No. 124688

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RORY JOHN SWENSON, Defendant-Appellant.	) Appeal from the Appellate Court of Illinois, Second District, No. 2-16-0960) There on Appeal from the Circuit Court of the Seventeenth Judicial Circuit, Winnebago County, Illinois, No. 15 CF 2814) The Honorable Fernando L. Engelsma, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Defendant appeals from the appellate court's judgment affirming his disorderly conduct conviction following a bench trial. No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

Defendant was convicted of disorderly conduct based on his conduct during a lengthy phone call with a school official about school shootings that prompted school officials to call 911 and place the school on lockdown. The issues presented are:

(1) Whether defendant's speech is unprotected under the true threats doctrine because a reasonable person would have known that his words would be perceived as a true threat in context;

(2) Whether defendant's speech is unprotected because it was likely to (and did) result in an immediate breach of the peace; and

(3) Whether the People proved defendant guilty beyond a reasonable doubt of knowingly engaging in unreasonable acts that he knew or should have known were likely to provoke a breach of the peace.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b). On May 22, 2019, this Court allowed defendant's petition for leave to appeal. *People v. Swenson*, 124 N.E.3d 467 (Ill. 2019) (Table).

STATEMENT OF FACTS

Defendant was charged by information with disorderly conduct, attempted disorderly conduct, and phone harassment. C11-13.[1] He waived his right to a jury, C33; R38-39, and the case proceeded to a bench trial in October 2016.

Trial

Monica Krysztopa testified that she was responsible for handling admissions at Keith Country Day School, a college preparatory school for students from pre-kindergarten through high school. R71-72. On December 7, 2015, around 2:00 p.m., she listened to an office voicemail from a male caller named Rory who left his phone number and requested to speak with her about admissions. R72-74. When Krysztopa returned his call, defendant identified himself as Rory Swenson and said that he wanted to enroll his son in the second grade. R75-76. Krysztopa took notes during the call, as was her practice. R75, 85.

From the outset of the fifteen- to twenty-minute call, R85, defendant asked "a battery of questions" about the school's protocols relating to guns and shootings. R76. He questioned how prepared Krysztopa would be "if he or anyone" arrived on campus with guns; whether the school had bulletproof windows at the secretary's desk or bulletproof doors; how thick the doors

[1] "C_," "R_," and "Def. Br. _" refer to the common law record on appeal, the report of proceedings in the circuit court, and defendant's opening brief, respectively.

were; where staff stand in the classrooms, normally and during lockdowns; whether staff were armed; and how staff would defend themselves against an armed intruder. R76, 96. Defendant also mentioned "in passing that the United States was full of socialists and KGB members." R77.

Defendant pointed out that a mass shooting had occurred a week earlier in San Bernardino, California and asked Krysztopa whether the school was prepared "if that would happen in your campus today" and if she personally "was prepared to have the sacrificial blood of the lambs of [the] school on [her] hands." R78. He also asked whether Krysztopa knew the number of school shootings that had occurred in the United States and the "success rate" of shooters once they were on campus, because "it would be important for Keith [Country Day School] to know that [information] when an armed individual was on [the] campus." R78, 93.

Defendant's questions about school shootings continued. He asked what the protocol would be if he showed up on campus with a gun, whether the school gave teachers "PEZ dispensers" to defend themselves, whether the teachers carried guns, what the students would think of "seeing a gun pointed in their teachers [*sic*] face," and whether "the teachers were prepared to have a gun in their face." R80-81. He also asked how quickly the police would get to the school after a shooting. R81. And as defendant was "talking about when you shoot and kill children and you're looking them in the eye and their innocence," he asked Krysztopa how the school would protect the

children and whether she would "sniff the pillow of their innocence after they've been dead." R86. Although Krysztopa did not remember defendant saying that he owned guns, he did talk "about a number of guns and their success rate in kill." R81.

Then, toward the end of the call, defendant asked if the conversation was being recorded. R87. After once again asking about the school's protocol for "shooters," defendant said that he "had to go, the conversation was done," and he hung up. *Id.*

Based on defendant's questions, particularly the questions concerning whether she and the school were prepared if something were to happen "today," R78, Krysztopa believed that defendant was on the school's campus as they spoke, R82. Her belief was reinforced by defendant's remarks that he was familiar with the woods around the campus because he had attended the school, but had been kicked out. R82, 100. In more than 150 admissions phone calls that she had received, no parent had ever asked Krysztopa questions of the sort that defendant asked of her that day. R96-97.

The phone call so alarmed Krysztopa that she texted the head of the school to "get out there immediately"; "there's someone talking about guns and the safety of our school, call 911." R83. After the head of school called 911, the school went into a "soft lockdown," the first lockdown in Krysztopa's year-and-a-half-long tenure with the school. *Id.* The students were ushered into classrooms, the classroom doors were closed, and the students were

counted to make sure that all were accounted for. *Id.* After police arrived on campus and school officials were notified that police had been dispatched to defendant's home, the students were dismissed fifteen minutes early, and the school alerted parents that a threat had been made. R84.

On cross-examination, Krysztopa explained that defendant did not explicitly state that he was "coming to [the] school with guns" or that he was "on the campus," and that she did not know "his intention" behind his words. R90-93. Although the conversation led her to believe that defendant was on campus, she agreed that "no immediate threat was made." R94.

Rockford Police Officer Michael Clark testified that he went to defendant's home to speak with defendant about his phone call with Krysztopa. R60. When Clark arrived, he called defendant using a number that had been provided by the 911 dispatchers, but no one answered. R60-61. About a minute later, defendant came out of his home and approached Clark. R63. Defendant admitted that he had spoken to someone at the school because he wanted to know about the security in the building; he said that he asked whether the school had armed security guards and bulletproof glass. R64. Clark arrested defendant for disorderly conduct. R65.

On cross-examination, Clark agreed that defendant had stated that he was considering transferring his son to Keith Country Day. R66. Defendant also said that had no weapons, and Clark saw no weapons in plain view upon entering defendant's apartment. R67.

Defendant testified that he had been concerned about the security of Rockford Public Schools and wanted to enroll his son in a private school that was not "bound by budgeting restrictions used as an excuse not to protect our children." R108-09. It was in this context that he had asked Krysztopa about the school's security protocols and, according to defendant, the availability of financial aid. R110. Defendant denied threatening anyone at the school and testified that he had neither a Firearm Owner's Identification card nor any weapons. R111-12.

On cross-examination, defendant claimed that he had asked about the curriculum but admitted that he did not inquire about the school schedule or arranging a tour. R114-16. He denied threatening the school but admitted that he had asked if the teachers were armed. R111, 118. He also admitted telling Krysztopa that replacing a teacher with an off-duty police officer would reduce the response time and "lower the casualty rate" in "an active shooter scenario," and he mentioned that "a two- to four-minute response time" was inadequate to protect his son. R119. Defendant said that he "discussed the investigation that [he] had done on why they weren't putting guns in schools," and said that "if the liberal left wants to make me their sacrificial lamb so be it"; "[t]hen the blood is on their hands next time there is a school shooting in regards to civil ramifications." R120.

Defendant explained that he ended his call with Krysztopa when Officer Clark (and several squad cars) arrived at his home. R122. He went

outside and told Clark that he did not threaten anybody and that Krysztopa "took [his] political affiliation and spun it out of context." *Id.*

The trial court credited Officer Clark's and Krysztopa's testimony. R131. The court determined that defendant's testimony was credible "in parts" but credited Krysztopa's testimony over defendant's when their accounts conflicted. *Id.* The court convicted defendant of disorderly conduct and acquitted him of the remaining charges. *See* R131-35; C45. When explaining the basis for the disorderly conduct conviction, the court stated:

> Would you as a parent have the right to know some things about the school? Yes, but not in this fashion. The hallmark of this ruling here is reasonableness. We try to look at things reasonably and this was just an unreasonable act. Would a reasonable person be alarmed and disturbed? Yes. A reasonable person would be alarmed and disturbed. And I so find.
>
> * * *
>
> I find that the act was done knowingly. Even if it wasn't done knowingly in the sense of making a threat to the school but if the act was done knowingly and was the act an unreasonable act? Yes. The conversation is outlined by a credible witness Krysztopa and was unreasonable. It went too far for that.
>
> * * *
>
> So it is disorderly conduct.

R132-35.

Because defendant had a prior conviction, the trial court declined to impose supervision and instead sentenced defendant to twelve months of probation and four days in jail, as well as a mental health assessment and counseling. R140, 143; C46.

Appeal

On appeal, defendant first argued that the People failed to prove that he acted "knowingly," as the disorderly conduct statute, 720 ILCS 5/26-1(a)(1), requires. *People v. Swenson*, 2019 IL App (2d) 160960, ¶ 16. The appellate court rejected defendant's interpretation of "knowingly" as requiring that he be aware his conduct was "practically certain to alarm or disturb another and cause a breach of the peace"; instead, it concluded that the statute required that defendant have knowingly engaged in the conduct in an unreasonable manner and that he "knew or should have known" that his conduct would disturb another and breach the peace. *Id.* ¶¶ 19-22. Applying this standard, the court held that the evidence was sufficient to convict because defendant's "comments as a whole were broader, morbid, and clearly inappropriate to his purported objective." *Id.* ¶¶ 23-24.

Defendant next argued that the disorderly conduct statute cannot be interpreted to criminalize the speech at issue here because that speech was protected by the First Amendment. *Id.* ¶ 25. Again, the appellate court disagreed, explaining that "[w]ords that are expressed 'in such an unreasonable manner as to provoke, make or aid in making a breach of peace [do] not come within the protections of the first amendment.'" *Id.* (quoting *City of Chicago v. Morris*, 47 Ill. 2d 226, 230-31 (1970)). Thus, the appellate court held that the First Amendment did not protect defendant's speech

because his manner of expressing his concern was unreasonable and he provoked a breach of the peace. *Id.* ¶ 27.

ARGUMENT

Both of defendant's arguments before this Court — that the disorderly conduct statute is unconstitutional as applied to his speech, Def. Br. 10, and that the People failed to prove beyond a reasonable doubt that he was guilty of disorderly conduct, *id.* at 14 — are without merit. First, his speech was unprotected, both because a reasonable person would foresee that the recipient would receive his words as a threat and because it was made in an unreasonable manner so as to provoke a breach of the peace. Second, the People proved beyond a reasonable doubt that defendant knowingly engaged in the conduct at issue in an unreasonable manner that he knew or should have known would disturb, alarm, or provoke others. Accordingly, this Court should affirm defendant's conviction.

I. Applying the Disorderly Conduct Statute to Defendant's Speech Does Not Violate the First Amendment.

A. First Amendment principles and standard of review

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The amendment's protections of speech, however, are not absolute, and the United States Supreme Court has long recognized that the States may regulate certain categories of expression, including both "true threats" and words that "tend to incite an immediate

breach of peace." *Virginia v. Black*, 538 U.S. 343, 358-59 (2003). These categories involve speech "of such slight social value as a step to truth that any benefit that may be derived from [the speech] is clearly outweighed by the social interest in order and morality." *Id.* (internal quotations omitted).

Two types of First Amendment attacks can be mounted against a statute that criminalizes speech: facial and as-applied. An overbreadth challenge is a facial challenge. It allows "persons to whom a statute may constitutionally be applied to challenge the statute on the ground that it may conceivably be unconstitutionally applied to others in situations not before the court." *Vuagniaux v. Dep't of Prof'l Regulation,* 208 Ill. 2d 173, 191 (2003). But if, as here, the defendant is contending that the statute cannot be constitutionally applied to *his* conduct, he is making an as-applied challenge. Such a challenge "asserts that the particular acts which gave rise to the litigation fall outside what a properly drawn regulation could cover." *Id.*; *accord People v. Garvin,* 219 Ill. 2d 104, 117 (2006) (as-applied challenge requires challenger to show that statute is unconstitutional as it applies to him). Thus, the particular facts and circumstances become relevant. *In re M.A.,* 2015 IL 118049, ¶¶ 39-40; *Napleton v. Vill. of Hinsdale,* 229 Ill. 2d 296, 305-06 (2008).

Because the constitutionality of a statute presents a legal question, this Court should review defendant's as-applied challenge to the disorderly conduct statute de novo. *See People ex rel. Hartrich v. 2010 Harley-Davidson*,

2018 IL 121636, ¶ 13. But the Court gives deference to the trial court's underlying credibility and factual findings, reversing them only if they are against the manifest weight of the evidence. *Id.*

B. Defendant's speech constituted an unprotected true threat.

Defendant's speech added up to an unprotected true threat, i.e., "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *United States v. Parr*, 545 F.3d 491, 497 (7th Cir. 2008) (citing *Black*, 538 U.S. at 359; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992); *Watts v. United States*, 394 U.S. 705, 707 (1969)) (internal quotations omitted). The speaker need not actually intend to carry out the threat. *Black*, 538 U.S. at 360. This "true threats" doctrine allows States to "protect individuals from the fear of violence" and "from the disruption that fear engenders," not merely the possibility that the violence will actually occur. *R.A.V.,* 505 U.S. at 388.

In *Black*, the Supreme Court stated that "true threats" encompass situations where the speaker had an "intent to threaten." 538 U.S. at 359-60. Although this Court has not decided whether, after *Black,* the true threats doctrine requires subjective intent, most courts have held that "true threats" are defined objectively – that is, by asking whether a reasonable person would foresee that the recipient would perceive the speech as a threat and not, as defendant argues, Def. Br. 10-11, whether the defendant knew or intended that his speech be perceived as a threat. *See, e.g.*, *United States v.*

Dutcher, 851 F.3d 757, 761 (7th Cir. 2017) ("a 'true threat' . . . is defined objectively"); *United States v. Dillard*, 795 F.3d 1191, 1199 (10th Cir. 2015) ("[w]e apply an objective test to determine whether the speaker made a true threat"); *United States v. Martinez*, 736 F.3d 981, 987 (11th Cir. 2013) (holding that *Black* does not require a subjective-intent analysis for true threats), *vacated on other grounds by United States v. Martinez*, 800 F.3d 1293 (11th Cir. 2015); *United States v. Elonis*, 730 F.3d 321, 332 (3d Cir. 2013) (*Black* does not hold that true threats require a subjective intent to threaten), *overruled on other grounds by Elonis v. United States*, 135 S. Ct. 2001 (2015); *but see United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) (*Black* requires "proof that the speaker subjectively intended the speech as a threat").

Contrary to defendant's argument, Def. Br. 10-11, this Court should follow the majority rule. Although *Black* described "true threats" as encompassing situations where "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," 538 U.S. at 359-60, the circuits that have adopted the majority approach have reasoned that *Black* had no reason to distinguish between subjective and objective standards for true threats because (1) the Virginia law at issue required subjective intent; and (2) the provision that the Supreme Court invalidated included no standard for intent. *United States v. Jeffries*, 692 F.3d 473, 479-80 (6th Cir. 2012); *see also Elonis*, 730 F.3d at 329 (holding *Black* did not

"invalidate the objective intent standard the majority of circuits appl[y] to true threats" because the Virginia statute "already required a subjective intent"). Thus, these courts concluded that *Black* requires that the speaker "intend to make the communication," not the threat. *Elonis*, 730 F.3d at 329; *see also Martinez*, 736 F.3d at 986–88; *Jeffries*, 692 F.3d at 480.

Indeed, application of this objective standard is most consistent with the rationale underlying the true threats doctrine. True threats "by their very utterance inflict injury" on the recipient. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). That is, the exclusion of true threats from First Amendment protection is rooted in their effect on the listener. As a result, identifying true threats requires a test that focuses not on the intent of the speaker but on the effect on a reasonable listener. As courts applying *Black* have explained, "[l]imiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from the fear of violence and the disruption that fear engenders, because it would protect speech that a reasonable speaker would understand to be threatening." *Elonis*, 730 F. 3d at 330 (internal quotations omitted).

Nor is there a risk that protected speech will be criminalized in the absence of a subjective intent requirement. The reasonable-person standard reliably winnows out protected speech because the trier of fact must consider contextual cues in deciding whether a "reasonable person" would perceive the

charged conduct "as a serious expression of an intention to inflict bodily harm." *Jeffries*, 692 F.3d at 480. For example, the words of a disappointed student telling a friend, "I'm going to kill you" after the friend purchased the last dessert in the cafeteria line will be interpreted very differently than a reasonable person would interpret defendant's statements in this case.

Indeed, in the seminal true threats case, *Watts*, the Supreme Court relied on the objective test to identify and protect political speech that appeared at first blush to constitute a sincere threat. The incident that led to Watts' arrest occurred during a public rally at the Washington Monument during the Vietnam War. *Watts*, 394 U.S. at 706. According to an investigator for the Army Counter Intelligence Corps, who was present during a discussion group with fellow draft protestors, Watts said:

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. . . . They are not going to make me kill my black brothers.

Id. The jury found that Watts had committed a felony by knowingly and willfully threatening the President. Watts' counsel argued that there was no basis to find that he had sincerely threatened the President. *Id.* at 707. Watts's statement was made during a political debate, it was expressly made conditional upon an event — induction into the Armed Forces — that Watts vowed would never occur, and both Watts and the crowd laughed after the statement was made. *Id.* The Court held that the statute under which Watts

had been convicted was constitutional on its face, but that it must be interpreted with the commands of the First Amendment clearly in mind. *Id.* "What is a threat must be distinguished from what is constitutionally protected speech." *Id.* Therefore, the Court held, "the statute initially requires the Government to prove a true 'threat.'" *Id.* at 708. The Court concluded that Watts' speech was not a true threat, but rather "'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise." *Id.* at 708.

Thus, applying an objective, contextual approach, the Court identified a statement that was threatening on its face — "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." — as political hyperbole rather than a true "threat." The Court did not ask what Watts' subjective intent had been. That question would have advanced neither the purpose of the true threats exception, nor was it necessary to separate true threats from protected speech.

In any event, *Black's* definition of true threats is fully consistent with an objective standard for true threats. *Black* defined "intimidation" as a "type of true threat" — one directed with the subjective intent to place listeners in fear of bodily harm or death. 538 U.S. at 360. The Court was clear that true threats "encompassed" intimidation, but also that

intimidation is merely one type of true threat: a true threat delivered with a particular subjective intent. Requiring subjective intent for one type of true threat makes little sense if the Court intended all true threats to require such intent. *See, e.g.*, *Martinez*, 736 F.3d at 987 ("By defining intimidation to include a subjective-intent analysis, *Black* indicated that the general class of true threats does not require such an inquiry into the speaker's subjective mental state. After all, intimidation is but one type of true threat.").

Nor did the Court's subsequent decision in *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001 (2015), suggest that the Supreme Court has changed course and required a subjective, rather than objective, standard for the true threats doctrine. First, *Elonis* was a statutory interpretation case that expressly avoided consideration of First Amendment principles. *Id.* at 2012. Defendant's claim that *Elonis* held that "a true threat is one made 'for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat,'" Def. Br. 10-11 (quoting *Elonis*, 575 U.S. at 2012), is incorrect. The full sentence from which defendant selectively quotes reads: "There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Elonis*, 575 U.S. at 2012. In other words, *Elonis* reached no holding about what constitutes a true threat under the First Amendment, but rather simply stated that the parties did not dispute that subjective

knowledge or intent would satisfy the mens rea component of that particular section of the federal code. Thus, it is not surprising that the majority of circuits that interpreted *Black* to require an objective standard have not changed their approach after *Elonis*. *See, e.g.*, *United States v. Stevens*, 881 F.3d 1249, 1253-54 (10th Cir. 2018) ("Under the reasonable person standard, [t]he question is whether those who hear or read the threat reasonably consider that an actual threat has been made.") (internal quotations omitted); *United States v. Elonis*, 841 F.3d 589, 596-97 (3d Cir. 2016) ("The objective [test] shields individuals from culpability for communications that are not threatening to a reasonable person, distinguishing true threats from hyperbole, satire, or humor.").

Applying the objective standard to defendant's speech, the trial court appropriately found defendant guilty despite his supposed lack of subjective intent:

> The hallmark of this ruling here is reasonableness. We try to look at things reasonably and this was just an unreasonable act. Would a reasonable person be alarmed and disturbed? Yes..

R134-35. After introductions, defendant "immediately" launched into aggressive, disturbing questions about the school's preparedness for a school shooting that went well beyond typical parental concern. R76. Among defendant's questions, several suggested that he presented an imminent threat: he asked how prepared Krysztopa would be "if *he* or anyone" arrived on the school campus with guns, whether the school was prepared if a mass

shooting like that in San Bernardino "would happen in [sic] your campus *today,*" if Krysztopa personally "was prepared to have the sacrificial blood of the lambs of [the] school on [her] hands," and if she would "sniff the pillow of their innocence after they've been dead." R76, 78, 86 (emphasis added). In addition, defendant recited facts about shooters' "success rate[s]" once they were on campus, explained that he was familiar with the school's campus as he had attended the school, and talked about "shoot[ing] and kill[ing] children and you're looking them in the eye and their innocence[.]" R82, 86, 93, 100. Viewed as a whole and in context, a reasonable person would not take defendant's speech as mere "political hyperbole," but as a true threat. *See Watts*, 394 U.S. at 708.

C. Defendant's speech was likely to — and in fact did — provoke a breach of the peace.

Defendant's speech is unprotected for another reason: because it was likely to — and in fact did — provoke a breach of the peace. As the appellate court recognized below, *Swenson*, 2019 IL App (2d) 160960, ¶ 25, words that are expressed "in such an unreasonable manner as to provoke, make or aid in making a breach of peace [do] not come within the protections of the first amendment." *City of Chicago v. Morris*, 47 Ill. 2d 226, 230-31 (1970); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1967) (speech is unprotected if it would tend to incite an immediate breach of the peace). This doctrine, which has come to be known as the "fighting words" doctrine, was perhaps most famously articulated by Justice Holmes, who observed that one

may not falsely yell "fire" in a crowded theater. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

The Seventh Circuit's opinion in *United States v. Woodard*, 376 F.2d 136 (7th Cir. 1967), on which this Court relied in *Morris*, is instructive. There, the defendants were convicted of disorderly conduct. *Woodard*, 376 F.2d at 138-39. One defendant was convicted for jumping to his feet during a congressional hearing and shouting, "Being an American citizen, I don't have to sit here and listen to these lies." *Id.* at 139. He was warned to keep quiet, but continued shouting and was removed from the building. *Id.* The Seventh Circuit rejected the argument that his speech was protected by the First Amendment. *Id.* at 142-43. The court held that while "the defendant . . . was attempting to voice a protest against the proceedings, [he] had no constitutional right to voice his protest in the manner he adopted. The first amendment does not guarantee the right of a spectator to shout during a legislative hearing so as to disrupt the orderly processes of the proceeding." *Id.* at 142.

Here, defendant argues that his speech was protected by the First Amendment because he purportedly merely "had a conversation with Ms. Krysztopa about the security at Keith School during which he inquired about the security protocols at the school and made statements about appropriate measures to prevent school shootings." Def. Br. 9. This mischaracterizes and understates the phone call. Defendant did not engage in a conversation

concerning a matter of public interest in which he "peacefully express[ed] unpopular views." *See People v. Raby*, 40 Ill. 2d 392, 397 (1968). Rather, he subjected Krysztopa to a lengthy interrogation that went well beyond reasonable parental concern for school security and in fact resulted in her calling 911, an emergency police response, and a school lockdown. As in *Woodard*, although defendant's concern might have been reasonable, his manner of expressing it was not, and he provoked a breach of the peace. *See People v. Pence*, 2018 IL App (2d) 151102, ¶ 17 ("a breach of the peace can occur without overt threats or profane and abusive language") (internal quotations omitted). Therefore, defendant's speech was not constitutionally protected.

Defendant's reliance on *Purtell v. Mason*, 527 F.3d 615 (7th Cir. 2008), is misplaced. *See* Def. Br. 12. There, the Seventh Circuit held that "inflicting psychic trauma alone — without any tendency to provoke responsive violence or an immediate breach of the peace — does not lose constitutional protection under the fighting words doctrine." *Purtell*, 527 F. 3d at 624. Before Halloween, the Purtells erected six fake tombstones on their lawn, five of which described the deaths of specific neighbors with whom the Purtells were feuding. *Id.* at 618. The court explained that "[w]hile the tombstones apparently elicited an emotional response from the Purtells' neighbors — embarrassment, anger, resentment, and for some, fear — the messages were not, in context, the sort of provocatively abusive speech that inherently tends

to incite an immediate breach of the peace." *Id.* at 625. Therefore, the Purtells' speech was constitutionally protected. *Id.*

Unlike the Purtells' tombstones, defendant's speech subjecting a school official to a lengthy, lurid, and morbid interrogation about a potential shooting at that particular school was almost certain to provoke a breach of the peace, and indeed it had exactly that effect. In *Purtell*, the Seventh Circuit observed that "to qualify as fighting words, the speech in question must have a tendency to provoke an average person to commit an *immediate* breach of the peace. The tombstones did not have that tendency, and in fact for a long time stood on the Purtells' lawn without incident." 527 F. 3d at 625. In contrast, defendant's speech here immediately caused school officials to call 911 and place the school on lockdown. Indeed, defendant was still on the phone with Krysztopa when police arrived at his house. Defendant's assertion that there was nothing "inherent" in his words that would cause an immediate breach of the peace, Def. Br. 13, is without basis and belied by the record.

II. The People Proved Defendant's Guilt Beyond a Reasonable Doubt.

Nor is there any merit to defendant's challenge to the sufficiency of the People's proof. This Court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The "'relevant question is whether, after viewing the evidence in the light most

favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact is responsible for resolving conflicts in the testimony, weighing the evidence, and determining what inferences to draw, and this Court will not substitute its judgment for that of the trier of fact. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000); *accord People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007) ("The trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court and jury that saw and heard the witnesses."). Accordingly, credibility findings "are entitled to great weight," and a conviction will be reversed only "where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt." *Id.* at 115.

As relevant here, the disorderly conduct statute provides:

> (a) A person commits disorderly conduct when he or she knowingly:
>
> > (1) Does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace[.]

720 ILCS 5/26-1(a)(1) (2014). Thus, to prove defendant guilty of disorderly conduct, the People had to prove that defendant "knowingly" committed an act in an unreasonable manner that he "knew or should have known" would tend to alarm or disturb another so as to cause a breach of the peace. *Raby*, 40 Ill. 2d at 397. Defendant's argument that the People's proof was

insufficient because it did not show that he "knowingly caused a breach of the peace," Def. Br. 14, is premised on the misapprehension that he had to know or intend that his conduct would result in a breach of the peace. In fact, defendant had to knowingly engage in the conduct in question, and he was guilty of disorderly conduct so long as a reasonable person would have known that the conduct was likely to provoke a breach of the peace. *Raby*, 40 Ill. 2d at 397. Defendant does not challenge that he knowingly communicated the speech in question, but rather argues that the People failed to prove that he knew the effect it would have.

In other words, defendant asks this Court to hold that the word "knowingly" in the introductory clause of section 26-1(a)(1) modifies every element of the offense. But this Court rejected that construction in *Raby*, which noted the Drafting Committee's intent that "'the gist of the offense is not so much that a certain overt type of behavior was accomplished, as it is *that the offender knowingly engaged in some activity in an unreasonable manner which he knew or should have known would tend to disturb, alarm or provoke others*. The emphasis is on the unreasonableness of his conduct and its tendency to disturb.'" *Raby*, 40 Ill. 2d at 396-97 (quoting Ill. Ann. Stat., ch. 38, ¶ 26-1, Drafting Committee Comments (Smith-Hurd 1964)) (emphasis added).

Therefore, the question is whether the evidence was sufficient to establish beyond a reasonable doubt that defendant *knowingly* committed an

unreasonable act that he *knew or should have known* would tend to alarm or disturb another so as to provoke a breach of the peace. Viewed in the light most favorable to the State, and considering the trial court's credibility determinations, the evidence allowed the trial court to infer that defendant had the requisite mental state. Defendant does not challenge that the People proved he *knowingly* communicated the speech in question. And, viewing the evidence in the light most favorable to the People, it was sufficient to prove that he *should have known* that speech would cause a breach of the peace. Although asking about a school's security protocol is not, in itself, unreasonable, the manner of defendant's inquiry, considered in its totality, was plainly unreasonable.

Defendant called during the school day, emphasized to Krysztopa that he was familiar with the campus, conveyed a detailed knowledge of guns and school shootings, and asked what would happen "if *he* were to show up at the campus with a gun." R79 (emphasis added). Defendant referenced the then-recent San Bernardino mass shooting and asked, "Is [the school] prepared if that would happen in [sic] your campus *today*?" R78 (emphasis added). Defendant also asked how long it would take police to get to the school in the event of a shooting, whether there were bulletproof windows at the secretary's desk, whether the doors were bulletproof, where faculty members stood in the event of a lockdown, and whether they were armed. Krysztopa testified that defendant also talked about "when you have a shooter who

shoots [children] in the face" and asked her "what does that do for [her] as a school" and "if [she] would sniff the pillow of their innocence after they've been dead." R86. He also asked "if [she] was prepared to have the sacrificial blood of the lambs of [the] school on [her] hands." R78. Defendant claims that he was "simply . . . having a conversation with the school administrator about policies and his concerns about a school shooting," Def. Br. 18, but his manner of doing so was clearly unreasonable and he knew or should have known that it was likely to provoke a breach of the peace, as it in fact did.

Viewing the evidence in the light most favorable to the People, a rational trier of fact could have found that defendant knowingly acted in an unreasonable manner and knew or should have known that his act would alarm or disturb Krysztopa so as to breach the peace, and the evidence was therefore sufficient to convict.

CONCLUSION

This Court should affirm the appellate court's judgment.

December 16, 2019

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is twenty-six pages.

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CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On December 16, 2019, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which served notice on the following e-mail addresses:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail an original and twelve copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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