No. 124688

IN THE

SUPREME COURT OF ILLINOIS

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

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

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POINT AND AUTHORITIES

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NATURE OF THE CASE

After a bench trial, Rory Swenson was convicted of disorderly conduct and sentenced to 12 months of probation and four days in jail.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUE PRESENTED FOR REVIEW

Whether the State failed to prove Mr. Swenson guilty of disorderly conduct where no evidence was presented he knowingly caused a breach of the peace and, in fact, his conduct of having a conversation which did not contain any "true threats" or "fighting words" cannot constitute a breach of the peace under the First Amendment?

JURISDICTION

Rory Swenson, petitioner-appellant, appeals from a final judgment of conviction in a criminal case. He timely filed a notice of appeal from his conviction and sentence on November 10, 2016. (C. 52) The Second District Appellate Court affirmed the conviction on February 28, 2019. *People v. Swenson*, 2019 IL App (2d) 160960. This Court granted the petition for leave to appeal from that judgment on May 22, 2019.

STATUTE INVOLVED

720 ILCS 5/26-1 (a)(1)(2015):

§ 26-1. Disorderly conduct

(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;

STATEMENT OF FACTS

The defendant, Rory Swenson, was charged in an information with attempted disorderly conduct, a Class A misdemeanor, for attempting to transmit a threat against persons at Keith Country Day School. (C. 11-13) The information also charged Swenson with telephone harassment, a Class B misdemeanor, for calling the director of admissions at Keith School, and disorderly conduct, a Class C misdemeanor, for acting unreasonably during a phone call with the director of admissions which alarmed and disturbed her and caused a breach of the peace. (C. 11-13)

Mr. Swenson waived his right to a jury trial. (C. 33) A bench trial was held on October 4, 2016. (R. 54-135)

The State called Michael Clark, an officer with the City of Rockford. (R. 59) Ofc. Clark testified that, on December 7, 2015, he was dispatched to a home on Flintridge Court in Rockford to speak to Rory Swenson about a phone call he had made to Keith Country Day School. (R. 60) Ofc. Clark was given a phone number with an 815 area code as the number that had made the call. (R. 63) When Ofc. Clark was outside of the Flintridge address, he called that number. (R. 63) There was no answer but, about one minute later, Mr. Swenson came outside to speak to Ofc. Clark. (R. 63) Ofc. Clark patted Mr. Swenson down and found no weapons on him. (R. 64) Mr. Swenson admitted that he had called Keith School and stated he had called only to ask about security at the school. (R. 64) Ofc. Clark asked Mr. Swenson to sit in his squad car and he complied. (R. 64) Ofc. Clark later informed Mr. Swenson that he was under arrest. (R. 64) Mr. Swenson was cooperative with Ofc. Clark throughout the interaction. (R. 66) After he arrested

Mr. Swenson, Ofc. Clark went into Mr. Swenson's apartment to retrieve Mr. Swenson's seven-year-old son. (R. 67) While inside the apartment, Ofc. Clark did not see any weapons. (R. 68)

Monica Krysztopa testified that she handles admissions at Keith Country Day School in Rockford. (R. 71) On December 7, 2015, she received a voicemail on her office phone from a man named Rory who stated he was interested in enrolling his son in the school. (R. 72) The man left a number to call him back. (R. 72) Krysztopa called the man back and spoke to him about enrolling his son at Keith School. (R. 73) The man identified himself as Rory Swenson. (R. 75) He stated his son was in second grade and was attending public school. (R. 76)

Mr. Swenson then asked a series of questions about school security and school shootings. (R. 76) He wanted to know how prepared the school would be if he or anyone else arrived on campus with a gun. (R. 76) Mr. Swenson asked numerous questions, including whether the school has bulletproof glass, where faculty members would stand if there is a lockdown, if they are armed, and how they would defend themselves. (R. 76) He mentioned the recent shooting in San Bernandino and asked Ms. Krysztopa if Keith School was prepared if something like that happened on their campus that day. (R. 78) He then asked Ms. Krysztopa if she was prepared to have the "sacrificial blood" of the lambs of her school on her hands if something bad were to happen. (R. 78) Ms. Krysztopa testified she took that statement as asking if she was prepared to have it on her soul if something happened. (R. 78)

Although Mr. Swenson spoke about guns during the call, Ms. Krysztopa testified he never stated he had a gun. (R. 81) Mr. Swenson did mention the woods

around campus and that he had previously gone to school there. (R. 81) At that point, Ms. Krysztopa was nervous the person she was speaking to might be on campus and she sent a message to the head of the school saying someone was talking about guns on campus, and asked them to call 9-1-1. (R. 83) The school then went on a "soft lockdown," which meant that the students all had to go into classrooms and be counted. (R. 83) The school was dismissed 15 minutes early that day. (R. 83)

Ms. Krysztopa took notes on her phone call with Mr. Swenson, as she did for all admissions calls. (R. 85) After refreshing her recollection with her notes, Ms. Krysztopa recalled that the defendant asked an odd question; after talking about when children are shot and they lay their heads on their pillows, Mr. Swenson asked what that does for the school and how do we protect them from that. (R.86) He then asked Ms. Kryztopa if she would "sniff the pillow of their innocence." (R. 86) Ms. Krysztopa was alarmed and disturbed by the phone call. (R. 88) However, she acknowledged that Mr. Swenson never stated he was on campus, that he had a gun, or that he was coming to campus with a gun. (R. 90-92) Ms. Krysztopa testified that Mr. Swenson did not make a threat against the school. (R. 94)

After presenting these witnesses, the State rested. (R. 103) The defense made a motion for a directed finding. (R. 103) The trial court granted the defense motion as to Count 2, telephone harassment, on the basis that the conversation took place when Ms. Krysztopa called Mr. Swenson back and Mr. Swenson did not make that phone call. (R. 106) The court denied the motion as to the attempted disorderly conduct and disorderly conduct charges. (R. 106)

Rory Swenson then testified that he has an eight-year-old son named

Jonathan and, in December 2015, he was looking into private schools to which to transfer his son because he was concerned with the lack of security in Rockford public schools. (R. 108) He called Keith Country Day School to inquire about this and received a call back. (R. 109) He did ask questions about the security at Keith, but he did not threaten anyone and he never said that he would bring a gun to campus. (R. 111-112) Mr. Swenson testified that he does not have a firearm owner's identification card and he does not own any firearms. (R. 111-112)

Mr. Swenson acknowledged that he asked if the teachers at Keith School carried firearms. (R. 118) He said he asked this question because Keith is a private school and he thought they may have more security. (R. 118) He also stated he told Ms. Krysztopa that if the school fired some teachers and hired off-duty police officers, the school could reduce casualties in a school shooting. (R. 119) Mr. Swenson denied that he asked Ms. Krysztopa if she was prepared to have "sacrificial blood" on her hands; rather, he was talking to her about his investigation as to why there are not more guns in school and that is when he said: "if the liberal left wants to make me their sacrificial lamb so be it. Then the blood is on their hands next time there is a school shooting in regards to civil ramifications."(R. 120)

The trial court found that there was no attempt on the part of Mr. Swenson to relay a threat to the school, school property, the teachers, or other students at Keith School and therefore, Mr. Swenson was not guilty of attempted disorderly conduct for attempting to transmit a threat against a school. (R. 132) The trial court further found that while there was no threat, Mr. Swenson's statements were unreasonable and found him guilty of the Class C misdemeanor disorderly conduct charge. (R. 132)

The case proceeded to sentencing immediately after the trial was completed. (R. 135) Mr. Swenson was sentenced to 12 months probation and four days in jail with credit for jail time he had already served. (C. 46, R. 141-143)

Mr. Swenson filed a motion for a new trial on October 28, 2016. (C. 49) That motion alleged that the State failed to prove him guilty beyond a reasonable doubt and that the verdict in the case was contrary to the law. (C. 49) Following the denial of the motion, Mr. Swenson appealed. (C. 52)

On appeal, Mr. Swenson argued that he was not proven guilty of disorderly conduct beyond a reasonable doubt because the State failed to prove he acted knowingly to cause a breach of the peace. *People v. Swenson,* 2019 IL App (2d) 160960, ¶¶ 17-19. Specifically, Mr. Swenson argued that, because he engaged in a telephone conversation with Ms. Kryztopa in which he merely inquired about security at the school, and did not raise his voice or make threats, there was no evidence he knew or should have known his conduct would cause a breach of the peace. *Swenson,* 2019 IL App (2d) 160960 ¶¶ at 19-23. The appellate court found that, because Mr. Swenson's comments were "morbid" and "innappropriate" to the goal of learning about the school's security, he should have known his conversation would disturb Ms. Kryztopa and cause a breach of the peace. *Swenson,* 2019 IL App (2d) 160960 ¶ 24.

Mr. Swenson further argued that, because his only conduct was speech which was not lewd, profane, obscene, libelous, or threatening and was not "fighting words," his conduct was protected by the First Amendment, such that the disorderly conduct statute cannot be read as criminalizing it. *Swenson,* 2019 IL App (2d) 160960 ¶ 24. The appellate court found that, although Mr. Swenson could reasonably

inquire about school security, because his manner of inquiry was not reasonable in that it was "disturbing" and "morbid," his conduct was not constitutionally protected. *Swenson,* 2019 IL App (2d) 160960 ¶ 27.

This Court granted leave to appeal on May 22, 2019.

ARGUMENT

During the phone conversation at issue in this case, Rory Swenson did not make statements which were "true threats" or "fighting words." Therefore, his conduct cannot be criminalized under the First Amendment. Moreover, because he made no statements which were "true threats" or "fighting words," the State failed to prove he knowingly acted unreasonably in order to cause a breach of the peace.

A. The First Amendment prevents Mr. Swenson's conviction based on a phone conversation which is protected speech.

Mr. Swenson's only conduct in this case was engaging in a phone conversation with Keith County Day School admissions director Monica Krysztopa which did not fall into any category of unprotected speech and, therefore, his conduct may not be criminalized under the First Amendment. Mr. Swenson was convicted of disorderly conduct because he 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. (C13; R. 76-92) Although the idea of a school shooting may be upsetting, it is clear from all the evidence that Mr. Swenson was making an inquiry about the school's policies and potential response to a school shooting and expressing displeasure that the school did not have stricter security measures or armed guards. During the conversation, Mr. Swenson did not make statements that were lewd, profane, obscene, or libelous. Nothing he said could reasonably be construed as "fighting words" or a "true threat." Therefore, the whole of the conversation was protected speech under the First Amendment and cannot provide a basis for a criminal conviction.

Because the disorderly conduct statute in this case is punishing conduct which is purely speech, the statute must be interpreted in accordance with the

First Amendment to the United States Constitution. U.S. Const. Amends. I, XIV; *Cohen v. California,* 403 U.S. 15, 18 (1971); *People v. Allen,* 288 Ill. App. 3d 502, 506-07 (4th Dist. 1997). An as-applied constitutional challenge such as tht brought here presents a legal question which this Court reviews *de novo* while giving deference to the trial court's underlying credibility and factual findings which may be set aside only if they are against the manifest weight of the evidence. *People ex rel. Hartrich v. 2010 Harley-Davidson,* 2018 IL 121636, ¶ 13.

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union,* 535 U.S. 564, 573 (2002)(Internal quotation marks omitted). The First Amendment prohibits criminalizing speech that is not lewd, profane, obscene, libelous, or "fighting words." *Beauharnais v. Illinois,* 343 U.S. 250, 255-56 (1952). The First Amendment does, however, permit a state to criminalize "true threats." *Virginia v. Black,* 538 U.S. 343, 359 (2003); *People v. Relerford,* 2017 IL 121094, ¶ 33. In order to comply with the First Amendment, therefore, Illinois courts must limit the scope of the disorderly conduct statute to those narrowly defined categories of speech which are unprotected. *Cohen* 403 U.S. at 18; *Allen,* 288 Ill. App. 3d at 506-507.

Nothing in Mr. Swenson's conversation fell into the category of a true threat. A true threat is one 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." *People v. Relerford,* 2017 IL 121094, ¶ 37 (citing *Virginia v. Black,* 538 U.S. 343, 359 (2003)); see also *Elonis v. United States,* 575 U.S. ——, ——, 135 S. Ct. 2001, 2012 (2015) (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"). Political hyperbole does not fall into the category of "true threats." *Watts v. United States*, 394 U.S. 705, 708 (1969) (finding defendant's conditional statement, that the first person he would shoot if he were drafted was the president, was not a true threat).

Here, there was clearly no "serious expression of an intent to commit an act of unlawful violence." The trial court specifically found that Mr. Swenson did not make any threats when it found him not guilty of attempted disorderly conduct because there was no attempt on the part of Mr. Swenson to relay a threat to the school, school property, the teachers, or other students at Keith School. (R. 132) The judge specifically stated, "I don't think you were threatening the school." Based on the evidence presented, the trial court was correct. Mr. Swenson's conversation with Ms. Krysztopa was not threatening. Indeed, Krysztopa herself recognized in her testimony that Swenson was not making any threats. (R. 90-92, 94). Mr. Swenson's speech thus does not fall under the unprotected category of "true threats" and his conviction cannot be upheld on that basis.

Neither did Mr. Swenson's conversation fall into the constitutionally unprotected category of "fighting words." " 'Fighting words' are those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, *inherently* likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971) (emphasis added). However, speech is "nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello v. City of Chicago*,

337 U.S. 1, 4 (1949) (finding that a conviction under a Chicago city ordinance which punished speech that "stirred the public to anger, invites dispute, brings about a conviction of unrest, or creates a disturbance" was unconstitutional as it was not narrowly tailored to punish only "fighting words"). Speech "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 v. Mason*, 527 F.3d 615, 624 (7th Cir. 2008)(finding that Purtell's tombstone lawn decorations containing insults and describing various means of demise for Purtell's neighbors were not unprotected "fighting words" despite provoking a strong reaction from those neighbors); see also *State v. Drahota*, 280 Neb. 627, 635–36 (2010)(finding that e-mails which contained provocative statements and insults were not inherently likely to cause a violent response and therefore did not constitute fighting words).

None of Mr. Swenson's questions or statements to Ms. Kryzstopa regarding school shootings were "personally abusive epithets." It is obvious they were not; there was no testimony that Mr. Swenson was insulting Ms. Krysztopa at all. Only two statements or questions during the phone conversation were personally directed at Ms. Krysztopa. One came after the defendant had asked about the security measures and expressed that the school did not have all the appropriate security to protect against a school shooting, Mr. Swenson then asked Ms. Krysztopa if she was prepared to have the "sacrificial blood" of the lambs of her school on her hands if something bad were to happen. (R. 78) Ms. Krysztopa testified she took that statement as asking if she was prepared to have it on her soul if something happened. (R. 78) The only other statement directed to her was the somewhat

confusing statement Ms. Krysztopa testified about when Mr. Swenson asked her if she was willing to "sniff the pillow of their innocence." (R. 86) Neither of those statements contain personally abusive epithets inherently likely to cause an immediate violent response by Ms. Krystopa.

Although the subject matter of Mr. Swenson's questions and statements regarding school shootings and a school's responsibility to protect its students is one about which people may have strong feelings, there is nothing *inherent* in the words that would cause a violent response or even an immediate breach of the peace. Mr. Swenson's statements could not reasonably be construed as "fighting words" and therefore his conviction cannot be upheld on this basis. Even if Ms. Krysztopa, or the Second District Appellate Court, found Mr. Swenson's remarks to be "disturbing," "morbid," or unreasonable, that did not transform them into "fighting words" or "true threats" that may be criminalized. (R. 88); *People v. Swenson,* 2019 IL App (2d) 160960 ¶ 24.

In sum, the State did not prove that, by engaging in this phone conversation with Ms. Krysztopa, Mr. Swenson committed the offense of disorderly conduct. Because there was no evidence presented that Mr. Swenson's speech was lewd, profane, obscene, libelous, or contained "true threats" or "fighting words," it cannot constitute a breach of the peace under the First Amendment. Mr. Swenson's conviction for disorderly conduct cannot stand.

B. Because Mr. Swenson's statements on the phone did not contain any true threats or fighting words, the State did not prove that he acted knowingly to provoke a breach of the peace.

For the same reason that Mr. Swenson's conversation could not form the basis for criminal liability because it did not contain unprotected "true threats" or "fighting words," the State failed to prove that Mr. Swenson knowingly caused a breach of the peace. Because, during the phone conversation, Mr. Swenson did not make any statements which were "true threats" or "fighting words," no reasonable trier of fact could find that Mr. Swenson acted knowingly to cause a breach of the peace. The evidence presented by the State at trial supports that Mr. Swenson did not intend to cause any breach of the peace, but rather intended to convey only his thoughts and concerns about school safety.

Due process requires the State to prove beyond a reasonable doubt every element of the crime of which a defendant is accused. U.S. Const. Amend. XIV; Ill. Const. 1970, Art. I, §2; *In re Winship*, 397 U.S. 358, 361-64 (1970); *People v. Carpenter*, 228 Ill. 2d 250, 264 (2008). Where a defendant challenges the sufficiency of the evidence used to convict him, the reviewing court must determine 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 offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Smith*, 185 Ill. 2d 532, 541 (1999). A court reviewing the sufficiency of the evidence must draw all reasonable inferences in favor of a finding of guilt. *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004). However, the court cannot make unreasonable inferences. *Id.* If the evidence at trial is such that no reasonable trier of fact could have found proof beyond a reasonable doubt, then the reviewing court must reverse the

defendant's conviction. 212 Ill.2d at 285.

To be guilty of the offense of disorderly conduct, Mr. Swenson had to "knowingly" act in an unreasonable manner which he "knew or reasonably should have known" would cause a breach of the peace. 720 ILCS 5/26-1(a)(1) (2015); *People v. Raby*, 40 Ill. 2d 392, 395 (1968). "The word 'knowingly' describes a conscious and deliberate quality which negatives accident or mistake." *Id.* at 395. As this Court observed in *Raby* regarding statutes punishing disorderly conduct, "under no circumstances would the statute 'allow persons to be punished merely for peacefully expressing unpopular views.'" *Raby*, 40 Ill. 2d at 397 (quoting *Cox v. Louisiana*, 379 U.S. 536, 544 (1965)).

As argued above, Mr. Swenson's conversation can be criminalized only if it falls into one of several narrow, well-defined categories of unprotected speech, such as speech that is lewd, profane, obscene,or libelous, or that contains "fighting words," *Beauharnais v. Illinois,* 343 U.S. 250, 255-56 (1952), or "true threats." *Virginia v. Black*, 538 U.S. 343, 359 (2003); *People v. Relerford*, 2017 IL 121094, ¶ 33.

" Fighting words" are "personally abusive epithets" which are "*inherently* likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971) (emphasis added). In *Cohen,* in determining that the defendant's speech did not qualify as "fighting words," the Court considered it significant that the speech did not contain any "direct personal insult." *Id.* The Court determined that, given there was no evidence that Cohen intended to provoke a violent reaction with his speech, it was not unprotected "fighting words." *Id.*

Here, during their phone conversation, Mr. Swenson similarly never directed

any personal insult at Ms. Krysztopa. The only questions directed at her personally were two questions which, in essence, asked how she would feel if there was a shooting incident at her school. (R. 78-87) No evidence presented that Mr. Swenson intended to cause a violent reaction on the part of Ms. Krysztopa.

Also, as argued above, the only other potentially applicable category of unprotected speech which is able to be criminalized is "true threats." A "true threat" is a statement where "the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence." *People v. Relerford*, 2017 IL 121094, ¶ 37 (citing *Virginia v. Black*, 538 U.S. 343, 359 (2003)) (emphasis added); see also *Elonis v. United States*, 575 U.S. ——, ——, 135 S. Ct. 2001, 2012 (2015) (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"). Illinois courts have recognized that, in order for speech to be a "true threat," the State must prove more than just that the statement was made knowingly; it must prove that the statement was intended as a threat. *People v. Dye*, 2015 IL App (4th) 130799, ¶ 10.

The State likewise did not prove that Mr. Swenson intended any of his statements as a threat. Not only did Ms. Krysztopa not consider Mr. Swenson's statements to be threats, (C. 90-92), but the trial court also specifically found that Mr. Swenson's conduct was not threatening. (R. 132) The judge specifically stated, "I don't think you were threatening the school." (R. 132)

The balance of the State's evidence shows that the State did not prove Mr. Swenson engaged in speech which can be properly characterized as "true threats" or "fighting words," and therefore it did not prove he acted knowingly, as required in this case. Ms. Krysztopa confirmed that Mr. Swenson never stated he was on

the school's campus, that he had a gun, or that he was coming to campus with a gun. (R. 90-92) It was clear from her testimony that, throughout Ms. Krysztopa's conversation with Mr. Swenson, he was only inquiring about the security at the school because he had expressed interest in enrolling his son at the school. (R. 71-92) There was no evidence that Mr. Swenson knew his conduct in inquiring about the school's security, however extensively, would cause a breach of the peace. Given Ms. Krysztopa's testimony, it was not proven that Mr. Swenson knowingly acted to provoke a breach of the peace.

Other evidence presented by the State further confirms that Mr. Swenson was not acting knowingly to provoke a breach of the peace in this case. Officer Clark testified that the defendant voluntarily came outside to speak to him. (R. 64) He patted the defendant down and found no weapons on him, and Mr. Swenson complied with Ofc. Clark's request to sit in the back of the squad car. (R. 64) Ofc. Clark testified that Mr. Swenson admitted right away that he had called Keith School, only to ask about security at the school. (R. 64) Mr. Swenson was cooperative with Ofc. Clark throughout the interaction, even after his arrest. (R. 66) From the State's own evidence, it is clear that Mr. Swenson did not knowingly breach the peace.

As this Court made clear in *Raby,* the disorderly conduct statute cannot be violated accidentally. 40 Ill. 2d at 395. This Court also observed that "under no circumstances would the statute 'allow persons to be punished merely for peacefully expressing unpopular views.'" *Raby*, 40 Ill. 2d at 397 (quoting *Cox v. Louisiana*, 379 U.S. 536, 544 (1965)). This means that a person cannot mistakenly cause a breach of the peace for which he is criminally culpable simply by engaging

in speech that might be upsetting to a particular listener. Applied to Mr. Swenson's case, it is clear that, simply by having a conversation with the school administrator about policies and his concerns about a school shooting, Mr. Swenson did not knowingly cause a breach of the peace.

In sum, the State did not prove that, by his phone conversation with Ms. Krysztopa Mr. Swenson committed the offense of disorderly conduct. Because there was no evidence presented that Mr. Swenson's phone call was lewd, profane, obscene, libelous, or contained "fighting words" or a "true threat," it cannot constitute a breach of the peace under the First Amendment. Moreover, because Mr. Swenson engaged in speech that did not fall under these categories of unprotected speech which require some intentionality, there was no evidence that he acted knowingly in this case. Considering the evidence in the light most favorable to the State, no rational trier of fact could find that Mr. Swenson knowingly provoked a breach of the peace by speaking to Ms. Krystopa. Mr. Swenson's conviction for disorderly conduct cannot stand.

CONCLUSION

For the foregoing reasons, Rory Swenson respectfully requests that this Court vacate his conviction and sentence for disorderly conduct.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Erin S. Johnson, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 19 pages.

/s/Erin S. Johnson
ERIN S. JOHNSON
Assistant Appellate Defender

No. 124688

IN THE

SUPREME COURT OF ILLINOIS

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

NOTICE AND PROOF OF SERVICE

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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 July 30, 2019, the Brief and Argument of Defendant-Appellant was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. On that same date, we electronically served the Attorney General of Illinois and opposing counsel by transmitting a copy from an agency email address to the email addresses of the persons named above. One copy is also being mailed to the defendant-appellant in an envelope deposited in a U.S. mailbox in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Norma Huerta
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APPENDIX TO THE BRIEF

Rory Johnson Swenson No. 124688

STATE OF ILLINOIS UNITED STATES OF AMERICA COUNTY OF WINNEBAGO

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT

THE PEOPLE OF THE STATE OF ILLINOIS
VS.
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2-16-0960

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CC-30

In the Circuit Court of the Seventeenth Judicial Circuit
Winnebago County, State of Illinois

FILED V3
Date: 10/4/16
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Clerk of the Circuit Court
By _____ Deputy
Winnebago County, IL

People of the State of Illinois, Plaintiff,

Rory Swenson, Defendant

Case No(s). 15CF2814 ct 3

PROBATION ORDER

YOU HAVE BEEN GRANTED THE PRIVILEGE OF PROBATION. IF YOU FAIL TO OBEY THE FOLLOWING CONDITIONS, YOUR PROBATION MAY BE MODIFIED OR REVOKED. IF REVOKED, YOU CAN BE RESENTENCED ON THE OFFENSE FOR WHICH YOU RECEIVED PROBATION. The above named defendant, having been convicted of the offense(s) designated below, is hereby sentenced to probation, subject to the terms and conditions stated below, provided, that any violation of said conditions may result in the above named defendant being subject to modification or revocation of this disposition:

OFFENSE(S) Disorderly Conduct a Class _____ felony and/or Class C misdemeanor, for a period of 12 months/years.

THE CONDITIONS OF SENTENCE ARE THAT DEFENDANT SHALL:

☒ Not violate any criminal statute or ordinance of any jurisdiction;

☒ **Defendant shall report immediately to the Adult Probation Department located on the first floor of the Winnebago County Courthouse.** Furthermore, defendant shall report monthly or as often as the probation officer may direct;

☒ Not possess any firearms or dangerous weapons;

☒ Not leave the State of Illinois without consent of the court and giving advance notice to and obtaining written permission from probation officer;

☒ Permit probation officer to visit the defendant at the defendant's home or elsewhere as requested by the probation officer;

☒ Inform the Clerk of the Circuit Court and Probation of a change of address within 24 hours;

☒ If an offense referenced in this order is: a felony, a qualifying offense or an attempt at a qualifying offense, classified as a felony under the Juvenile Court act of 1987, or is an offense requiring registration under the Sex Offender Registration Act, submit a blood and/or tissue and/or saliva specimen within 45 days for DNA testing pursuant to 730 ILCS 5/5-4-3.

☐ Register as a sex offender and comply with Sex Offender Registration Act 730 ILCS 150/1 et. seq;

☐ Not consume alcohol and drugs (unless prescribed for you by a physician) or any substance labeled not fit for human consumption.

☐ Submit to random urinalysis and/or blood test and /or breathalyzer test at the direction of the probation department or any agency referred to for counseling, and shall sign releases of information disclosing the test results to the court and probation;

☐ Undergo medical testing for sexually transmissible diseases pursuant to 730 ILCS 5/5-5-3(g) and shall appear and obtain the results in court on _____. The results are to be forwarded to the sentencing judge;

☒ Submit to _____

☐ Pay restitution* in the amount of $_____, to be paid in full by _____

*Restitution is payable at a rate to be determined by the Court. *Restitution payments made through the Winnebago County Circuit Clerk's Office.

☐ Serve _____ days Periodic Imprisonment in the Winnebago County Jail and abide by all rules thereof and report in compliance with the Periodic Imprisonment Order.

☒ Serve 4 (DFD) days in the Winnebago County Jail with _____ days of that time stayed.

☒ Receive 2 days credit for time actually served;

☐ Day for day credit does not apply (730 ILCS 130/3);

☒ Pursuant to 725 ILCS 5/110-14; receive $5.00/day credit for 2 days served towards fines allowable per ILCS.

☒ Cooperate with and satisfactorily complete any assessment, treatment, education and/or counseling as directed by the probation office, including, but not limited to, participation in services offered at the R.I.C. Also sign releases of information consenting to disclosure of all assessment, treatment, education and counseling information to the court and probation. mental health assessment - consult

☐ Attend the Victim Impact Panel on _____ at _____ P.M. or as directed by the Court and/or Probation Office;

☐ Shall work or pursue a course of study or vocational training;

☐ Perform _____ hours of community/public service at times and places designated by the Probation Office. Such hours to be completed by _____.

☐ Surrender all rights in the weapon pursuant to 720 ILCS 5/24-6(b);

☒ Not have any contact directly or indirectly with the following persons or places: Keith Country Day School or Monica Kryptop

☐ Be monitored by drug court;

☐ Appear in courtroom _____ on _____ at _____.

☒ PAY THE FOLLOWING:

☒ Court Costs, Fines and/or Penalties	$ 500 —
☒ Probation Fee (per month)	$ 25 —
☐ DNA Analysis Fee	$ 250.00
☐ Street Value Fine	$
☐ Drug Assessment Fee	$
☐ Lab Analysis Fee	$ 100.00
☐ Trauma Center Fund Fine	$ 100.00
☐ State's Attorney's Trial Fee ($25 x ____ days of actual trial)	$
☐ Public Defender Fee	$
☐ Crimestoppers Contribution	$
☐ Victim Impact Panel Fee	$ 10.00
☐ Sexual Assault Fine	$ 100.00
☐ Domestic Violence Fine (☐ Family ☐ Non-Family)	$ 200.00
☐ Domestic Battery Fine	$ 10.00
☐ Viol. of an Order of Prot. Fine	$ 20.00
☐ STD/HIV Testing	$ 40.00
☐ Restitution*(as directed)	$

☒ Bond from this/these case(s) and case #s 500 — _____ in the amount of $_____ to be applied to fines, costs and restitution; Remainder to poster

☐ Immediately pay in full at the Clerk of the Circuit Court, located in this building.

☐ Report to the Clerk of the Circuit Court located in this building before 4:00 p.m. on the next business day after release from custody to pay in full.

Judgment is hereby entered in favor of the prosecuting entity and/or victim for the above stated fines, costs, penalties and/or restitution.

FAILURE TO MAKE PAYMENT AS ORDERED MAY RESULT IN THE ISSUANCE OF A WARRANT FOR DEFENDANT'S ARREST AND/OR HAVING ANY UNPAID JUDGMENT BEING SENT TO COLLECTION AND ADDITIONAL COLLECTION FEES MAY APPLY.

Circuit Clerk is to send **restitution** to: _____

Defendant Address: 4863 Flintridge ct #2 Rockford IL

Defendant's Signature: _____

Judge: _____

Entered: 10-4-16

FILED
Date: 11/10/16
Clerk of the Circuit Court
By _____ Deputy
Winnebago County, IL

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

THE PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff,)
VS) 2015CF0002814
)
RORY JOHN SWENSON,)
10/6/1976)
)
Defendant)

NOTICE OF APPEAL

1. Defendant, RORY JOHN SWENSON, appeals from the Circuit Court of Winnebago County, State of Illinois, to the Second District Appellate Court of the State of Illinois.

2. That the address of the defendant is 4863 Flintridge Ct, Rockford, IL 61107.

3. That the name and address of the Appellant's attorney on appeal:

Thomas A. Lilien, Deputy Appellate Defender
OFFICE OF THE STATE APPELLATE DEFENDER
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, IL 60120

4. That the defendant is indigent, has no attorney for the purpose of appeal and wishes that counsel be appointed for this purpose.

5. That the date of Judgment Order was 10/4/2016.

6. The offense of which the Defendant was convicted was Disorderly Conduct.

7. The sentence ordered was one year probation, credit for two days served. (Count 3 only)

RORY JOHN SWENSON, Defendant

By Shauna Gustafson
SHAUNA L GUSTAFSON, His/Her
Attorney
Assistant Public Defender

OFFICE OF THE PUBLIC DEFENDER
400 W. State St., Suite 340
Rockford, Illinois 61101
Phone: (815)319-4900

2019 IL App (2d) 160960
No. 2-16-0960
Opinion filed February 28, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RORY JOHN SWENSON, Defendant-Appellant.	)	Appeal from the Circuit Court of Winnebago County. No. 15-CF-2814 Honorable Fernando L. Engelsma, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court, with opinion.
Justices McLaren and Jorgensen concurred in the judgment and opinion.

OPINION

¶ 1 In the direct appeal of his disorderly-conduct conviction, defendant, Rory John Swenson, argues that the State failed to prove him guilty beyond a reasonable doubt and, further, that his conduct was protected by the first amendment. We affirm.

¶ 2

I. BACKGROUND

¶ 3 On February 8, 2016, defendant was charged by information with one count of attempted disorderly conduct (attempt to convey a threat) (720 ILCS 5/8-4(a), 26-1(a)(3.5) (West 2014)), one count of phone harassment (*id.* § 26.5-2(a)(2)), and one count of disorderly conduct (*id.* § 26-1(a)(1)). The charges stemmed from a phone call that defendant made on December 7,

2015, to the Keith Country Day School (the school) and a conversation that he had with a school employee.

¶ 4 The following evidence was presented at defendant's bench trial. Monica Krysztopa testified that she was the director of advancement at the school. On December 7, 2015, defendant called the school and left a voice-mail message indicating that he wanted to discuss admissions at the school. He provided a phone number and asked that his call be returned. Shortly thereafter, Krysztopa returned defendant's call and spoke with him. Defendant told Krysztopa that he was interested in enrolling his second-grade son at the school, and according to Krysztopa, he "immediately went into a battery of questions about the protocol at [the] school for handling things that were related to guns and shooting." He also told Krysztopa that he had previously attended the school but had been kicked out. Krysztopa testified:

> "[H]e basically wanted to know how prepared I would be if he or anyone who arrived on our campus with guns? And do we have bullet proof windows at our secretary's desk? Are our doors bullet proof? Where do our faculty members stand when we do a lockdown when there is an intruder in our building? Where do they stand in position in a classroom? Do we arm our faculty? How would our faculty defend themselves against an armed intruder? There were multiple questions."

Defendant also mentioned that "the United States was full of socialists and KGB members." He asked about truancy laws. He also asked if she "knew the number of *** school shootings that had taken place in the United States and if [she] knew the success rate of shooters once they were on campus." Defendant brought up the San Bernardino shooting, which had happened one week earlier. Krysztopa testified that defendant stated: "Is [the school] prepared if that would happen in your campus today?" Krysztopa testified: "He asked me if I was prepared to have the

sacrificial blood of the lambs of our school on our, on my hands, if this were to happen and what would I do?" Defendant asked, "if he were to show up at the campus with a gun what would be the protocol of [the] school?" Defendant also asked if the students were given "PEZ dispensers to defend themselves." He asked if the teachers carried guns, and he talked about "a number of guns and their success rate in kill." He asked how long it would take police to get to the school in the event of a shooting. At one point, defendant "was talking about when you shoot and kill children and you're looking them in the eye and their innocence and the pillows of laying their heads down at night and then you have a shooter who shoots them in the face, you know, what does that do for [her] as a school?" He asked her if she would "sniff the pillow." She stated that she thought he wanted to know "if [she] would sniff the pillow of their innocence after they've been dead."

¶ 5 Krysztopa testified that, based on her conversation with defendant, she believed that defendant was on the school campus, particularly due to his comment about whether she was "prepared to have the blood of the sacrificial lambs on [her] hands that day and if [they] were prepared to handling [*sic*] something like San Bernardino that day." In addition, defendant had stated that he was familiar with the woods around the school campus because he had gone to school there. Krysztopa described the campus as "very large" with "a lot of trees and wooded areas behind a neighborhood."

¶ 6 Krysztopa testified that she texted the head of the school. She told her that someone was talking about guns and the safety of the school, and she told her to call 911. The head of the school called 911 and placed the school on a "soft lockdown." After an officer had been dispatched to defendant's home and two officers were present at the school, the children were dismissed.

¶ 7 Krysztopa testified that her conversation with defendant lasted 15 to 20 minutes. Defendant ended the conversation by saying that "he had to go." During the conversation, Krysztopa took notes. Krysztopa identified her notes as State exhibit No. 2, and she used them to refresh her recollection while testifying. Krysztopa testified that the conversation left her "very shook up."

¶ 8 On cross-examination, Krysztopa testified that defendant told her that his son was currently enrolled in public school and that he was looking to move him to her school. He mentioned that he was concerned about the lack of security at his son's current school. He never told her that he had a gun; he asked what would happen if someone went to the school with a gun. He asked her if she knew the success rate of a "hitter" who showed up at school with a gun, and he told her that it was 80%. The school went into a soft lockdown because she believed that defendant was on campus. But defendant never said that he was on campus.

¶ 9 Rockford police officer Michael Clark testified that, on December 7, 2015, at about 2:30 p.m., he was dispatched to defendant's apartment to investigate a report of a threatening phone call that had been made to the school. When he arrived, he telephoned defendant using a phone number that had been given to him by the dispatchers. No one answered the call, but about a minute later, defendant exited the building and approached Clark. Clark patted down defendant and told him that he was there to investigate a threatening phone call that had been made to the school. Defendant admitted that he had made the call. He told Clark that he had called to find out about security at the school. He also told Clark that he had asked if the school had armed security guards and bulletproof glass. Clark placed defendant in the back of his squad car. Defendant was not placed in handcuffs. At 3:20 p.m., after receiving a phone call from police officer Mace, Clark arrested defendant.

¶ 10 On cross-examination, Clark testified that defendant cooperated with him at all times. Defendant told him that he was considering transferring his son to the school and that he wanted to know about the school's security. When defendant was arrested, he asked Clark to get his son from his apartment. Clark asked defendant if there were any weapons in the apartment, and defendant told him that there were not. Clark went into the apartment to get defendant's son. He did not see any weapons in plain view.

¶ 11 At the close of the State's evidence, defendant moved for a directed finding. The trial court granted the motion as to the charge of phone harassment because it was Krysztopa who called defendant. The trial court denied the motion with respect to the remaining charges.

¶ 12 Defendant testified that in December 2015 his son was seven years old and attended a Rockford public elementary school. At that time, defendant was interested in enrolling him in a "privatized institution of learning where they weren't bound by budgeting restrictions used as the excuse not to protect our children." He left a voice-mail message with the school. He testified that his intent in making the call was to enroll his son in the school. When Krysztopa called him back, he told her why he wanted to enroll him in the school. According to defendant, he asked first about financial aid and then about security. He testified:

> "And then my other question was what is the security protocol, even about me talking to you over the phone, about security protocols? If need be, when I come in to fill out the financial aid information, I can talk to you about it then is exactly what I said to her."

Defendant testified that he never threatened anyone at the school. He never said that he was bringing a weapon to the school. He did not have a firearm owner's identification card, nor did he own any weapons.

¶ 13 In making its ruling, the court stated as follows. First, with respect to the credibility of the witnesses, the court found Clark and Krysztopa to be credible. The court further found that defendant's testimony, in parts, was also credible. To the extent that defendant's testimony conflicted with Krysztopa's, the court found Krysztopa's testimony to be more credible. Next, with respect to the charge of attempted disorderly conduct, in that defendant attempted to convey a threat, the court found defendant not guilty. With respect to the charge of disorderly conduct, however, the court found defendant guilty. The court found that defendant knowingly committed an unreasonable act given the statements that he made to Krysztopa and that Krysztopa was alarmed and disturbed. 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."

¶ 14 The trial court imposed a sentence of 12 months' probation. Following the denial of his motion for a new trial, defendant timely appealed.

¶ 15 II. ANALYSIS

¶ 16 Defendant first argues that he was not proved guilty of disorderly conduct beyond a reasonable doubt, because the State failed to prove that he acted knowingly.

¶ 17 A reviewing 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). When we review a challenge to the sufficiency of the evidence, " '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.' " (Emphasis in original.) *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 a reviewing court ordinarily will not substitute its judgment on these matters for that of the trier of fact. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 18 Defendant was charged with violating section 26-1(a)(1) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/26-1(a)(1) (West 2014)), which provides as follows:

> "(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[.]"

To prove defendant guilty beyond a reasonable doubt of disorderly conduct, the State 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. *People v. Raby*, 40 Ill. 2d 392, 397 (1968).

¶ 19 Defendant argues that the State failed to prove that he acted knowingly. More specifically, defendant argues that the State was required to prove that he was consciously aware

that his conduct was practically certain to alarm or disturb another and cause a breach of the peace. We disagree.

¶ 20 In support of his argument, defendant relies on *People v. Kotlinski*, 2011 IL App (2d) 101251. *Kotlinski* involved section 31-1(a) of the Criminal Code, which provided that "[a] person who *knowingly resists or obstructs* the performance by one known to the person to be a peace officer *** of any authorized act within his official capacity commits a Class A misdemeanor." (Emphasis added.) 720 ILCS 5/31-1(a) (West 2008). Relying on the statutory definition of knowingly,[1] this court found that the evidence had to establish that the defendant was consciously aware that his conduct was practically certain to obstruct. *Kotlinski*, 2011 IL App (2d) 101251, ¶ 54.

¶ 21 However, unlike the statute at issue in the present case, the statute at issue in *Kotlinski* made clear that the word "knowingly" modified the words "resists or obstructs." Here, to accept defendant's interpretation of the statute, we would have to find that the word "knowingly" in the introductory clause of section 26-1(a)(1) modifies every element in the clause "[d]oes 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) (West 2014). But, in *Raby*, our supreme court made clear that such an interpretation was not intended. There, the court addressed a claim that the provision reached conduct with first-amendment protection. It looked to the committee comments to determine the provision's breadth, quoting them as follows:

---

[1] A person acts knowingly or with knowledge of "[t]he result of his or conduct, described by the statute defining the offense, when he or she is consciously aware that that result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b) (West 2014).

> " 'Section 26-1(a) is a general provision intended to encompass all of the usual types of "disorderly conduct" and "disturbing the peace." Activity of this sort is so varied and contingent upon surrounding circumstances as to almost defy definition. *** In addition, the task of defining disorderly conduct is further complicated by the fact that the type of conduct alone is not determinative, but rather culpability is equally dependent upon the surrounding circumstances. *** These considerations have led the Committee to abandon any attempt to enumerate "types" of disorderly conduct. Instead, another approach has been taken. As defined by the Code, 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.' " (Emphasis added.) *Raby*, 40 Ill. 2d at 396-97 (quoting Ill. Ann. Stat., ch. 38, ¶ 26-1, Committee Comments (Smith-Hurd 1964)).

Thus, although the *scienter* requirement for the doing of the act in an unreasonable manner is one of knowingness, the *scienter* requirement for " 'tend to disturb, alarm or provoke' " is " 'knew or should have known.' " *Id.* at 397; see *People v. Albert*, 243 Ill. App. 3d 23, 27 (1993) (because the defendant "performed her shouting knowingly and also knew or should have known that such noise likely would disturb people such as the complainant," she could properly be found guilty of disorderly conduct).

¶ 22 Given the supreme court's clear statement, 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. In making this determination, we note the following:

> "The types of conduct included within the scope of the offense of disorderly conduct almost defy definition. [Citation.] As a highly fact-specific inquiry, it embraces a wide variety of conduct serving to destroy or menace the public order and tranquility. [Citation.] [C]ulpability *** revolves not only around the type of conduct, but is equally dependent upon the surrounding circumstances. [Citation.] Generally, to breach the peace, a defendant's conduct must threaten another or have an effect on the surrounding crowd. [Citation.] However, a breach of the peace can occur without overt threats or profane and abusive language. [Citation.] In addition, it need not occur in public." (Internal quotation marks omitted.) *People v. Pence*, 2018 IL App (2d) 151102, ¶ 17.

¶ 23 Here, viewed in the light most favorable to the State, the evidence allowed the trial court to infer that defendant had the requisite mental state. Although inquiring generally about a school's security protocol is not unreasonable in itself, the nature of defendant's questions and comments, considered in their totality, clearly exceeded the bounds of reasonableness. For instance, although defendant never stated that he was on the campus, he let Krysztopa know that he was familiar with the campus. Defendant conveyed a detailed knowledge of guns and school shootings, and he asked what would happen "if *he* were to show up at the campus with a gun." (Emphasis added.) Defendant reminded Krysztopa about the recent San Bernardino shooting and asked, "Is [the school] prepared if that would happen in your campus *today*?" (Emphasis added.) Defendant also asked how long it would take police to get to the school in the event of a shooting. He asked whether there were bulletproof windows at the secretary's desk and whether the doors were bulletproof. He asked where faculty members stood in the event of a lockdown

and whether they were armed. Defendant warned Krysztopa that "the United States was full of socialists and KGB members." Defendant also made disturbing comments about shooting children. Krysztopa testified that defendant talked "about when you shoot and kill children and you're looking them in the eye." He asked her "if [she] would sniff the pillow of their innocence after they've been dead." He also asked her "if [she] was prepared to have the sacrificial blood of the lambs of [the] school *** on [her] hands." Thus, although defendant claims that he "was only inquiring about the security at the school in relation to his concerns for his son's safety," his comments as a whole were broader, morbid, and clearly inappropriate to his purported objective.

¶ 24 Viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have found that defendant knowingly acted unreasonably and knew or should have known that his act would alarm or disturb Krysztopa so as to breach the peace.

¶ 25 Defendant next argues that, because his words were not lewd, profane, obscene, libelous, "fighting words," or "true threats," they were protected by the first amendment, such that the disorderly-conduct statute cannot be read as criminalizing them. We disagree. 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). Indeed, as Justice Holmes famously observed, one cannot falsely yell "fire" in a crowded theater. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

¶ 26 In *Morris*, our supreme court relied on *United States v. Woodard*, 376 F.2d 136 (7th Cir. 1967). There, the defendants were convicted of disorderly conduct. *Id.* at 138-39. One of the defendants, Ranier Seelig, 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. *Id.* When he continued his shouting, he was removed

from the building. *Id.* The Seventh Circuit rejected Seelig's argument that his conduct was protected by the first amendment. *Id.* at 142-43. The court stated:

> "First amendment rights are 'not absolute at all times and under all circumstances.' [Citation.] Conceding that the defendant Seelig was attempting to voice a protest against the *** proceedings, Seelig 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.

¶ 27 Here, defendant, like Seelig, argues that his conduct was protected by the first amendment in that he merely "had a conversation with Krysztopa about the security at Keith School." This is flagrantly disingenuous. As noted, defendant did not merely engage in a civil conversation concerning a matter of public interest. Nor was he "peacefully expressing unpopular views." (Internal quotation marks omitted.) *Raby*, 40 Ill. 2d at 397. Rather, he subjected Krysztopa to a lengthy interrogation that was disturbing, morbid, and well beyond a reasonable concern for school security, causing a 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 *Pence*, 2018 IL App (2d) 151102, ¶ 17 ("a breach of the peace can occur without overt threats or profane and abusive language" (internal quotation marks omitted)). It thus was not constitutionally protected.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for

this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 30 Affirmed.