Can Your Clients Be Convicted For Threats on Social Media?

by Christopher B. Hopkins

Can't WAIT to shoot up my school. It's time. School getting shot up on a Tuesday.

In a series of Tweets over a two week period, a Florida high school student unintentionally set in motion a series of events – his arrest, trial, and appeal – which ultimately revealed a gaping hole in Florida law: many threats on the Internet cannot be prosecuted under the relevant Florida Statute because the law fails to address the situation when threats are not directly made to a recipient but, instead, are broadcast via open social media platforms, discussion forums, and website comment sections.

In *J.A.W. v. Florida*, the Second District concluded that the Tweets above did not violate Florida Statute 836.10 ("Written Threats Statute") because the Statute's "narrow language" required that the threat be sent directly to intended victims or their family members. In *J.A.W.*, the teenager wrote his Tweets as jokes directed to his group of fellow gamers who felt their taste in heavy metal music was wrongly associated with school shootings. None of the recipients attended J.A.W.'s school or were even located in Florida (indeed, group members apparently got the "joke"); unexpectedly, the Tweets ultimately came to the attention of local (Sarasota) police. J.A.W. was charged and tried under the Statute but the appellate court reversed since he had not directly sent the threat to any victim(s).

The Second District acknowledged that social media platforms such as Twitter are "often used to post communications publicly, for the whole world to see, instead of sending those communications directly to any specific person" (discussion forums and comment sections also fit the criteria). The Court recognized, "in this context, a threat of violence made publicly on social media is likely to reach its target and cause fear of bodily harm just like a traditional letter [but not violate the Statute]."

The Written Threats Statute comprises five elements: it is a felony to (i) write or compose and (ii) send or procedure the sending of (iii) a letter, inscribed communication, or electronic communication (iv) to the intended recipient or a member of the recipient's family (v) which contains a threat to kill or injure the recipient or family member.

From 1900-1920, it was a common criminal practice to send so-called "black hand" extortion notes which were anonymously signed with a threatening symbol, the drawing of a black hand. The Written Threats Statute, enacted in 1913, may have been born out of that early Mafia practice. After one hundred years and four amendments, the Statute still requires that the threat must be sent to the victim or family member. The Legislature added "electronic communication" to the Statute in 2010 but this proved to be a belated (and perhaps incomplete) attempt to include all Internet communications. Social media platforms, forums, and comment sections were already widely used by that time but, either by choice or omission, any threats which were openly (rather than directly) made in such forums would slip through the grasp of the Statute.

Meanwhile, in Florida's judiciary, online threats appeared to be a trend: five of the last six opinions interpreting the Written Threats Statute involved Internet-based communications. By 2013, two opinions confirmed that the Statute would not apply to online threats which were made openly but not directly.

Macchione v. State illustrated that the addition of "electronic communication" to the Statute in 2010 may have been too late to catch the social media explosion. Macchione's threatening Twitter posts and YouTube videos were circulated in 2009 before the "electronic communication" amendment and thus were outside of the scope of the then-applicable Statute. The Fifth District recognized that Twitter and YouTube had already "grown exponentially" by the time of the amendment but stopped short of discussing whether the Statute applied to "open" versus "direct" threats online. The First District, however, caught the point.

In *O'Leary v. State*, the defendant made threatening statements on Facebook about harming his relative who did not see the post because the defendant's account was private. However, by propinquity, the defendant was "Facebook friends" with a mutual relative; thus, the First District stitched together that O'Leary's threat was "sent to" the one relative who was his Facebook friend. Since that person was related to the victim, the statutory elements were met. Despite a successful prosecution under the *O'Leary* facts, the shortcoming in the Written Threats Statute was clear: a threat on social media would not be prosecutable since it was not sent to the victim unless, by pure chance, it could be argued that it was directed at a victim or family member who happened to be a "friend" or "follower" of the person making the threat.

The State might argue that Florida Statute 790.163(1) criminalizes a "false report, with intent to deceive, mislead, or otherwise misinform any person… concerning the use of firearms in a violent manner…" That law, however, requires "intent" which, as the Supreme Court confirmed in *Elonis v. U.S.*, can be difficult to prove. Since *Elonis*, defendants often deny criminal intent by claiming that their statements were "a joke" or quotes from violent rap songs.

J.A.W. confirms that the Written Threats Statute cannot address threats which, while still harmful, are openly (but not directly) made on the Internet. The Second District concluded that, "the Legislature may wish to revisit section 836.10 to address the modern problem of threats issued and shared publicly on social media."

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