collection and presentation to prove this new element of the offense beyond a reasonable doubt.

Direct Evidence

Direct evidence of a defendant's actions and patterns of conduct can help establish their intent, particularly focusing on how the victim becomes aware of these actions:

- Possession, access, and use of weapons and/or possession of weapons when prohibited
- Direct threats to harm or kill the victim or family/household members
- Acts of stalking behavior: following the victim, verbal or electronically transmitted threats of harm
- Using coercion, threats, or intimidation
- Issuance of protective orders or prior violations of protective orders
- Escalation of acts

Prosecuting stalking cases raises unique issues for prosecutors in that the evidence of the above acts may not be as direct or obvious as a jury would like to see. Threats to harm or kill may not be made directly to the victim but to those people and animals they care about or have responsibility to protect. Prosecutors may need to look at circumstantial evidence to establish the proof needed for a stalking conviction. With the additional lens of *Counterman* and the requirement of evidence of the defendant's knowledge, building a case with multiple types of evidence becomes even more crucial.

⁴ *People v. Counterman*, 497 P.3d 1039 (Colo.App.2021)

⁵ Minn.Stat. §609.749

⁶ *State v. Ketterling*, 2024 Minn.App.Unpub. LEXIS 718, 2024 WL 3934826; *State v. Christensen*, 2024 Minn.App.Unpub. LEXIS 643, 2024 WL 3648681, *Corrigan v. State*, 2024 Minn.App.Unpub. LEXIS 604, 2024 WL 3493348.

Digital Evidence

An increase in electronic/digital communication corresponds to an increase in access to a victim by an offender. Digital camera doorbells, tracking devices, and Wi-Fi access are just some of the ways in which a victim can be monitored in their own home and beyond.

Technology-Facilitated Sexual Violence involves the use of new technologies to perpetuate or extend the harm of sexual assault, extend control and abuse in violent situations, and distribute sexual or intimate images of another without their consent.⁷ The devices used to access digital evidence can provide a wide variety of content to provide evidence of intent in stalking cases to comply with the ruling in *Counterman*.

- Call logs (received, sent, missed)
- Photographs
- Video/audio
- Email
- Online accounts
- Social media accounts
- Banking apps
- Text and video messaging
- Billing information
- Internet/data usage
- Browser history
- Connected devices
- Installed apps (spyware, monitoring, tracking)
- Vehicle information
- "Smart" home devices

In viewing the relevance of digital evidence through the lens of the *Counterman* case, the forensic footprint can be particularly effective. Utilizing a digital forensics expert to view evidence related to a victim's phone, email, social media, vehicle, or smart home devices can yield a wealth of information regarding a defendant's activities. The expert testimony can provide insight into a defendant's methods of access, particularly in circumstances where log-ins, passcodes, or remote access is necessary. This evidence can corroborate the defendant's intent as required.

⁷ Powell, A. & Henry, N., *Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law*, Social & Legal Studies, (January 12, 2016).

Circumstantial Evidence of Defendant's Knowledge of the Effects of His Conduct/Communication

In addition to direct evidence of the defendant's intent (such as use of physical violence or threats to do physical harm), prosecutors and investigators should seek evidence showing the defendant's state of mind. Digital evidence can be useful in meeting this burden. Examples include:

- Evidence of communication by the defendant about the effects on the victim, including messages sent to others or posted online about his intent. For example, if the defendant sent an Instagram message to a friend stating "she (the victim) deleted her Insta account! She must be really freaked out that I found her online."
- Use of anonymous messaging services to contact the victim. Prosecutors could argue that the defendant hid his identity in an attempt to cause emotional distress.
- Defendant's search history: does the defendant's internet search history reveal attempts to find ways to cause emotional distress?

Additional Thoughts

Prosecutors should collaborate with investigators, advocates, and other attorneys to address the new requirement of demonstrating a defendant's knowledge/intent regarding the impact of their statements on victims. Where the offender's conduct is limited to words only, and those words do not directly threaten harm, a victim should consider obtaining an order of protection, articulating that both the words and conduct are unwanted and cause emotional distress. Serving the offender with this petition for a protective order should eliminate any question as to what the offender knew about the victim's state of mind. There is no possible interpretation of or ambiguity about the effects of future conduct and words by the offender.

404(b) Evidence

There is a general prohibition against using evidence of other crimes committed by a defendant to prove the conduct related to the current charges they are facing. This is outlined in Minnesota Rule of Evidence 404(b) and mirrored in the Federal Rule of Evidence 404(b).⁸ However, after conducting a proper balancing test, a court may admit evidence of prior crimes to: show motive, negate mistake, establish identity, or prove the previous offense was part of a scheme or conspiracy connected to the charge on trial.⁹ When a defendant is charged with committing acts of domestic abuse against a family or household member, evidence of domestic conduct by the accused against the victim or against other family and household members may be admissible pursuant to Minnesota statute 634.20.¹⁰ This type of evidence can be particularly relevant in stalking cases when the nature of the relationship between the defendant and the victim is at issue. Evidence of past incidents in a

⁸ Minn. R. Evid. 404(b).

⁹ *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965)

¹⁰ Minn. Stat. § 634.20

relationship can explain the nature of the relationship with the defendant and provide context for which the jury could assess the victim's actions and demeanor.¹¹

In light of the ruling in *Counterman*, the admissibility of 404(b), or *Spreigl* evidence, can be compelling proof of the defendant's knowledge of the impact of their language. In order to prove the elements required by the stalking statute, prosecutors must prove the defendant "knows or has reason to know their actions would cause the victim under the circumstances to feel terrorized or to fear bodily harm and which does cause this reaction on the part of the victim".¹² Evidence of behavioral patterns, the victim's responses or lack thereof, repeated in-person interactions, and the victim's preventive measures can all demonstrate the defendant's awareness of their impact and strengthen a stalking prosecution.

Conclusion

The decision of the United States Supreme Court in *Counterman v. Colorado* impacts the investigation and prosecution of domestic violence and stalking cases nationwide. Under these new requirements, Minnesota prosecutors must reevaluate their approach to gathering and presenting evidence. While this ruling creates additional prosecutorial challenges, a comprehensive presentation of direct evidence, digital evidence, and evidence of other bad acts significantly strengthens cases before factfinders.

¹¹ *State v. McCoy*, 682 N.W.2d 153 (Minn. 2004).

¹² Minn.Stat. §609.749



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