SUMMARY
July 22, 2021

2021COA97

No. 17CA1465, *People v. Counterman* — Crimes — Stalking — Serious Emotional Distress; Constitutional Law — First Amendment — Freedom of Speech — True Threats

A division of the court of appeals addresses an as-applied constitutional challenge arising from a defendant's conviction for stalking – serious emotional distress under section 18-3-602(1)(c), C.R.S. 2020. Specifically, defendant contends that section 18-3-602(1)(c) impermissibly criminalized speech that was protected under the Free Speech Clauses of the Federal and Colorado Constitutions.

Applying both federal and Colorado law, the division concludes that the statements were true threats and, thus, unprotected speech under both the First Amendment of the United States Constitution and section 10 of the Colorado Constitution. Thus,

the division concludes that section 18-3-602(1)(c) wasn't unconstitutional as applied.

The division further holds that the trial court didn't plainly err when it failed to sua sponte instruct the jury on true threats or require a finding that Counterman's statements were true threats as an additional element of a violation of section 18-3-602(1)(c).

Finally, the division concludes that the trial court's response to a jury question, which told the jury that it could consider evidence that the victim suffered serious emotional distress outside of the timeframe in the charging document, was a simple variance — not a constructive amendment — and that it didn't lower the prosecution's burden of proof.

Accordingly, the division affirms the conviction.

COLORADO COURT OF APPEALS **2021COA97**

Court of Appeals No. 17CA1465
Arapahoe County District Court No. 16CR2633
Honorable F. Stephen Collins, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Billy Raymond Counterman,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division II
Opinion by JUDGE WELLING
Román and Brown, JJ., concur

Announced July 22, 2021

Philip J. Weiser, Attorney General, Joseph Michaels, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Mackenzie Shields, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Bringing an as-applied constitutional challenge, Billy Raymond Counterman appeals his conviction for stalking (serious emotional distress) under section 18-3-602(1)(c), C.R.S. 2020, as a violation of both his federal and Colorado constitutional rights to freedom of speech. Specifically, he contends that section 18-3-602(1)(c) impermissibly criminalizes his protected statements contained in Facebook messages that he sent to the victim — a local musician and public figure.

¶ 2 Applying both federal and Colorado law, we conclude that Counterman's statements were true threats and, thus, unprotected speech under both the First Amendment to the United States Constitution and article II, section 10 of the Colorado Constitution. Accordingly, section 18-3-602(1)(c) isn't unconstitutional as applied to him.

¶ 3 We further hold that the trial court didn't plainly err by failing to sua sponte instruct the jury on true threats or to require the jury to find that Counterman's statements were true threats as an additional element of stalking (serious emotional distress).

¶ 4 Finally, we resolve whether the trial court's response to a jury question, which told the jury that it could consider evidence that

the victim suffered serious emotional distress outside of the timeframe in the charging document, was a constructive amendment of the charge or a simple variance and whether it impermissibly lowered the prosecution's burden of proof. We conclude that the response was a simple variance and that it didn't lower the prosecution's burden of proof. Accordingly, we affirm Counterman's conviction.

I. Background

¶ 5 C.W. is a singer-songwriter based in Colorado. C.W. had two Facebook profiles — a public account for promoting her music and a private account for personal use.

¶ 6 In 2014, Counterman sent a Facebook friend request to C.W.[1] Over the next two years Counterman sent "clusters" of messages to C.W.'s accounts. C.W. deleted some of the messages and didn't respond to any of them. She said the messages were "weird" and "creepy." C.W. also blocked Counterman on Facebook multiple

[1] C.W. couldn't remember whether Counterman initially sent the friend request to her personal account or her public account. This isn't material to the case at hand, however, because he sent messages to both accounts and messages to both accounts were used as evidence to support his conviction for stalking.

times to prevent him from sending her messages, but he would create new Facebook accounts and continue to send her messages.

¶ 7 In 2016, C.W. spoke with a family member about the messages Counterman had sent her. She was "fearful" of Counterman and said that his messages caused her "serious" concern. She was "extremely scared" of being hurt or killed after Counterman sent her messages saying that he wanted her to die. And Counterman's messages alluded to making "physical sightings" of C.W. in public. For example, in one of his messages Counterman told C.W. that he had witnessed her doing "things that [she did] out and about."

¶ 8 In April 2016, C.W. (along with the family member in whom she had confided) contacted an attorney to determine what actions she could take to protect herself from Counterman. In the course of meeting with this attorney, C.W. learned that Counterman was serving probation for a federal offense.

¶ 9 She said that this "scared" her, and she then reported Counterman to law enforcement. C.W. obtained a protective order against Counterman and cancelled some of her planned

performances because she worried that he would show up at the venue. Law enforcement arrested Counterman on May 12, 2016.

¶ 10 The People charged Counterman with one count of stalking (credible threat), section 18-3-602(1)(b); one count of stalking (serious emotional distress), section 18-3-602(1)(c); and one count of harassment, section 18-9-111(1)(e), C.R.S. 2020. Before trial, the prosecution dismissed the count of stalking (credible threat).

¶ 11 Counterman filed a motion to dismiss the remaining counts of stalking (serious emotional distress) and harassment. He asserted that sections 18-3-602(1)(c) and 18-9-111(1)(e), if applied to his Facebook messages, would violate his right to free speech under both the First Amendment to the United States Constitution and article II, section 10 of the Colorado Constitution. Specifically, he contended that his messages to C.W. weren't true threats and, thus, his speech was protected from criminal prosecution. The trial court denied the motion.

¶ 12 On the first day of trial, the prosecution dismissed the harassment count, leaving only the count of stalking (serious emotional distress) under section 18-3-602(1). To convict Counterman of this offense, the prosecution was required to prove,

beyond a reasonable doubt, that "directly, or indirectly through another person," Counterman knowingly

> [r]epeatedly follow[ed], approache[d], contact[ed], place[d] under surveillance, or ma[de] any form of communication with [C.W.], . . . in a manner that would cause a reasonable person to suffer serious emotional distress and d[id] cause [C.W.] . . . to suffer serious emotional distress.

§ 18-3-602(1)(c).

¶ 13 The jury found Counterman guilty of stalking (serious emotional distress). The trial court sentenced him to four-and-a-half years in prison.

II. Analysis

¶ 14 Counterman raises two categories of contentions on appeal — constitutional and instructional. We address each in turn.

A. Constitutionality of Section 18-3-602(1)(c) As Applied to Counterman's Facebook Messages

¶ 15 Counterman asserts that section 18-3-602(1)(c) is unconstitutional as applied to his statements because they are protected speech, not unprotected true threats. In the alternative, he asserts that even if his statements were true threats, the court

erred by failing to sua sponte instruct the jury on true threats. We address and reject each contention in turn.

1. Additional Facts

a. The Messages

¶ 16 Counterman sent numerous direct messages to C.W. over a two-year period. These messages were largely text, with the exception of some photographs that contained text within the image. The prosecution presented the following messages as evidence that Counterman stalked C.W.:

- "Was that you in the white Jeep?"
- "Five years on Facebook. Only a couple physical sightings."
- "Seems like I'm being talked about more than I'm being talked to. This isn't healthy."
- "I've had tapped phone lines before. What do you fear?"
- An image of stylized text that stated, "I'm currently unsupervised. I know, it freaks me out too, but the possibilities are endless."
- An image of liquor bottles that was captioned "[a] guy's version of edible arrangements."

- “How can I take your interest in me seriously if you keep going back to my rejected existence?”
- “Fuck off permanently.”
- “Your arrogance offends anyone in my position.”
- “You’re not being good for human relations. Die. Don’t need you.”
- “Talking to others about me isn’t prolife sustaining for my benefit. Cut me a break already . . . . Are you a solution or a problem?”
- “Your chase. Bet. You do not talk and you have my phone hacked.”
- In a message sent the following day from the “[y]our chase” message, an apology that stated, “I didn’t choose this life.”
- “Staying in cyber life is going to kill you. Come out for coffee. You have my number.”
- “A fine display with your partner.”
- “Okay, then please stop the phone calls.”
- “Your response is nothing attractive. Tell your friend to get lost.”

b. Counterman's Motion to Dismiss and the Trial Court's Analysis

¶ 17 In a pretrial motion, Counterman's counsel argued that the charge for stalking (serious emotional distress) should be dismissed because, if applied to Counterman, section 18-3-602(1)(c) would criminalize his protected speech. Specifically, counsel asserted that none of his messages to C.W. was a true threat — a category of speech unprotected by the First Amendment and article II, section 10. Rather, counsel argued that Counterman's statements were protected speech under both the First Amendment and article II, section 10. Thus, criminal prosecution of him for those statements would violate his right to freedom of speech under both constitutions.

¶ 18 The trial court addressed Counterman's argument at a motions hearing. It noted that, under *People v. Chase*, 2013 COA 27, and *People in Interest of R.D.*, 2016 COA 186, *rev'd and remanded*, 2020 CO 44, "if something is found not to be a true threat, it's subject to First Amendment protection and it will not support a charge or a conviction of stalking or, I believe, harassment." But, if speech "is found to be a true threat, then it

does not benefit from the First Amendment protection and it would provide a basis for a lawful charge and a lawful conviction of either stalking or harassment."

¶ 19 After applying the test articulated in *Chase*, the trial court denied Counterman's motion to dismiss, ruling that,

> having considered the totality of the circumstances, I find that [Counterman's] statements rise to the level that presenting the charges to a jury to make a determination of whether the defendant's statements rise to the level of a true threat does not impermissibly intrude on or violate [his] First Amendment rights. I believe that [Counterman's] statements rise to the level of a true threat, although ultimately that will be a question of fact for the jury to decide.

¶ 20 However, the trial court warned the parties that "the evidence that comes in at trial may make [the court] reconsider [its order]" and that, if so, it would "go through this analysis again, just to make sure we don't have [a] First Amendment issue."

¶ 21 After the prosecution rested, Counterman's attorney renewed the motion to dismiss the stalking charge for violating Counterman's right to free speech and moved for a judgment of acquittal.

¶ 22 The trial court again denied Counterman's motion to dismiss and denied his motion for judgment of acquittal, ruling that the evidence elicited at trial

> confirm[ed] the belief I had after the motions hearing that this would not be considered protected speech. And that having considered the totality of the circumstances, a reasonable jury could find that [Counterman's] statements rise to the level of a violation of law and that of a true threat. And, therefore, the charges should be submitted to the jury for them to be making a determination.

2. As-Applied Challenge to Section 18-3-602(1)(c)

¶ 23 Counterman contends that section 18-3-602(1)(c) is overbroad as applied to him under both the Free Speech Clauses of the federal and state constitutions because the statute doesn't require the criminalized speech to be a true threat. Thus, to resolve Counterman's constitutional challenge, we must address whether his speech consisted of true threats or, instead, consisted of protected speech under both federal and Colorado law.

a. Legal Principles Governing True Threats

¶ 24 "[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). Rather, content-based

restrictions on speech are permitted "when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'" *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)); *see also Chaplinsky*, 315 U.S. at 571-72 ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.").

¶ 25 One type of permissible content-based restriction on speech is the restriction of "true threats." *See Alvarez*, 567 U.S. at 717 (citing *Watts v. United States*, 394 U.S. 705 (1969)).

¶ 26 The United States Supreme Court has defined "true threats" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). But "[t]he speaker need not actually intend to carry out the threat." *Id.* at 359-60. Rather, limits to true threats serve to "protect[] individuals from the fear of violence," "the disruption that fear engenders," and "the possibility that threatened violence will occur." *R.A.V. v. City of St. Paul*, 505

U.S. 377, 388 (1992); *see also Black*, 538 U.S. at 360. The Supreme Court has long held that when determining whether statements are true threats, statements shouldn't be considered in isolation; instead, a court must examine them in the context in which they were made. *See, e.g.*, *Black*, 538 U.S. at 359; *R.A.V.*, 505 U.S. at 388; *Watts*, 394 U.S. at 707.

¶ 27 The Supreme Court recently applied these principles to internet speech. In *Elonis v. United States*, 575 U.S. 723, 726 (2015), the Court addressed whether a federal law prohibiting "any communication containing any threat . . . to injure the person of another" was constitutional as applied to a defendant who created threatening Facebook posts. The defendant, Elonis, was convicted under the statute for sharing Facebook posts (not direct messages) that included "crude, degrading, and violent material about his soon-to-be ex-wife" and material that threatened his former coworkers, police officers, and an FBI agent. *Id.* at 726-27. Elonis's ex-wife and coworkers testified that they "felt afraid and viewed Elonis's posts as serious threats." *Id.* at 731.

¶ 28 The Court held that the statute as applied to Elonis and his Facebook posts was unconstitutional because it didn't require the

prosecution to prove the defendant's mental state; it only required the prosecution to prove that a communication was transmitted and that a reasonable person would have found the communication threatening. *Id.* at 737-38. "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." *Id.* at 740. Thus, the statute needed to require the prosecution to prove either that the "defendant transmit[ted] a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Id.*

¶ 29 Just last year, the Colorado Supreme Court provided guidance for determining whether a statement is a true threat. In *People in Interest of R.D.*, 2020 CO 44, the supreme court defined a "true threat" as a "statement that, considered in context and under the totality of the circumstances, an intended or foreseeable recipient would reasonably perceive as a serious expression of intent to commit an act of unlawful violence." *Id.* at ¶ 4. This is an objective test. *Id.* at ¶ 51 n.21 ("In the absence of additional guidance from the U.S. Supreme Court, we decline today to say that a speaker's

subjective intent to threaten is necessary for a statement to constitute a true threat for First Amendment purposes.").

> In determining whether a statement is a true threat, a reviewing court must examine the words used, but it must also consider the context in which the statement was made. Particularly where the alleged threat is communicated online, the contextual factors courts should consider include, but are not limited to (1) the statement's role in a broader exchange, if any, including surrounding events; (2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features; (3) the manner in which the statement was conveyed (e.g., anonymously or not, privately or publicly); (4) the relationship between the speaker and recipient(s); and (5) the subjective reaction of the statement's intended or foreseeable recipient(s).

Id. at ¶ 52.

¶ 30 When addressing the "words themselves," the supreme court instructed that a reviewing court's "inquiry should include whether the threat contains accurate details tending to heighten its credibility" and "whether the speaker said or did anything to undermine the credibility of the threat." *Id.* at ¶ 53.

¶ 31 Both parties contend — and we agree — that *R.D.* controls our analysis of whether Counterman's statements constituted a true

threat. With this framework in mind, we turn to Counterman's statements.

b. Application

¶ 32 We review the constitutionality of a statute as applied to an individual de novo. *Chase*, ¶ 65. We presume that a statute is constitutional, "and the party challenging the statute has the burden of proving unconstitutionality beyond a reasonable doubt." *Id.*

¶ 33 "Whether a particular statement constitutes a true threat is an issue of fact to be determined by the fact finder in the first instance." *R.D.*, ¶ 63 (citing *Chase*, ¶ 70). But, "in First Amendment speech cases, an appellate court must make an independent examination of the record to assure itself that the judgment does not impermissibly intrude on the field of free expression." *Id.* Accordingly, whether a statement is a true threat is a matter subject to independent review. *Id.*

¶ 34 Counterman contends that section 18-3-602(1)(c) is overly broad as applied to his speech. We disagree and conclude that his statements were true threats.

¶ 35 We begin, as *R.D.*, ¶ 52, instructs, by looking at the plain language of Counterman's messages to C.W.

¶ 36 Most troubling are the messages that tell C.W. to "die" or to "[f]uck off permanently." These messages, although they don't explicitly threaten C.W.'s life, imply a disregard for her life and a desire to see her dead. Another somewhat suggestive message is an image of stylized text that said Counterman was "unsupervised" and that the "possibilities are endless."

¶ 37 There are also messages that reflect a feeling of entitlement to C.W.'s response or engagement that, when met with silence, turn quickly to hostility toward her: "[s]eems like I'm being talked about more than I'm being talked to," "[y]our arrogance offends anyone in my position," "[h]ow can I take your interest in me seriously if you keep going back to my rejected existence," "[y]ou're not being good for human relations," "[y]ou do not talk," "[s]taying in cyber life is going to kill you," and "[y]our response is nothing attractive."

¶ 38 The messages that reference surveilling or watching C.W., such as "[w]as that you in the white Jeep?," "[o]nly a couple of physical sightings," "a fine display with your partner," and "tell your friend to get lost," are troubling because they are escalation. That

is, they imply that the contact is not just over Facebook but also in person. And again, they imply an entitlement to C.W.'s company and jealousy of her "friend" and "partner" who spend time with her.

¶ 39 Then, there are messages that imply Counterman either suspects that C.W. has contacted authorities about the messages she receives or that exhibit a delusion that he thinks his phone has been tapped: "I've had tapped phone lines before," "you have my phone hacked," and "[o]kay, then, please stop the phone calls." These messages are concerning because they indicate a potential trigger for further escalated behavior. Other messages demonstrate that Counterman fluctuates between affection and hostility. For example, C.W. ignored Counterman's messages and he retaliated by telling her to "die." Thus, this delusion or paranoia, coupled with Counterman's unpredictable mood, causes concern.

¶ 40 *R.D.*, ¶ 53, further instructs that, at this step, we should consider whether Counterman's statements include any "accurate details tending to heighten [their] credibility" and whether Counterman "said or did anything to undermine the credibility of the threat."

¶ 41 Here, there are details that heighten the credibility of Counterman's threats. The references to surveilling C.W. — particularly to seeing her with her partner or friend and the white Jeep — indicate that Counterman may have had a familiarity with C.W. gained from secretly watching her. These details add to the threat implied in Counterman's messages.

¶ 42 At the same time, nothing in the language of Counterman's messages undermined the threat. Though at one time Counterman appeared to offer an apology after one statement, this didn't undermine the threat. Rather, it contributed to an impression that Counterman was unstable and, at times, delusional when contacting C.W. This unpredictability further buttressed the threats contained in Counterman's other statements.

¶ 43 With the plain language of these statements in mind, we turn to examine them in context, considering the factors articulated in *R.D.*, ¶ 52.

¶ 44 First, we consider the role of Counterman's statements in a broader exchange. Here, it is notable that there was *not* a broader exchange. That is, Counterman's messages to C.W. were uninvited, and C.W. didn't send any messages back to Counterman or engage

in a conversation with him. And yet, he continued over years to send messages to her — some even expressing his frustration that it "[s]eems like I'm being talked about more than I'm being talked to."

¶ 45 Second, we consider the medium or platform that Counterman used to contact C.W. Counterman communicated to C.W. on Facebook from 2014 to 2016. C.W. had both a public Facebook account for her work as a musician and a private Facebook account for personal use. Counterman sent messages to both accounts.

¶ 46 Private accounts typically required a user to be "friends" with the account to communicate with the account holder. However, in 2014, as a practice, C.W. would accept any friend request she received — either to her public or private account — as a way to grow her business as a musician. She said she believes that this is why she initially accepted Counterman's friend request to her private account — allowing him to send her direct messages.

¶ 47 Another feature of the platform is that users can block another user from contacting them — to a certain extent. Facebook users can block a specific account — but that doesn't mean they can prevent a specific user from creating more accounts.

¶ 48 C.W. testified that she would block Counterman from contacting either of her accounts, but he would create a different account to continue to send messages to her. Thus, when met with being blocked — an action that communicated that C.W. didn't wish to be contacted by him — Counterman would ignore this and create another account, frustrating her efforts to block communication.

¶ 49 This supports an inference that Counterman created accounts and sent messages to C.W.'s two accounts knowing that the messages would cause an emotional response. He also expressed animosity toward C.W. when she didn't engage with him, and he circumvented her efforts to block his unwelcome communications. Indeed, despite being blocked from messaging her — an unequivocal indication that she wished not to be contacted by him — he would take the time to create new accounts, find her account, and her send even more messages.

¶ 50 Third, we consider the manner in which Counterman conveyed his statements. Counterman messaged C.W. privately. He sent her instant messages through Facebook to both of her accounts. The messages were addressed only to C.W. This direct targeting of C.W.

is indicative of a specific pursuit of one person and Counterman's specific intent to have an emotional effect on C.W. alone.

¶ 51 Fourth, we consider the relationship between Counterman and C.W., which was, at best, of a fan ceaselessly pursuing a public figure. That is to say, their "relationship" was of Counterman — a stranger to C.W. — sending numerous unanswered and increasingly disturbing messages to a local public figure who never responded except to endeavor to block Counterman's communications.

¶ 52 Fifth and finally, we consider C.W.'s subjective reaction. Her reaction was one of escalating alarm and fear of Counterman. C.W. testified that she was increasingly worried that Counterman was following her and that he wanted to physically harm her. The messages had the subjective effect of threatening C.W. such that she feared for her life and safety. This caused C.W. to contact a family member, an attorney, and law enforcement about her concerns. She cancelled concerts that she had previously scheduled because she feared that Counterman would show up.

¶ 53 Given this context and based on our independent review of the record, we conclude that Counterman's messages were true threats

— threats that are not protected speech under the First Amendment or article II, section 10. And, as such, Counterman's as-applied challenge to section 18-3-602(1)(c) fails.

¶ 54 Counterman contends that his statements — although threatening — didn't rise to the level of a "true threat" because they weren't explicit "statements of purpose or intent to cause injury or harm to the person, property, or rights of another, by an unlawful act." But this limited characterization of a true threat misses the mark by ignoring the importance of the context in which a statement is made. This approach thereby risks excluding true threats that may not be explicit but, when considered in context, are just as undeserving of protection. *See People v. Hickman*, 988 P.2d 628, 638-39 (Colo. 1999) (noting that extortionate threats may not appear to be threats when examined in isolation, but, in context, are true threats); *see also R.D.*, ¶ 4 (a "true threat" is a "statement that, considered in context and under the totality of the circumstances, an intended or foreseeable recipient would reasonably perceive as a serious expression of intent to commit an act of unlawful violence").

¶ 55 And context can cut either way; it can ensure that protected speech remains protected, and that unprotected speech may be criminalized, if the legislature so chooses. In *Watts*, the plain language of the defendant's statement that "if they ever make me carry a rifle the first man I want in my sights is L.B.J.," 394 U.S. at 706, divorced from any context, could certainly have been interpreted as a serious threat against the then-President's life. But it was the context in which the statement was made — the identity of the speaker and his relationship (or lack thereof) to President Johnson, the broad audience of the statement of fellow participants in an anti-Vietnam War rally (as opposed to a statement to President Johnson directly), the political and social context of the time, and the hyperbolic tone of the statement — that made the statement protected political opinion rather than a true threat against the President's well-being.

¶ 56 This emphasis on context has only grown as case law has refined the objective standard for true threats when speech is communicated via the internet. The "basic principle[] of freedom of speech" doesn't "'vary' when a new and different medium for communication appears." *Brown v. Ent. Merchs. Ass'n*, 564 U.S.

786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)); *see also R.D.*, ¶ 47. But each "medium of expression presents" its own special set of "First Amendment problems which must be examined in the light of the circumstances which are interwoven with the speech in issue." *People v. Weeks*, 197 Colo. 175, 180, 591 P.2d 91, 95 (1979) (citing *Joseph Burstyn, Inc.*, 343 U.S. at 502-03, and *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)); *see also R.D.*, ¶ 47.

¶ 57 When examining statements made via social media, "we are alert to the competing concerns that '[s]ocial media make hateful and threatening speech *more common* but also magnify the potential for a speaker's innocent words to be misunderstood.'" *R.D.*, ¶ 47 (quoting Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I🔫U: Considering the Context of Online Threats*, 106 Calif. L. Rev. 1885, 1885 (2018)). While "[t]he risk of mistaking protected speech for a true threat is high," so too are the "stakes of leaving true threats unregulated." *R.D.*, ¶ 50. Particularly in the context of stalking, online communication can enable "unusually disinhibited communication" from a perpetrator to a victim — "magnifying the

danger and potentially destructive impact of threatening language on victims." *Id.*

¶ 58 Recent widely reported cases of online harassment and stalking of public figures — particularly of women — involve internet users who are "strangers to the victims" granted previously unavailable access to their targets through social media. *See* Emma Marshak, Note, *Online Harassment: A Legislative Solution*, 54 Harv. J. on Legis. 503, 504 (2017) (discussing, among other articles on the subject, David Whitford, *Brianna Wu vs. the Gamergate Troll Army*, INC (April 2015), https://perma.cc/T84K-N2VV (video game developer Brianna Wu released a game and was inundated with "shocking, gruesome, specific, and obscene [threats], involving many variations on murder and rape" over social media platforms like Twitter)).

¶ 59 This context mirrors the one in which Counterman sent his myriad Facebook messages to C.W over two years. And this context buttresses our conclusion that Counterman's statements were true threats that aren't protected under the First Amendment or article II, section 10. Accordingly, we conclude that section 18-3-602(1)(c) is constitutional as applied to his unprotected threats.

B. Jury Instruction on True Threats

¶ 60 Next, Counterman asserts that, even if there was sufficient evidence to prove that he made true threats to C.W., the trial court reversibly erred by failing to instruct the jury on the meaning of true threats. We disagree.

1. Preservation and Standard of Review

¶ 61 "We review jury instructions de novo to determine whether the instructions as a whole accurately informed the jury of the governing law." *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009). Whether to give additional instructions, however, lies within the trial court's sound discretion, *Fain v. People*, 2014 CO 69, ¶ 17, and we will not reverse on this basis "absent manifest prejudice or a clear showing of abuse of discretion," *People v. Rogers*, 220 P.3d 931, 936 (Colo. App. 2008).

¶ 62 Before we address Counterman's contention, however, we must resolve whether he preserved this argument. Counterman asserts that his counsel requested a jury instruction defining true threats by filing a pretrial motion to dismiss the charges for violating his right to free speech. While Counterman's counsel objected to the charges on both federal and state constitutional

grounds in his motion to dismiss, his counsel didn't request an instruction on true threats. Nor does the record show that Counterman's counsel tendered a jury instruction on true threats. *See People v. Tardif*, 2017 COA 136, ¶ 10 ("An alleged instructional error is preserved if the defendant tenders the desired relevant instruction even if the defendant does not object or otherwise raise the issue during the jury instruction conference.").

¶ 63 Accordingly, Counterman's counsel failed to "allow the trial court 'a meaningful chance to prevent or correct the [alleged] error and create[] a record for appellate review.'" *Id.* (quoting *Martinez v. People*, 2015 CO 15, ¶ 14). This contention isn't preserved; thus, we will review for plain error.

¶ 64 Plain error is error that is both "obvious and substantial." *Hagos v. People*, 2012 CO 63, ¶ 18 (quoting *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005)). A plain error is substantial if it so undermines "the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *Id.* (quoting *Wilson v. People*, 743 P.2d 415, 420 (Colo. 1987)).

¶ 65 When courts review jury instructions for plain error, "the defendant must 'demonstrate not only that the instruction affected

a substantial right, but also that the record reveals a reasonable possibility that the error contributed to his conviction.'" *Miller*, 113 P.3d at 750 (quoting *People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001)). A court's "failure to instruct the jury properly does not constitute plain error if the relevant instruction, read in conjunction with other instructions, adequately informs the jury of the law." *Id.*

2. Analysis

¶ 66 The trial court instructed the jury on stalking (serious emotional distress). The instruction tracked the model jury instruction for the offense of stalking (serious emotional distress). *See* COLJI-Crim. 3-6:03 (2017). It didn't include a definition of "true threat."

¶ 67 Counterman contends that this instruction was insufficient. He asserts that the trial court should've sua sponte instructed the jury on the definition of true threats and required the jury to find that the prosecution proved beyond a reasonable doubt that Counterman's statements were true threats before convicting him of stalking (serious emotional distress).

¶ 68 But even if the trial court erred by omitting an instruction on true threats, any error wasn't obvious.

¶ 69 Only two published Colorado cases involve instructing a jury on true threats. In *Chase*, ¶ 71, the defendant explicitly requested a jury instruction on true threats. And "Chase's counsel urged the jury to acquit Chase on the basis that his e-mails were not true threats and were, thus, entitled to First Amendment protections." *Id.* The trial court allowed that instruction to be given separately from the elemental instruction for Chase's charged offense of stalking (credible threat). *Id.* at ¶ 72. Thus, the instruction given in *Chase* defining true threats was akin to a theory of defense instruction.

¶ 70 And, in *People v. Stanley*, 170 P.3d 782, 791 (Colo. App. 2007), the defendant contended, for the first time on appeal, that jury instructions that "set[] forth the elements of the offense" — attempting to influence a public official — "and defin[ed] a threat [of violence] were constitutionally deficient because they . . . incorrectly stated that a 'threat of violence' is not protected by the First Amendment." The division held that "the instruction, considered in its entirety, [wa]s not erroneous" because, while the instruction stated that "threats of violence are not protected free speech, it also stated in the next sentence that words 'used as mere political

argument, or as idle talk or in jest' are not threats." *Id.* at 792 (citation omitted). Thus, the division concluded, the "[i]nstruction . . . properly distinguished between threats of violence that are true threats and those that are not." *Id.*

¶ 71 Neither of these cases addresses the essence of Counterman's contention: whether a defendant is automatically entitled to a jury instruction on true threats when facing a charge that may implicate his protected speech. Simply put, Counterman doesn't point to *any* case or statute that would've alerted the trial court to his entitlement to such an instruction (assuming such an entitlement exists).

¶ 72 To be sure, whether a statement is a "true threat" is a factual determination. *See id.* at 790 ("[T]he question whether a statement is a 'true threat,' as opposed to protected speech, is, in the first instance, one of fact to be determined by the fact finder."); *see also People v. McIntier*, 134 P.3d 467, 474 (Colo. App. 2005). But it wasn't obvious that Counterman was entitled to an instruction

requiring the jury to determine if his statements were true threats absent any request from defense counsel.[2]

¶ 73 The trial court's instruction on stalking (serious emotional distress) tracked the model jury instruction and the language used in section 18-3-602(1)(c). *See Miller*, 113 P.3d at 750 (it's not plain error if trial court's instruction "adequately informs the jury of the law"). This adequately informed the jury of the guiding law for its decision: whether the prosecution established beyond a reasonable doubt that Counterman had committed stalking (serious emotional distress). Accordingly, we conclude that the trial court didn't plainly err by failing to sua sponte instruct the jury on the meaning of true threats.

C. Court's Response to Jury Question

¶ 74 Counterman raises two contentions regarding a response the trial court gave to a jury question about the timeframe in which it had to find that C.W. suffered serious emotional distress. First, he

---

[2] Whether a true threats instruction is required upon request from defense counsel is a question we save for another day. Here, the record shows that Counterman's counsel didn't request a true threats instruction, nor did his counsel tender an instruction on true threats.

asserts that the court's response was an impermissible constructive amendment of the stalking count or, alternatively, was a simple variance that caused prejudice. Second, he asserts that the court's response lowered the prosecution's burden of proof for the element of serious emotional distress.

¶ 75 We address, and reject, each contention in turn.

1. Additional Facts

¶ 76 The trial court instructed the jury that "Counterman is charged with the crime of [s]talking in Arapahoe County, Colorado, between and including April 1, 2014 and April 30, 2016." This was the same charging period identified in the criminal complaint against Counterman.

¶ 77 Another instruction provided,

> The burden of proof upon the prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged.

¶ 78 And,

> If you find from the evidence that each and every element of a crime has been proven beyond a reasonable doubt, you should find Mr. Counterman guilty of that crime. If you find from the evidence that the prosecution

> failed to prove any one or more of the elements of a crime beyond a reasonable doubt, you should find Mr. Counterman not guilty of that crime.

¶ 79 The court then instructed the jury on the elements of stalking (serious emotional distress):

> The elements of the crime of stalking are:
>
> 1. That Billy Counterman,
>
> 2. In the State of Colorado, at or about the date and place charged,
>
> 3. Knowingly repeatedly followed, approached, contacted, placed under surveillance, or made any form of communication with another person, either directly, or indirectly, through a third person,
>
> 4. In a manner that would cause a reasonable person to suffer serious emotional distress, and
>
> 5. Which did cause that person to suffer serious emotional distress.
>
> After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find Mr. Counterman guilty of stalking.
>
> After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find Mr. Counterman not guilty of stalking.

¶ 80 During its deliberations, the jury sent the court the following question:

> What does the date in line item #2 apply to? In particular does the emotional distress in line item #4 and #5 have to occur between April 1, 2014[,] and April 30, 2016, or do the dates only apply to the "stalking" charge?

¶ 81 The court drafted a proposed response and invited counsel to raise any objections. The prosecutor said, "it appears that [the jury] do[esn't] understand that it's Mr. Counterman's conduct that that element applies to as far as between the date and the place charged, and that they are concerned that it also applies to [C.W.], which it doesn't."

¶ 82 Counterman's counsel disagreed, arguing that

> the crime is alleged to have occurred between April 2014 and April 30th, 2016. Each of the elements that make up that crime need to have occurred within that period of time as charged, and so I don't know that – the proposal by the [c]ourt does necessarily explain what the jury is asking.

Instead, Counterman's counsel asserted that the court's response should be that

> [t]he crime of stalking is alleged to have occurred between and including April 1st, 2014, and April 30th, 2016. As such, each of

> the elements of the crime must be proven beyond a reasonable doubt to have occurred within that time frame.

¶ 83 Specifically, he argued that the trial court's proposed response would constitute a constructive amendment. He didn't assert, however, that the court's proposed response would lower the prosecution's burden of proof for the element of serious emotional distress.

¶ 84 Proposing an alternative, the prosecutor asked to amend the date range charged in the complaint under Crim. P. 7(e). Counterman's attorney objected, asserting that doing so would be a substantive amendment to the complaint and that it would be a "substantial infringement on [Counterman's] due process rights."

¶ 85 The court denied the prosecutor's request to amend the complaint, stating,

> I do note that I think it would have been the better practice for the People to have made a motion to amend either prior to trial, or even prior to the case going — the — the jury being instructed and deliberation started, to amend the date range to run from the 2014 period through the date of trial. It's unfortunate they didn't do that. Had they done that, I would have granted the amendment.

¶ 86 Rather, applying *People v. Huynh*, 98 P.3d 907 (Colo. App. 2004), the trial court determined that its proposed response to the jury question would be "a simple variance, as opposed to a constructive amendment." Further, the court held that this simple variance wouldn't prejudice Counterman because

> [w]hen [the court] look[s] at how the evidence was presented and the arguments that were being made, this wasn't just an argument that, no, there was no serious emotional distress at any particular time; rather, it was a more generalized argument that, first, a reasonable person would not have suffered serious emotional distress from this; and, second, that this particular alleged victim, [C.W.], did not, in fact, suffer serious emotional distress; and there was no distinction as to *when* that may have been.

¶ 87 Thus, the court held that the

> best way to respond [to the jury's question] is similar to what the [c]ourt did in *People v. Rail*, which was go back and tell [the jury], no, the serious emotional distress that the – acts in question by [Counterman] must have taken place within the date charged, but the serious emotional distress does not have to occur within the dates charged.

¶ 88 Counterman's counsel objected again, this time asserting his "due process rights, his right to present a defense[,] . . . a right to effective assistance of counsel, [and] to confront witnesses under

the U.S. and Colorado constitutions." He explained that he didn't "agree with the [c]ourt's proposed [response], because I don't think it's an accurate reflection of the law."

¶ 89 The court responded to the jury question over Counterman's objections, as follows:

> [The instruction] sets forth the elements of the crime of [s]talking. The date range referenced in line 2 of Jury Instruction No. 10 refers to the date range in the charge in this case, i.e., th[at] Mr. Counterman is charged with the crime of [s]talking in Arapahoe County, Colorado, between and including April 1, 2014 and April 30, 2016, as set forth in Jury Instruction No. 2. The People must prove beyond a reasonable doubt that [Counterman's] conduct must have taken place within the date range charged. However, the People do not have to prove beyond a reasonable doubt that the alleged victim, [C.W.], suffered serious emotional distress within the date range charged.

¶ 90 After the court read its response, Counterman's attorney objected again, on the same grounds.

2. Constructive Amendment or Simple Variance

¶ 91 Counterman asserts that the trial court constructively amended the stalking charge by telling the jury that the prosecution didn't have to "prove beyond a reasonable doubt that the alleged

victim, [C.W.], suffered serious emotional distress within the date range charged." Alternatively, he asserts that this response was a simple variance that caused prejudice and, thus, requires reversal. We conclude that the court's response was a simple variance and that it wasn't prejudicial.

a. Legal Principles

¶ 92 The prosecution may charge a criminal defendant by complaint, information, or indictment. *People v. Rodriguez*, 914 P.2d 230, 257 (Colo. 1996). A charging document is "sufficient if it advises the defendant of the charges he is facing so that he can adequately defend himself and be protected from further prosecution for the same offense." *Cervantes v. People*, 715 P.2d 783, 785 (Colo. 1986) (quoting *People v. Albo*, 195 Colo. 102, 106, 575 P.2d 427, 429 (1978)); *see Rodriguez*, 914 P.2d at 257. And the prosecution can't "require a defendant to answer a charge not contained in the charging instrument." *Rodriguez*, 914 P.2d at 257 (citing *Schmuck v. United States*, 489 U.S. 705, 717 (1989)).

¶ 93 There are two ways that the charge of which a defendant is convicted may differ from the charge contained in the charging

instrument: (1) a constructive amendment or (2) a simple variance. *See id.*

¶ 94 A constructive amendment "alter[s] the substance of the indictment." *People v. Gallegos*, 260 P.3d 15, 26 (Colo. App. 2010); *see People v. Rail*, 2016 COA 24, ¶ 50, *aff'd on other grounds*, 2019 CO 99. This occurs "when jury instructions change an element of the charged offense to the extent the amendment 'effectively subject[s] a defendant to the risk of conviction for an offense that was not originally charged.'" *People v. Vigil*, 2015 COA 88M, ¶ 30 (citations omitted), *aff'd*, 2019 CO 105. Divisions of this court have held that constructive amendments are per se reversible. *See Rail*, ¶ 50; *People v. Riley*, 2015 COA 152, ¶ 15; *People in Interest of H.W.*, 226 P.3d 1134, 1137 (Colo. App. 2009); *People v. Pahl*, 169 P.3d 169, 177 (Colo. App. 2006).[3]

¶ 95 A simple variance "'occurs when the charging terms are unchanged, but the evidence at trial proves facts materially

---

[3] However, *People v. Carter*, 2021 COA 29, ¶¶ 35-48, recently called into question whether a constructive amendment is a structural error mandating reversal. We need not address this question here, however, because we conclude that the court's response to the jury question was a simple variance, not a constructive amendment.

different from those alleged' in the charging instrument." *Rodriguez*, 914 P.2d at 257 (quoting *United States v. Williamson*, 53 F.3d 1500, 1512 (10th Cir. 1995)). A simple variance requires reversal only if it is material to the merits of the case and "prejudices the defendant's substantial rights." *Rail*, ¶ 51 (citing *Huynh*, 98 P.3d at 912); *see also* § 16-10-202, C.R.S. 2020.

¶ 96 We review de novo whether a variance occurred and whether it was a constructive amendment or a simple variance. *Rodriguez*, 914 P.2d at 256-58; *Rail*, ¶ 48.

b. Analysis

¶ 97 Counterman asserts that the trial court's response to the jury question was a constructive amendment of the stalking (serious emotional distress) charge. We are unpersuaded.

> To prevail on a constructive amendment claim, a defendant must demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the [charging document].

People v. Madden, 111 P.3d 452, 461 (Colo. App. 2005) (quoting *United States v. Milstein*, 401 F.3d 53, 65 (2d Cir. 2005)).

¶ 98 The trial court's response to the jury's question stated that, when considering whether the prosecution had met its burden of proof as to the fifth element of stalking, the prosecution didn't have to prove that C.W. suffered serious emotional distress during the charging period. Rather, the jury could consider evidence that C.W. suffered serious emotional distress after the charging period ended. This response modified the date range for the fifth element. But, notably, it didn't so alter the element that "it [wa]s uncertain whether [Counterman] was convicted of conduct that was the subject of the [charging document]." *See id.* Rather, we conclude that the court's response to the jury's question constituted a simple variance and not a constructive amendment.

¶ 99 "Generally, a variance between the specific date alleged in the charging document and that which is proved at trial is not fatal." *Huynh*, 98 P.3d at 911.

¶ 100 The court's response was akin to the circumstances in *Rail*. Rail was charged by information with sexual assault of a child. The information alleged that the offense occurred between March 24, 1999, and March 21, 2001, but it didn't describe any specific incidents. *Rail*, ¶ 44. During trial, the victim testified to "roughly

twenty-five incidents over several years" with the "worst" incident occurring "at an Embassy Suites hotel when [the victim] was about thirteen years old." *Id.* at ¶ 3. The victim's mother testified that she believed the Embassy Suites incident occurred in 2007. *Id.* at ¶ 44.

¶ 101 During deliberations, the jury asked the trial court if, in light of the testimony about the Embassy Suites incident occurring in 2007, it could only consider the time period charged in the information when reaching a verdict. The trial court responded that the Embassy Suites incident need not be within the time period charged in the information. The jury indicated on the verdict form that it found beyond a reasonable doubt that the Embassy Suites incident had occurred. *Id.* at ¶ 45.

¶ 102 On appeal, Rail contended that the court's response to the jury's question constituted a constructive amendment. The division in *Rail* held that "trial testimony indicating that [a charged incident] had occurred outside of the timeframe alleged in the information *epitomizes a simple variance*." *Id.* at ¶ 53 (emphasis added).

¶ 103 Similarly here, evidence was presented that C.W. experienced serious emotional distress outside the time period in the charging

document. The court's response to the jury question stated that it could consider evidence of C.W.'s emotional distress that occurred after the charging period. This too epitomizes a simple variance. *See id.*

¶ 104 Further, this simple variance didn't "prejudice [Counterman's] substantial rights." *Id.* at ¶ 51 (citing *Huynh*, 98 P.3d at 912); *see also* § 16-10-202.

¶ 105 Counterman contends that the court's response was prejudicial because he wasn't given adequate notice that his defense should address evidence of C.W.'s emotional distress that occurred outside of the charged timeframe. Specifically, he contends that his defense included an attempt to distinguish when the emotional distress occurred and, thus, the court's response undermined this prepared defense strategy. We disagree.

¶ 106 The complaint charged Counterman with stalking (serious emotional distress). This notified Counterman that an element of the charge he faced was that C.W. suffered serious emotional distress as a result of his conduct. Further, Counterman was notified that C.W. would testify about suffering serious emotional distress as a result of the messages.

¶ 107 Counterman's defense to the charge was a general denial. As part of that defense, he contended that C.W. didn't experience *any* emotional distress at *any time* as a result of his statements. While evidence was elicited at trial that C.W. suffered serious emotional distress both during and after the charging period, there's nothing to indicate that the court's response to the jury's question altered the charge in a way that impaired Counterman's defense. Given the ongoing nature of the alleged crime and its emotional toll, there wasn't a lack of notice nor could it have come as a surprise that C.W.'s alleged emotional distress was ongoing, including after the close of the charging period. Accordingly, we conclude that the simple variance didn't result in prejudice and, thus, doesn't require reversal.

3. Burden of Proof for Fifth Element of Stalking (Serious Emotional Distress)

¶ 108 Finally, Counterman contends for the first time on appeal that the trial court's response impermissibly lowered the prosecution's burden to prove that C.W. suffered serious emotional distress. Specifically, he contends that, because the court's response to the jury stated that the jury could consider evidence of C.W.'s

emotional distress that occurred outside of the charging period, the court implicitly lowered the prosecution's burden to prove that C.W. suffered serious emotional distress. We conclude that the court's response wasn't plain error.

¶ 109 Counterman's counsel objected to the trial court's proposed response to the jury's question on the basis that the court's response would be a constructive amendment of the charge. But his counsel didn't specifically object on the burden of proof grounds he now raises on appeal. Accordingly, we review for plain error.

¶ 110 Again, plain error is that which is both "obvious and substantial." *Hagos*, ¶ 18. A court's "failure to instruct the jury properly does not constitute plain error if the relevant instruction, read in conjunction with other instructions, adequately informs the jury of the law." *Miller*, 113 P.3d at 750.

¶ 111 While perhaps, when read in isolation, the court's response is susceptible of the interpretation that Counterman offers on appeal, as a whole the jury instructions adequately informed the jury of the prosecution's burden of proof — beyond a reasonable doubt. Three different instructions informed the jury that the prosecution's burden of proof was beyond a reasonable doubt and specified that

this burden of proof applied to every element of the charge of stalking (serious emotional distress).

¶ 112 One instruction stated that the prosecution was required "to prove to the satisfaction of the jury beyond a reasonable doubt the existence of *all of the elements* necessary to constitute the crime charged." (Emphasis added.) The instruction reiterated that "[i]f you find from the evidence that *each and every element* of a crime has been proven beyond a reasonable doubt, you should find Mr. Counterman guilty of that crime." (Emphasis added.) And, in the elemental instruction, the jury was instructed that, "[a]fter considering all the evidence, if you decide the prosecution has proven *each of the elements* beyond a reasonable doubt, you should find Mr. Counterman guilty of stalking." (Emphasis added.)

¶ 113 Thus, as a whole, these instructions adequately informed the jury that it was required to find that the prosecution proved each element of stalking (serious emotional distress) — including the fifth element, that C.W. suffered serious emotional distress — beyond a reasonable doubt. The court's response, read in combination with these instructions, didn't obviously lower the burden of proof for the fifth element.

¶ 114 Thus, the trial court's response to the jury's question wasn't plain error.

III. Conclusion

¶ 115 For the reasons set forth above, we affirm.

JUDGE ROMÁN and JUDGE BROWN concur.