STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CRIMINAL DIVISION
Docket No. 3422-10-18 Cncr
Docket No. 3588-10-18 Cncr

State of Vermont v. Christopher M. Hayden, Defendant	DECISION ON MOTION

VERMONT SUPERIOR COURT
CHITTENDEN UNIT
MAR 27 2019
FILED

DECISION AND ORDER:
DEFENDANT'S MOTION TO DISMISS

On March 1, 2019, the Court held a hearing on Defendant Christopher Hayden's motions to dismiss pursuant to V.R.Cr.P. 12(d), filed on January 16, 2019, with Emily Bayer-Pacht, Esq., appearing on the brief. The State's response to the motions was filed on February 1, 2019. At the hearing, Defendant was present and represented by Robert W. Katims, Esq. The State was represented by Sally Adams, Esq.

I: Findings of Fact

No testimony was taken at the hearing. The State proceeded in Docket No. 3422-10-18 Cncr by relying on the Affidavit of Probable Cause submitted by Officer Brock Marvin, *State's Exhibit 1*, and the sworn statements of Jordan Redell, *State's Exhibit 2*, and Michael Kanarick, *State's Exhibit 3*. The State proceeded in Docket No. 3588-10-18 Cncr by relying on the Affidavit of Probable Cause submitted by Sergeant My T. Nguyen, *State's Exhibit 4*, Sergeant Nguyen's Supplemental Affidavit, *State's Exhibit 5*, and the sworn statement of Ali Dieng, *State's Exhibit 6*. For the purposes of the pending motions, the Court finds the following based on the submitted exhibits.

The aggravated disorderly conduct charge arises out of an incident in the office of Burlington Mayor Miro Weinberger in the Burlington City Hall on October 9, 2018. Earlier that day, at around 1:00 p.m., Defendant had made threatening statements about his new landlord while paying his rent at the Champlain Housing Trust offices in Burlington, Vermont. At approximately 3:38 p.m., officers responded to a report of a male causing a disturbance and yelling threats at Mayor Weinberger in the reception area of the mayor's office on Church Street in Burlington. In the 911 recordings made during the incident, Defendant can be heard clearly in the background "screaming unintelligibly," and the caller states that Defendant is "banging and screaming" in the reception area.

City Hall Employee Jordan Redell stated that she heard a male in the reception area being disruptive, and this led her to leave her office and enter the reception area to see if she could help. She recognized Defendant, as he has given "many, many death threats towards this

office before and other individuals in Burlington." She also stated that he has sent threatening emails to the mayor, including the statement "I'm going to get you, Miro. You should die," as well as anti-Semitic comments. On this occasion, Defendant was in the reception area yelling and screaming at employees in the reception area in an angry tone of voice and making anti-Semitic comments. Ms. Redell feared for her safety. She told the mayor to lock the door to his office, locked herself and another employee into a different office, and then called 911. At the time, the mayor was meeting with a group of high school students. Ms. Redell suggested that the students leave through a back entrance, which they did. Other employees in the reception area evacuated the area. Defendant continued to shout loudly in an angry tone of voice. Ms. Redell based her decision to evacuate on the fact that Defendant was "shouting loudly," that he wasn't leaving, that the police were taking longer than expected to arrive, and that she didn't know exactly where Defendant was at the time. Ms. Redell felt fearful, and she felt her fear was reflected in her voice on the 911 call. Her fear was based on the instant situation and her knowledge of Defendant's history with the office.

City Hall Employee Michael Kanarick was in the mayor's office with the students with the door closed when he heard a male voice begin shouting in the reception area. He went into the reception area to see what was happening and observed Defendant as the individual screaming. He returned to the mayor's office, where he continued to hear Defendant making loud noises. Mr. Kanarick feared for the safety of the high school students, the mayor, and himself. He went back into the reception area and noticed that no one was out there with him, as the other employees had locked themselves in their offices. Mr. Kanarick then asked Defendant to stop yelling and using foul language, to which Defendant replied making unusual hand gestures and stating bizarre statements, like "I know who you are," and "I'm watching you." Mr. Kanarick returned to the mayor's office and ushered students out of the building. Defendant was seated the whole time, but Mr. Kanarick stated that he feared for his safety based on Defendant's history with disturbances in the office, including his previous visits to the office, previous calls to the office, and Facebook posts with anti-Semitic and threatening language directed toward the mayor's office, as well as Defendant's demeanor, including the angry look on his face, loud voice and screaming, and threatening statements.

The Affidavit of Probable Cause states that Defendant's history of prior disturbances in City Hall and his threats toward Mayor Weinberger, through email and in person, have been documented in four incident reports dating back to 2012.

The disturbing the peace by phone charge arises out of a series of emails that Defendant, from the email address modusartsgroup@yahoo.com, sent to Burlington Town Council member Ali Dieng. The evidence submitted does not conclusively establish what specific email address the emails were sent to. The Affidavits submitted merely say "Ali Dieng" in the relevant email field. The Court takes judicial notice pursuant to V.R.E. 201(b)(2) that the Burlington Town Council website lists all the town council members and their email addresses, all written as the person's first initial, and last name, followed by the "at" symbol, burlingtonvt.gov. City Council, The City of Burlington, available at https://www.burlingtonvt.gov/CityCouncil (last visited Mar. 22, 2019). As Defendant argues that he was communicating with a public official through appropriate channels, and the State has failed to present evidence that Defendant was using some other email address or that Mr.

Dieng has another email address, the Court finds for purposes of this decision that Defendant was using Mr. Dieng's official email address as stated on the website.

Defendant is a Caucasian male, born in the United States. Mr. Dieng is a black male who immigrated from Mauritania in West Africa. Mr. Dieng stated that he started receiving emails from Defendant around March 2017 when he was elected to the Burlington City Council.

The Affidavit of Probable Cause includes several emails sent from Defendant to Mr. Dieng, some of which include images along with the text. These emails are dated October 22, 2018 at 7:47 a.m., 7:57 a.m., 8:09 a.m., and 9:50 a.m.; October 18, 2018 at 11:25 p.m., 10:33 p.m., 1:42 a.m.; October 7, 2018 at 4:51 a.m., 4:07 a.m., 1:44 a.m.; September 12, 2018 at 10:28 p.m., 8:11 p.m.; and September 11, 2018 at 11:57 p.m. They contain racial and religious slurs, hateful rhetoric, threats such as "every person I've ever written a derogatory poem about has been destroyed/ if you want to be next keep up your nigger bullshit," and statements to the effect that Mr. Dieng should "just resign and move away." Defendant also emailed Mr. Dieng with the subject line "COP CALLING PUSSY" stating "NEWS FLASH – you are a public figure. Cops can't help ya. ha ha ha." The Affidavit also includes emails sent to Mr. Dieng along with others concerning Faisil Gill, in which Defendant states, "It's time to kill Fat Faisil Gill" and graphically describes him being dismembered, stating "Let justice be done/ Or blood flow like fountains/ No to Islam/ In these Green Mountains."

Mr. Dieng stated that he feared for his safety and for that of his family members as a result of Defendant's emails. Mr. Dieng was unsure of how Defendant became aware of the race of his wife and children, who are referenced in at least one email included in the Affidavit. Mr. Dieng also believes that Defendant is watching him. One of the emails states in the subject line "WATCHING" with a photo of Defendant looking into the camera holding a skull mask. Further, Mr. Dieng advised that he was recently sent an email about him being "LATE" to a city council meeting from Defendant, leading Mr. Dieng to fear that Defendant is waiting for or watching him.

II: Conclusions of Law

Defendant's motion alleges that the State cannot make out a prima facie case as to the elements of either Count 1, alleging aggravated disorderly conduct, in Docket No. 3422-10-18 Cncr, or Count 1, alleging disturbing the peace by phone, in Docket No. 3588-10-18 Cncr, as Defendant's conduct amounted to speech protected by the First Amendment of the U.S. Constitution and Chapter 1, Article 13 of the Vermont Constitution. As stated by the Vermont Supreme Court in *State v. Fanger*:

> The standard for addressing a motion to dismiss for lack of a prima facie case is the same as the standard for a motion for judgment of acquittal. *State v. Norton*, 147 Vt. 223, 229... (1986) (standard in Rule 29 for motion for acquittal applies to motion to dismiss for lack of prima facie case). The court must determine 'whether, taking the evidence in the light most favorable to the state and excluding modifying evidence, the state has [produced] evidence fairly and reasonably tending to show the defendant guilty beyond a reasonable doubt.' Reporter's Notes, V.R.Cr.P. 29; see V.R.Cr.P. 12(d)(2) (on motion to dismiss for lack

of prima facie case, State must show 'it has substantial, admissible evidence as to the elements of the offense challenged by the defendant's motion').

164 Vt. 48, 51 (1995). In ruling on such a motion, "the trial court must make its ruling based on all the evidence before it, whether produced by the State or the defendant." *Id.* at 52. However, the court should do no more "than determine if the State has admissible evidence on each element of the crime charged.... Direct conflicts between inculpatory or exculpatory facts cannot be resolved at this stage." *State v. Turnbaugh*, 174 Vt. 532, 534 (2002).

A: Aggravated Disorderly Conduct

The count alleging a violation of Section 1026a, aggravated disorderly conduct, charges that Defendant "engage[d] in a course of conduct directed at a specific person with the intent to cause the person inconvenience or annoyance, or to disturb the person's peace, quiet, or right of privacy and ... engage[d] in ... tumultuous ... behavior."[1] 13 V.S.A. § 1026a(a)(1). The State has argued that it is not prosecuting him based on the content of any of his communications, but rather for his conduct. Defendant argues that his conduct is protected by the First Amendment,[2] and thus the State cannot make out a prima facie case of guilt. The Court understands this to present an as-applied constitutional challenge to the statute.[3] See *State v. Noll*, 2018 VT 106, ¶ 31 ("As a practical matter, defendant's argument that 13 V.S.A. § 1062 was unconstitutional as applied to his case and his challenge to the sufficiency of the evidence to convict him under the criminal stalking statute turn on the same question: whether a jury could reasonably conclude that his 2015 dissemination of his book amounted to a true threat."). Thus, the first question which must be addressed is whether Defendant's tumultuous behavior in the Burlington town offices constitutes "expressive conduct, permitting him to invoke the First Amendment." *Texas v. Johnson*, 491 U.S. 397, 403 (1989). "[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First

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[1] At oral argument and in its brief, the State elected to proceed under the "tumultuous" prong of the aggravated disorderly conduct statute.

[2] Though Defendant also cites the Vermont Constitution, he makes no independent argument concerning its application, nor does he explain how the Vermont Constitution provides greater or different protection that the U.S. Constitution in this instance. "Defendant bears the burden of providing an explanation of how or why the Vermont Constitution provides greater protection than the federal constitution." *State v. Zumbo*, 157 Vt. 589, 592 (1991). As he has failed to meet his burden on this issue, the Court does not address it. The Court further notes that the Vermont Supreme Court has stated that, in general, it has "suggested that the right of free speech guaranteed under Chapter I, Article 13 is coextensive with the First Amendment." *State v. Read*, 165 Vt. 141, 153 (1996).

[3] The Court recognizes that it is preferable to consider as-applied challenges on a motion for acquittal during or after a trial; however, given that the State does not dispute the ability of the Court to reach the motion and has stipulated to the pertinent facts, the Court addresses the issue. *United States v. Hill*, 700 F. App'x 235, 237 (4th Cir. 2017). Indeed, in *Citizens United v. Federal Election Commission*, the U.S. Supreme Court noted that

> the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.

558 U.S. 310, 331 (2010). The Court cited *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995) for this proposition. In that case, the Court stated that

> although the occasional case requires us to entertain a facial challenge in order to vindicate a party's right not to be bound by an unconstitutional statute, we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants.

Id. at 477–78 (citations omitted). Here, the narrower remedy is all that is argued for.

Amendment even applies." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

> The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," ... we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."

Johnson, 491 U.S. at 404 (citations omitted). "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Id.* "[A] narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995). In *Johnson*, for example, the Court held that the burning of the American flag during a political rally constituted expressive conduct within the protections of the First Amendment. 491 U.S. at 406. This same standard was applied by the Fourth Circuit when it held that "liking" a Facebook post constituted expressive conduct:

> Aside from the fact that liking the Campaign Page constituted pure speech, it also was symbolic expression. The distribution of the universally understood "thumbs up" symbol in association with Adams's campaign page, like the actual text that liking the page produced, conveyed that Carter supported Adams's candidacy.

Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013), *as amended* (Sept. 23, 2013).

Here, viewing the facts in the light most favorable to the State, Defendant has failed to establish that any larger political message was intended by his conduct in the aggravated disorderly conduct count. Defendant is accused of screaming and waving his arms in the town offices, and Defendant does not argue that his intent in behaving this way in itself was expressive of any political message. Even if his intent in behaving in this manner was to express the urgency of his concern, the likelihood that those viewing his conduct would understand that message of urgency is low. A properly-instructed, reasonable jury could not find that there was a likelihood that Defendant's tumultuous behavior would be understood by the individuals who viewed it as conveying any substantive message. See *State v. Noll*, 2018 VT 106, ¶ 35; *United States v. Carrier*, 672 F.2d 300, 306 (2d Cir. 1982) ("Only where the factual proof is insufficient as a matter of law should the indictment be dismissed."). Defendant has failed to establish that his conduct with respect to the aggravated disorderly conduct charge is protected by the First Amendment.

The Court, therefore, moves on to consider whether the State has made out a prima facie case for aggravated disorderly conduct. As noted above, the State has elected to proceed

under the "tumultuous behavior" prong of the statute.[4] The elements of the charge are that (1) Defendant; (2) engaged in a course of conduct directed at a specific person, Miro Weinberger; (3) by engaging in tumultuous behavior; and (4) with the intent to cause the person inconvenience or annoyance or disturb the person's peace, quiet, or right of privacy. 13 V.S.A. § 1026a(a)(1). Defendant does not raise a dispute as to the first or fourth elements.

As to the second element, the statute defines "course of conduct" as "a pattern of conduct composed of two or more acts over a period of time, however short, evidencing a continuity of purpose." 13 V.S.A. § 1021(b). The statute excludes constitutionally protected activity from this definition. *Id.* The pattern of conduct alleged here is Defendant's similar conduct in the mayor's offices on other occasions and threats made via email to the mayor documented in the Affidavit of Probable Cause and the recorded sworn statements of two witnesses. Emails sent to harass a public official might constitute protected speech as explained below, but Defendant has failed to establish that threatening emails, see *infra*, and the past similar behavior on the part of Defendant are constitutionally protected, as noted above. Viewing the evidence in the light most favorable to the State, this conduct satisfies this element.

As to the third element, the Vermont Supreme Court has "previously cited dictionary definitions of tumult that include not only 'commotion and agitation of a large crowd' but also a 'violent outburst.'" *State v. Amsden*, 2013 VT 51, ¶ 16, 194 Vt. 128. In *Amsden*, the Court found that the defendant's conduct rose to the level of being criminally tumultuous as it "was so loud and disruptive inside the emergency room that [defendant] had to be placed in the safe room" and that because "defendant continued her disruptive behavior while in the safe room, the hospital staff closed the door to avoid disturbing people in the emergency room." *Id.* ¶¶ 17–18. Here, Defendant screamed and waved his arms, causing people throughout the town offices to be disturbed, and causing them to fear for their safety. A group of high school students who were meeting with the mayor at the time had to be escorted from the building via a back door. Without considering the content of any of Defendant's statements, and viewing the evidence in the light most favorable to the State, his behavior was clearly tumultuous. The Court finds that the State has met its burden as to this element.

Defendant's motion to dismiss the aggravated disorderly conduct charge for lack of a prima facie case pursuant to V.R.Cr.P. 12(d) is denied.

B: Disturbing the Peace by Phone

In Docket 3588-10-18 Cncr, Defendant is charged with a violation of 13 V.S.A. § 1027, which states that

> A person who, with intent to terrify, intimidate, threaten, harass, or annoy, makes contact by means of a telephonic or other electronic communication with another and makes any request, suggestion, or proposal which is obscene, lewd, lascivious,

[4] Though Defendant relies primarily on *State v. Albarelli* in making his argument, that case is inapposite, as it addresses the "threatening behavior" prong of the disorderly conduct statute, and merely holds that that defendant's similar behavior was not threatening. See 2011 VT 24, ¶ 24, 189 Vt. 293.

or indecent; threatens to inflict injury or physical harm to the person or property of any person; or disturbs, or attempts to disturb, by repeated telephone calls or other electronic communications, whether or not conversation ensues, the peace, quiet, or right of privacy of any person at the place where the communication or communications are received shall be fined not more than $250.00 or be imprisoned not more than three months, or both.

13 V.S.A. § 1027(a). The most recent amendment of the statute removed the numerals which previously identified the three independent acts which can make up this crime, see 2014, No. 150, § 5, yet the statute remains written in the disjunctive, and thus is still comprised of three independent means of committing the crime: (1) making an obscene request, etc.; (2) threatening injury or physical harm; or (3) repeated calls or communications. See *State v. Hastings*, 133 Vt. 118, 119 (1974) ("Since the statute is written in the disjunctive, the prosecution must specifically select the act or acts which make up the crime so that the defendant can be sufficiently apprised of the charges against which he must defend.").

The statute contains a specific intent element: "with intent to terrify, intimidate, threaten, harass, or annoy." 13 V.S.A. § 1027(a). "[T]he intent element of § 1027(a) is measured at the time the telephone call is made." *State v. Wilcox*, 160 Vt. 271, 275 (1993). Further, "[u]nlike some statutes in other jurisdictions, our statute does not require that the call be made 'solely' to harass or threaten another." *Id.* at 276. The plain language of the statute states a subjective element of intent.[5]

Defendant's motion focuses on the fact that the alleged emails did not amount to true threats and thus are protected by the First Amendment. See Mot. at 4. This argument appears to be addressed to the second iteration of the crime, which punishes a person who, "with intent to terrify, intimidate, threaten, [or] harass..., makes contact by means of a telephonic or other electronic communication with another and ... threatens to inflict injury or physical harm to the person or property of any person." 13 V.S.A. § 1027(a). Defendant is correct that on its face, this second enumeration of the crime appears to be limited to expression that falls within

[5] The Court notes that subsection (b) allows for this intent to be inferred based solely on the making of the obscene suggestion, the threat of bodily injury, or the repeated calls:

> An intent to terrify, threaten, harass, or annoy may be inferred by the trier of fact from the use of obscene, lewd, lascivious, or indecent language or the making of a threat or statement or repeated telephone calls or other electronic communications as set forth in this section and any trial court may in its discretion include a statement to this effect in its jury charge.

13 V.S.A. § 1027(b). The court notes that the United States Supreme Court struck down a similar statutory presumption in *Virginia v. Black*. See *Virginia v. Black*, 538 U.S. 343, 363–67 (2003) (plurality holding Virginia statute to be unconstitutional because of a provision which allowed for the burning of a cross to provide prima facie evidence of intent to intimidate, which is a required element for speech to fall outside the protections of the First Amendment); *United States v. Mabie*, 663 F.3d 322, 332 (8th Cir. 2011) ("[T]he Court determined that the statute at issue in *Black* was unconstitutional because the intent element that was included in the statute was effectively eliminated by the statute's provision rendering any burning of a cross on the property of another prima facie evidence of an intent to intimidate."). As neither party has raised this as an issue, and the presumption has not been applied in analyzing this case, the Court declines to address the constitutionality of subsection (b). Cf. *State v. Taylor*, 145 Vt. 437, 439 (1985) ("In briefing cases brought before this Court, it is the obligation of the parties to present, in a clear and concise manner, those legal and factual issues which they would have us address.... It is not the proper role of this Court to foretell, through the art of divination, those issues which the parties deem appropriate for resolution. It is only in the rare and extraordinary case that this Court will consider, sua sponte, issues not properly raised on appeal before us.").

the constitutionally unprotected category of true threats. "True threats" are one of those limited categories of expression the regulation of which is consistent with the Constitution. *Virginia v. Black*, 538 U.S. 343, 358 (2003). "The First Amendment permits restrictions upon the content of speech in [these] 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." *Id.* at 358–59 (internal quotation marks omitted). The Vermont Supreme Court recently defined the boundaries of the "true threats" category:

> [T]he U.S. Supreme Court has defined true threats as "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." *Black*, 538 U.S. at 359.... The prohibition of true threats "protects 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." *Id.* at 360... (quotations omitted). The speaker need not intend to deliver on the threat. *Id.* at 359–60.... The Court, however, has been careful to warn that "a threat must be distinguished from ... constitutionally protected speech," such as "political hyperbole," to ensure that "debate on public issues" is "uninhibited, robust, and wide open," which "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts v. United States*, 394 U.S. 705, 708... (1969).
>
> We evaluate whether speech rises to the level of a true threat objectively—that is, "whether an ordinary, reasonable" person "familiar with the context of the communication would interpret it as a threat of injury."....
>
> The context of the speech is integral to this objective inquiry—both for statutory and constitutional purposes. Speech may or may not be objectively threatening depending on the circumstances of the parties involved. We will not engage in a "rigid adherence to the literal meaning of the communication without regard to its reasonable connotations."....
>
> And the threatening speech need not be explicit or convey imminence. Imminence, however, may be an important factor for the trier of fact in objectively determining whether the speech is a threat.

State v. Noll, 2018 VT 106, ¶¶ 36–39 (certain citations omitted).

In *Black*, the U.S. Supreme Court made clear that "[c]ross burning with 'an intent to intimidate,' unquestionably qualifies as the kind of threat that is unprotected by the First Amendment." 538 U.S. at 368 (Stevens, J., concurring) (citation omitted). The problem with the statute at issue in *Black* was that it stated that cross burning alone was prima facie evidence of an intent to intimidate. *Id.* at 364. The case makes clear that to constitute a "true threat" there must be more than the threat itself, but also an intent to intimidate.

In *United States v. Turner*, the defendant posted on his blog that several judges of the Seventh Circuit should be killed in response to a recent decision they had issued, referencing a

previous situation where an individual, unhappy with the handling of a case by a judge, went to her house and murdered her family members. 720 F.3d 411, 414–15 (2d Cir. 2013). Turner posted detailed information about the locations of the judges' offices, photos of each of them, indicated where "anti-truck-bomb barriers" were located, and encouraged his readers to take action, stating that "[t]hese Judges deserve to be killed. Their blood will replenish the tree of liberty. A small price to pay to assure freedom for millions." *Id.* The Second Circuit found that these communications constituted "true threats" and affirmed Turner's conviction for threatening a federal judge, noting that "rigid adherence to the literal meaning of a communication without regard to its reasonable connotations derived from its ambience would render the statute powerless against the ingenuity of threateners who can instill in the victim's mind as clear an apprehension of impending injury by an implied menace as by a literal threat." *Id.* at 422. The Circuit Court found that the fact that Turner himself did not intend to murder them was not dispositive. *Id.* at 424. Rather, the court focused on the fact "that Turner intended his website to intimidate Judges Easterbrook, Bauer, and Posner and to impede them in the performance of their duties by putting them in fear for their lives." *Id.* at 423.

In *Noll*, the defendant was convicted of stalking for engaging in a course of conduct over a number of years that harassed his ex-girlfriend, and which culminated in his writing and self-publishing an autobiographical book with a chapter devoted to his relationship with the complainant, accusing her of many wrongs, and concluding with the question, "Shoot the terrorist? Or shoot the 'artist'?," referring to a painting of hers. 2018 VT 106, ¶¶ 2–13. The Vermont Supreme Court found that a jury could reasonably conclude that this statement constituted a true threat such that it was punishable under the stalking statute. *Id.* ¶ 41.

In this case, Defendant told Mr. Dieng "You are seriously pissing me off, Ali from Senegal./ Seriously," and "hey nigger – do you seriously want some?," and, in an email with the subject line "hey nigger," "you better watch your step," and email with the subject line "WATCHING," with an image of Defendant looking down at the camera holding a mask depicting a skull. See State's Ex. 4. Defendant emailed Mr. Dieng "NO SHEEP IS NOBLE TO A WOLF/ ali – niggers rape white girls/it's not the other way around/ GET OUT OF POLITICS YOU AFRICAN APE/ last chance." State's Ex. 4, Email from Defendant to Ali Dieng, Oct. 18, 2018, 1:42 a.m. Defendant told Mr. Dieng "about the time I wrote a poem about you you're gonna wish you stayed in fucking Africa/ every person I've ever written a derogatory poem about has been destroyed/ if you want to be next keep up your nigger bullshit/ there's no coming back after I set a few rhyming verses against anyone/ so just resign and move away./ you'll wish you had, Ali. You Christless bastard." State's Ex. 4, Email from Defendant to Ali Dieng, Oct. 22, 2018, 8:09 a.m. Defendant mentioned Mr. Dieng's wife and children, leading Mr. Dieng to worry about how Defendant knew who they were and to fear for their safety. Mr. Dieng had been included on a group email sent by Defendant stating that it was "time to kill" the immigrant, Muslim head of the Vermont Democratic Party and describing a gruesome dismemberment of the man and that blood would flow like a fountain.

Defendant included in these emails to Mr. Dieng images of him looking down at the camera holding a mask depicting a skull, in a ski mask outside a residence, in a hoodie outside the town hall building in Burlington, and in a room in front of a wall with a prominent "88." The Court takes judicial notice pursuant to V.R.E. 201(b)(2) of the Anti-Defamation League's trademarked "Hate on Display" hate symbols database, which lists both "88" and the

"Totenkopf" or "death head" as neo-Nazi symbols. See Anti-Defamation League, Hate on Display Hate Symbols Database, available at https://www.adl.org/hatesymbolsdatabase?cat_id[151]=151 (last visited Mar. 22, 2019). An expert in another case noted that the number "88" is used by white supremacists to refer "to the eighth letter of alphabet, 'H,' and thus to the words 'Heil Hitler,' and also to a white supremacist manifesto, 'The 88 Precepts.'" *White v. Uribe*, 893 F. Supp. 2d 1043, 1046 (C.D. Cal. 2012). The same expert stated that "a death head, or 'totenkopf,' ... was a symbol of the German military division that ran the concentration camps." *Id.* The inclusion of these images framed to specifically include what objectively constitute neo-Nazi symbols along with Defendant's face contribute to the threatening nature of the communications. Cf. *State v. Schenk*, 2018 VT 45, ¶ 36 ("[W]e do recognize that any communication from the Ku Klux Klan complete with symbols of the Klan, particularly the burning cross, would raise concern and fear in a reasonable person who is a member of an ethnic or racial minority.").

The evidence presented by the State is sufficient to prove that these communications fall within the definition of "true threats" outlined above. See *Carrier*, 672 F.2d at 306. A reasonable jury, viewing this evidence in the light most favorable to the State, could find that Defendant sent these emails with the intent to threaten Mr. Dieng. See *State v. Cole*, 150 Vt. 453, 456 (1988) ("Intent is rarely proved by direct evidence; it must be inferred from a person's acts and proved by circumstantial evidence."). An ordinary, reasonable person familiar with the context of the communications would interpret them as a threat of injury, particularly given Mr. Dieng's knowledge of Defendant's explicit, violent threats against another political figure. Indeed, Mr. Dieng in his sworn, recorded statement testified to his fear for the safety of both himself and his family. It is of no moment whether Defendant actually intended to do anything to Mr. Dieng, or that he did not lay out explicitly what he was threatening to do to him or his family. It is irrelevant that the threats contained no date certain upon which Defendant's would make good on his threats. A properly-instructed, reasonable jury could find that these emails constitute true threats, and thus outside the protection of the First Amendment. See *United States v. Malik*, 16 F.3d 45, 50 (2d Cir. 1994) ("Surely, an equivocal letter with equal chances of being interpreted innocuously or harmfully should not, in and of itself, convince a jury beyond a reasonable doubt that it is a threat. But once sufficient extrinsic evidence, capable of showing beyond a reasonable doubt that an ordinary and reasonable recipient familiar with the context of the letter would interpret it as a threat, has been adduced the trial court should submit the case to the jury.").

Defendant makes much of the fact that Mr. Dieng is a public official, and that as a result his emails are protected political speech. Defendant's emails to Mr. Dieng did not concern any matter of legitimate complaint or inquiry; Defendant did not email Mr. Dieng repeatedly to raise awareness of a pressing issue, or otherwise participate in political discourse or the marketplace of ideas. In the most favorable reading of a few of his emails, it could be said that he was expressing his dislike for Mr. Dieng as a town council member, and his wish for him to resign, which though couched in the most crude and vile language, is valid political speech. However, in several of his emails, Defendant went beyond expressing his hatred for Mr. Dieng based on his being a black person, an immigrant, and a believer of the Muslim faith, to threaten him should he not leave office. Speech against a public figure can cross the line from inappropriate but nonetheless protected political criticism to a true threat unprotected by the First Amendment and subject to criminal punishment. See, e.g., *Turner*, 720 F.3d 411, 421

("The evidence was more than sufficient, moreover, for a jury to conclude that Turner's statements were not 'political hyperbole,' as he contended, but violent threats against the judges' lives."). In this instance, a properly-instructed, reasonable jury could find that Defendant's statements crossed that line into constituting a true threat. Defendant's motion is unpersuasive on that point.

However, the State did not charge Defendant under the second iteration of 13 V.S.A. § 1027(a). The count alleging a violation of Section 1027, disturbing the peace by phone, charges that Defendant, "with intent to ... harass ..., ma[de] contact by means of ... [an] electronic communication with another and ... attempt[ed] to disturb, by repeated ... electronic communications, ... the peace, quiet, or right of privacy of any person at the place where the communication or communications [we]re received." 13 V.S.A. § 1027(a). The State has argued that it is not prosecuting him based on the threatening content of any of his communications, but rather for his conduct. Defendant argues that his conduct is protected by the First Amendment,[6] and thus the State cannot make out a prima facie case of guilt. The Court understands this to present an as-applied constitutional challenge to the statute.[7] See *Noll*, 2018 VT 106, ¶ 31. Thus, the first question which must be addressed is whether Defendant's repeated emails constitute "expressive conduct, permitting him to invoke the First Amendment." *Johnson*, 491 U.S. at 403.

Considering the legal standards laid out in Part II, section A., the Court finds that Defendant has established as a matter of law that his conduct constitutes expressive conduct protected by the First Amendment. Defendant is accused of sending an excessive amount of emails to a Burlington town council member at his official, public town council email. In *Hagedorn v. Cattani*, the Sixth Circuit, considering a similar factual situation, held that sending emails to a town mayor's *personal* email address was not protected by the First Amendment, noting that the court was

> considerably less concerned about infringing on Hagedorn's First Amendment rights because she retains multiple channels through which she can communicate with Cattani—including his official, Village of Timberlake email address. We recognize her right to speak out on a matter of public concern, but she does not have an uninhibited right to do so to an official's private email account after he asks her to stop. Officials like Cattani must be prepared to accept criticism and to be responsive to the demands of their constituents, but they are not expected to open up every aspect of their private lives for public access.

715 F. App'x 499, 507 (6th Cir. 2017).

Defendant's case raises the opposite factual situation: he emailed the public official at his public, official email address. Communication to a political figure—even rude, obnoxious, or disparaging speech—is core political speech. "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions....'(I)t is a prized American privilege to speak one's mind, although not always with

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[6] See *supra* note 2 concerning Defendant's citation of the Vermont constitution.
[7] See *supra* note 3.

perfect good taste, on all public institutions,' … and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (citations omitted). Indeed, political speech "is central to the meaning and purpose of the First Amendment." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329 (2010). "[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment,'" including tolerating speech that "may have an adverse emotional impact on the audience." *Boos v. Barry*, 485 U.S. 312, 322 (1988). "The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988). Here, we are presented with the question of whether emailing a public figure at their public, official email address multiple times is expressive conduct protected by the First Amendment.

This Court finds that, as a matter of law, a person's sending emails to an official's public, official email account with the intent to harass the official is core political speech. Consider, for example, if a constituent desperately wanted their representative to fix a pothole or vote a particular way; inundating the representative's email box with requests might be one way to communicate the urgency of the concern. The Circuit Court for the District of Columbia noted this exact concern in holding a similar federal statute unconstitutional as applied to a defendant, quoting the defendant's argument that the law "sweeps within its prohibitions telephone calls to public officials where the caller may not want to identify [him]self other than as a constituent and the caller has an intent to verbally 'abuse' a public official for voting a particular way on a public bill, 'annoy' him into changing a course of public action, or 'harass' him until he addresses problems previously left unaddressed." *U.S. v. Popa*, 187 F.3d 672, 676–77 (D.C. Cir. 1999). This conduct "possesses sufficient communicative elements to bring the First Amendment into play," as there is an intent to convey a particularized message—the urgency of the communication—and the likelihood is great that the message would be understood by the person receiving those emails. *Johnson*, 491 U.S. at 404; cf. *Bland*, 730 F.3d at 386; Ira P. Robbins, *What Is the Meaning of "Like"?: The First Amendment Implications of Social-Media Expression*, 7 Fed. Cts. L. Rev. 127, 145 (2013) (arguing that clicking "Like" on a Facebook post is constitutionally protected conduct-as-speech "because the user intends to convey a message, and there is a great likelihood that the message will be understood by its viewers."). That particular conduct—inundating a representative with communications with the intent to harass them into quicker action—is protected political speech.

Thus, Defendant's *conduct* of sending multiple emails per day to the official, public email address of a public official, Mr. Dieng, with the intent to harass that public official, could reasonably be found to convey a message of urgency and a desire that the public official take action on the emailed message. The likelihood was great that the sending of multiple emails to the same town council member would be understood to convey that urgency. Thus, as a matter of law, the Court finds that Defendant's conduct "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Johnson*, 491 U.S. at 404.

The Court here emphasizes that it is only considering the *conduct* alleged by the State, not the *content* of those messages under this iteration of the crime.[8] As the State emphasized at the hearing, the content of Defendant's emails is not relevant to the charge,[9] only the conduct, and here, as a matter of law, Defendant's conduct is protected political speech. See *Johnson*, 491 U.S. at 406 (holding that defendant's conduct in burning U.S. flag at political rally was expressive conduct as a matter of law, as government had already conceded); *Watts v. United States*, 394 U.S. 705, 708 (1969) (reversing conviction and entering judgment of acquittal where, as a matter of law, defendant's statement that he would shoot the president, made at a political rally, was protected speech and could not constitute a true threat).

The Court also does not find persuasive precedent concerning speech incidental to criminal conduct, which can be prosecuted without offending the First Amendment. See, e.g., *United States v. Osinger*, 753 F.3d 939, 944 (9th Cir. 2014) (upholding facial constitutionality of internet stalking statute, holding that "the proscribed acts are tethered to the underlying criminal conduct and not to speech"). These cases grew out of the U.S. Supreme Court's decision in *Giboney v. Empire Storage & Ice Co.*, which upheld the state's injunction of union picketing activity where the "sole, unlawful immediate objective" of the picketing was the violation of antitrade restraint laws. 336 U.S. 490, 502 (1949). Here, the State does not seek to punish Defendant's conduct, and incidentally infringes on his speech by criminalizing the conduct; nor is Defendant's speech itself the means of committing an otherwise unlawful act which is unlawful for reasons not pertaining to speech, see, e.g. *United States v. Petrovic*, 701 F.3d 849, 855 (8th Cir. 2012) ("Because Petrovic's harassing and distressing communications were integral to his criminal conduct of extortion under § 875(d), the communications were not protected by the First Amendment."); rather, the State seeks to punish his conduct which is *in itself* political speech. Further, this line of case law has not successfully been expanded to encompass speech and conduct directed at public figures such as Mr. Dieng. See, e.g., *United States v. Cassidy*, 814 F. Supp. 2d 574, 586 (D. Md. 2011) (granting motion to dismiss indictment on as-applied challenge to charge of internet harassment because target was "not merely a private individual but rather an easily identifiable public figure that leads a religious sect"); see also *Osinger*, 753 F.3d at 947 n.6 (distinguishing *Cassidy* on these grounds). Defendant has thus properly invoked the First Amendment.

This does not end the Court's inquiry. The Court must consider the standard of review to employ in weighing the constitutionality of 13 V.S.A. § 1027 in its application to Defendant. "Generally, the First Amendment prohibits the state from 'restrict[ing] expression because of its message, its ideas, its subject matter, or its content.'" *Noll*, 2018 VT 106, ¶ 23. In particular, "a *content-based* restriction on *political speech* in a *public forum* ... must be subjected to the most exacting scrutiny." *Boos*, 485 U.S. at 321. But the statute at issue here does not appear to fall within that definition. 13 V.S.A. § 1027 states that

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[8] As noted above, the content of some of the emails alleged by the State constitute true threats, which are not protected under the First Amendment, and which could be prosecuted without offending the First Amendment. See generally *State v. Noll*, 2018 VT 106, ¶¶ 23–25, 36–39.

[9] The State argued that the Court could consider the content of the emails in assessing Defendant's intent to harass. As explained below, pertaining to this iteration of the crime, the content of the emails is irrelevant in determining intent.

> A person who, with intent to ... harass, ... makes contact by means of a telephonic or other electronic communication with another and ... disturbs, or attempts to disturb, by repeated telephone calls or other electronic communications, whether or not conversation ensues, the peace, quiet, or right of privacy of any person at the place where the communication or communications are received shall be fined not more than $250.00 or be imprisoned not more than three months, or both.

13 V.S.A. § 1027(a). "[T]he intent element of § 1027(a) is measured at the time the telephone call is made." *Wilcox*, 160 Vt. at 275. Thus, everything that occurs after the making of the call is irrelevant to the charge.

This iteration of the statute, especially considered in light of the charge, does not appear to be directed at the content of any communication. Indeed, "Section 1027(a) of Title 13 was added in 1967 in response to concern over increased use of the telephone as a vehicle to harass persons." *Wilcox*, 160 Vt. at 273; *Gormley v. Dir., Connecticut State Dep't of Prob.*, 632 F.2d 938, 942 (2d Cir. 1980) ("Harassing telephone calls are an unwarranted invasion of privacy. They appear to be on the increase. They are properly outlawed by federal and state statutes. The possible chilling effect on free speech of the Connecticut statute strikes us as minor compared with the all-too-prevalent and widespread misuse of the telephone to hurt others. The risk that the statute will chill people from, or prosecute them for, the exercise of free speech is remote. The evil against which the statute is directed is both real and ugly."). Similar statutes in other jurisdictions have been understood to proscribe conduct—meaning the making of the telephone call—rather than speech. *Wilcox*, 160 Vt. at 274. As the Second Circuit explained concerning Connecticut's statute,

> [c]learly the Connecticut statute regulates conduct, not mere speech. What is proscribed is the making of a telephone call, with the requisite intent and in the specified manner. As the Appellate Session of the Superior Court stated ..., "(A) recital on the telephone of the most sublime prayer with the intention and effect of harassing the listener would fall within its ban as readily as the most scurrilous epithet." Indeed, by its express terms the statute may be violated where no conversation at all occurs.

Gormley, 632 F.2d at 941–42.

As to the intent element, it must exist at the time the call is made or email sent, *Wilcox*, 160 Vt. at 275, and thus does not depend upon the content of the call or email. As intent often must be proven by circumstantial evidence and inferred from a defendant's acts, *Cole*, 150 Vt. at 456, with respect to this crime, it is the making of the multiple calls, or the sending of the emails, itself which may demonstrate the requisite intent, i.e. defendant is intending to harass the recipient by the sending of the many emails, regardless of the content of those emails. Thus, on its face, and limiting the Court's analysis to the third enumeration of the crime—which is the only one relevant to the present action—§ 1027(a) appears to be limited to conduct, regardless of the content. For the purposes of the Court's analysis, Section 1027(a) is a content-neutral law.

"[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, see *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 293… (1984), because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (upholding statute banning burning of draft cards and defendant's conviction thereunder in the face of First Amendment challenge). "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

Defendant's arguments appear to attack the second and fourth factors in this analysis: first, he argues that the statute was intended to address repeated phone calls, which disturb a whole house because of the ringing, and that these same concerns do not apply to repeated emails; second, he argues that the statute should have no application when the target of the communications is a public figure. The Court finds that the second argument resolves the matter, and thus does not address the first.

In *United States v. Popa*, the Circuit Court for the District of Columbia found that a nearly identical federal statute was unconstitutional as applied to a defendant in similar circumstances. 187 F.3d at 678. There, the defendant had made seven telephone calls to the office of the U.S. Attorney for the District of Columbia, allegedly to complain about his treatment by police and the prosecutor involved in a case against him, over a period of about a month in which the defendant made several offensive, derogatory comments about the race and character of the U.S. Attorney, Eric Holder. *Id.* at 673–74. There, the Circuit Court held that

> the statute could have been drawn more narrowly, without any loss of utility to the Government, by excluding from its scope those who intend to engage in public or political discourse. Indeed, the Government itself, quoting *United States v. Lampley,* 573 F.2d 783 (3d Cir.1978), describes the interest furthered by § 223(a)(1)(C) as the "important interest 'in the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives.'" *Id.* at 787. In other words, as Popa notes, the Government's "asserted interest is limited to protecting individuals from noncommunicative uses of the telephone," such as tying up someone's line with a flood of calls, each of which is terminated by the caller as soon as it is answered. Punishment of those who use the telephone to communicate a political message is obviously not "essential to the furtherance of that interest." Hence the statute fails the fourth part of the *O'Brien* test. 391 U.S. at 377.

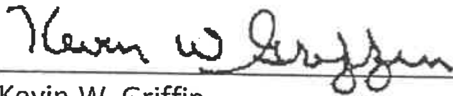
Id. at 677.

The Court agrees with this analysis. The disturbing the peace by phone statute, if read to apply to repeated communications to a public official at their public address or phone number, even where the statute limits its application to where a communicator communicates with the intent to harass, see *id.* at 676–77, does not survive *O'Brien*'s intermediate scrutiny. Thus, the Court finds that as a matter of law, the application of the breach of the peace by phone statute to Defendant's conduct improperly infringes on his First Amendment right of expression. As applied to Defendant, the statute is unconstitutional. The charge cannot stand. See *State v. Tracy*, 2015 VT 111, ¶¶ 39–40, 200 Vt. 216. Defendant's motion to dismiss the breach of the peace by phone count is granted. V.R.Cr.P. 12(d)(2) (stating that where the State fails to meet its burden, "the court *must* dismiss the indictment or information without prejudice and discharge the defendant" (emphasis added)).

III: Order

Defendant Christopher Hayden's motion to dismiss Count 1 in Docket No. 3422-10-18 Cncr charging aggravated disorderly conduct is DENIED. His motion to dismiss Count 1 in Docket No. 3588-10-18 Cncr charging disturbing the peace by phone is GRANTED. The Count is dismissed without prejudice.

Electronically signed on March 26, 2019 at 01:45 PM pursuant to V.R.E.F. 7(d).



Kevin W. Griffin
Superior Court Judge