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THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
ATLANTIC COUNTY
LAW DIVISION, CRIMINAL PART
INDICTMENT NO. 19-10-02086

STATE OR NEW JERSEY,

Plaintiff,

v.

KYLE POWELL,

Defendant.

APPROVED FOR PUBLICATION

October 5. 2021

COMMITTEE ON OPINIONS

Decided: January 27, 2020

Erika Halayko, Assistant Prosecutor, for plaintiff (Damon G. Tyner, Atlantic County Prosecutor, attorney).

Yvonne Maher, Assistant Deputy Public Defender, for defendant (Joseph E. Krakora, Public Defender, attorney).

WALDMAN, J.S.C.

This matter comes before the court on Kyle Powell's motion to dismiss counts one and four of the indictment. For the reasons set forth herein, the motion is denied.

I. Procedural History

An Atlantic County grand jury returned indictment No. 18-11-1966, charging defendant with one count of second degree bias crime with purpose to

intimidate, contrary to the provisions of N.J.S.A. 2C:16-1(a)(1); one count of cyber harassment, contrary to the provisions of N.J.S.A. 2C:33-4.1(a)(1); and one count of terroristic threats, contrary to the provisions of N.J.S.A. 2C:12-3(a).

Defendant filed a motion to dismiss count one of the indictment, charging him under N.J.S.A. 2C:16-1(a)(1). In response to defendant's motion, the State superseded the indictment and charged count one under N.J.S.A. 2C:16-1(a)(3). The New Jersey Supreme Court had previously declared this section of the statute to be unconstitutional. The State again superseded the indictment. Superseding indictment No. 19-10-02086 charges defendant with two counts of both second and third degree bias crimes, pursuant to N.J.S.A. 2C:16-1(a)(2); one count of fourth degree cyber harassment, pursuant to N.J.S.A. 2C:33-4.1(a)(1); and one count of third degree terroristic threats, pursuant to N.J.S.A. 2C:12-3(a). Defendant now seeks to dismiss both counts one and four of the indictment, both of which charge defendant under N.J.S.A. 2C:16-1(a)(2).

II. Factual Background

Officer Scott Packen (Officer Packen) of the New Jersey State Police (NJSP) responded to a call at 868 Harding Highway in Buena Vista. The caller, A.P., told Officer Packen that she received several threats on meetme.com, a social media website, from a user identified as "Kyle." The threats referenced

her six-year-old daughter, N.P., who is bi-racial. A.P. also went to the Atlantic County Prosecutor's Office (ACPO) and showed detectives screenshots of the threatening messages. The NJSP forwarded the complaint to the ACPO and requested information and assistance in identifying the individual on meetme.com.

The first threat was a posted image of A.P. and her daughter, which read "868 Harding Hwy I'll strangle that mongrel kid while you watch tied up." The second threat, posted on an image of A.P.'s daughter, read "Bashing that mutt's head in tonight." A.P. believed that the threats were racially motivated due to her daughter's skin complexion and the verbiage "mutt" and "mongrel." Adjacent to both of the comments by "Kyle" was an image of a white male with light-colored hair and a goatee. His profile indicated that he was twenty-nine years old from Pennsville, New Jersey. A.P. did not know "Kyle" and did not recognize him by his picture.

While police were in the process of obtaining account information from meetme.com, A.P. received two more threatening messages, which read "Ever get raped?" and "You like getting raped don't you? Probably please yourself every night to the memory." When A.P. did not respond, defendant repeatedly sent six messages indicating "I asked you a question" and "Who raped you?" Due to the threatening nature of the comments made and the use of her true

address, A.P. feared for her and her daughter's safety. A.P. subsequently sent her daughter to stay with her grandmother.

The ACPO made efforts to locate "Kyle" through various law enforcement databases. Officers confirmed through a New Jersey driver's license of Kyle Powell, subscriber information, and IP addresses, that defendant was the individual associated with the username on Meetme.com. Law enforcement also confirmed that defendant was on the Federal Terrorist Watch list. While law enforcement was gathering this information, defendant messaged A.P. again asking "Did you like getting raped you spic loving whore?"

Defendant was located and brought to the Buena Vista police station for an interview, which was recorded. After being read his Miranda rights, defendant acknowledged that he sent the threats to A.P. using his phone, to which only he has access. Defendant also stated that he had an active meetme.com profile during the course of the crimes committed and stated that he was "trying to be an asshole" and "takes offense to interracial relationships and children of those relationships."

III. Defendant's Argument

THE STATE DID NOT PROVE THAT THE DEFENDANT COMMITTED THE TERRORISTIC THREATS WITH THE PURPOSE OF INTIMIDATING THE VICTIM, BECAUSE OF RACE OR COLOR.

IV. Legal Analysis

a. Standard for Dismissing a Grand Jury Indictment.

Indictments are presumed valid and should be dismissed only upon the clearest and plainest ground and only if palpably defective. State v. Schenkowleski, 301 N.J. Super. 115, 137 (App. Div. 1997) (citing State v. N.J. Trade Waste Ass'n, 96 N.J. 8, 18-9 (1984)). In determining the sufficiency of evidence to sustain an indictment, see Rule 3:10-2(c), every reasonable inference is to be drawn in favor of the State. N.J. Trade Waste Ass'n, 96 N.J. at 27. Specifically, the trial court should "evaluate whether, viewing the evidence and the rational inferences drawn from that evidence in the light most favorable to the State, a grand jury could reasonably believe that a crime occurred and that the defendant committed it." Ibid.; State v. Morrison, 188 N.J. 2, 13 (2006) (citing State v. Reyes, 50 N.J. 454, 459 (1967)). "The quantum of this evidence . . . need not be great." Schenkowleski, 301 N.J. Super. at 137 (citing State v. Bennett, 194 N.J. Super. 231, 234 (App. Div. 1984)). Rather, the State need only present "some evidence of each element." State v. Lyons, 417 N.J. Super. 251, 258 (App. Div. 2010). The defendant bears the burden of proving that the "evidence is clearly lacking to support the charge." State v. McCracy, 97 N.J. 132, 142 (1984); State v. Graham, 284 N.J. Super. 413, 417 (App. Div. 1995).

However, even though an indictment is presumed valid, "a defendant with substantial grounds for having an indictment dismissed should not be compelled to go to trial to prove the insufficiency." State v. Hill, 166 N.J. Super. 224, 229 (App. Div. 1978) (citing State v. Graziani, 60 N.J. Super. 1, 22 (App. Div. 1959), aff'd, 31 N.J. 538 (1960)). A substantial ground for the dismissal of an indictment exists where the indictment "is manifestly deficient or palpably defective." State v. Wein, 80 N.J. 491, 501 (1979). Even if an indictment appears sufficient on its face, it cannot stand if the State fails to present the grand jury with at least "some evidence" as to each element of a prima facie case. State v. Donovan, 129 N.J.L. 478, 483 (Sup. Ct. 1943); Hill, 166 N.J. Super. at 228-29.

b. Bias Crime with Purpose to Intimidate

N.J.S.A. 2C:16-1(a)(2) provides that:

> A person is guilty of the crime of bias intimidation if he commits, attempts to commit, conspires with another to commit, or threatens the immediate commission of an offense specified in chapters 11 through 18 of Title 2C of the New Jersey Statutes . . . knowing that the conduct constituting the offense would cause an individual or group of individuals to be intimidated because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity . . . .

In order to sustain an indictment for bias intimidation in violation of N.J.S.A. 2C:16-1(a)(2), the State must present "some evidence" of the

following: (1) that the defendant committed, attempted or conspired with another to commit, or threatened to commit the crimes listed in the statute; and (2) that the defendant did so knowing that his actions would intimidate the individual or group of individuals because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin or ethnicity. Model Jury Charges (Criminal), "Bias Intimidation [Knowing Intimidation] (N.J.S.A. 2C:16-1(a)(2))" (rev. May 16, 2011); State v. Dixon, 396 N.J. Super. 329 (App. Div. 2007).

In the present case, defendant's argument that the State failed to present evidence to support the indictment for bias intimidation is misplaced. Detective Eugene Soracco's grand jury testimony detailed how law enforcement identified defendant as the individual who posted the threatening comments. This satisfied the State's burden to provide "some evidence" that defendant "committed, attempted to or conspired with another to commit, or threatened to commit" the crime of terroristic threats under N.J.S.A. 2C:12-3(a), as follows:

> Q. And how was it that he was ultimately identified as Kyle Powell in this matter?
>
> A. We used a law enforcement database and searched the information we had at hand. So we did Kyle, the roundabout age, and the city of Pennsville, and it came back to seven results. We took those seven results and compared them with DMV driver's license photographs and were able to locate Kyle Powell. His driver's license

photograph is substantially similar to the individual contained in the profile pictures.

. . . .

Q. Okay. On August 8th of 2018, did troopers of the New Jersey State Police locate the defendant?

A. Yes, they did.

. . . .

Q. And did he acknowledge sending those messages to A.P.?

A. Yes, he did.

Q. Okay. And ultimately you did get the subscriber information back from . . . meetme.com as well, correct, just to verify that? Okay. And he – so he acknowledged sending the messages to A.P., correct?

A. Yes.

This portion of the grand jury testimony was enough to establish by "some evidence" that defendant was the individual who sent the messages to A.P.. Detective Soracco's testimony went on further to provide evidence of the threatening nature of the messages:

Q. Okay. And what was the nature of the harassing or threatening messages that were sent to A.P. in reference to herself and to her daughter?

A. There was two original comments. One was, "I'm going to bash that mutt's head in tonight." And the other one is, "I'll strangle that mongrel child

while you watch tied up."

Q. Okay. And he used the term "mutt" and "mongrel," is that correct?

A. He used both of those terms, yes.

Q. And one of the two comments that he posted on her – on her page actually listed A.P.'s address. Is that correct as well?

A. That is – that is correct, yes.

. . . .

Q. And he also indicated that he was going to, underneath a photograph of the little girl, "Bash that mutt's head in tonight." Is that correct?

A. That is also correct, yes.

Defendant's actions demonstrate that he was aware that his threats would frighten and intimidate A.P. and her daughter. Defendant neither met A.P. nor her daughter, nor did they share any mutual friends. A.P. never responded to defendant's messages and they had never engaged in an online conversation. Defendant purposely made A.P. aware that he knew her address, knowing that doing so would instill fear.

Detective Soracco went on to provide further evidence that defendant made these terroristic threats "based on race":

Q. Did he indicate, in fact, that he was quote, "trolling the internet?" Is that correct?

A. That is correct, yes.

Q. And quote, "I apologize for my language. Trying to be an asshole." He said that as well?

A. That is correct.

Q. And did he also indicate that he did it because he, quote, "Takes offense to interracial relationships and children of those relationships?"

A. That is accurate, yes.

The State satisfied the burden to present "some" prima facie evidence for each of the elements of count one and count four of the indictment for bias intimidation.

Defendant misinterprets the language of N.J.S.A. 2C:16-1(a)(2). Under subsection (a)(2), bias intimidation is committed with knowledge "that the conduct constituting the offense would cause an individual or group of individuals to be intimidated because of race." N.J.S.A. 2C:16-1(a)(2). It matters only that the crime was committed targeting one of the requisite characteristics, with the purpose or knowledge that the intended victims would be intimidated.

Here, the language of the indictment for bias crime reads:

> . . . Kyle M. Powell did commit, attempt to commit or threaten the immediate commission of an offense specified in N.J.S.A. 2C:12-3(a) terroristic threats; specifically by sending racially bias threats via social media to A.P. that referenced her biracial daughter, N.P.

> and threatened a crime of violence to Ashley Parr and/or N.P. . . . .

The indictment alleges that defendant's threats were motivated by racial bias and were directed at A.P. and her daughter with the purpose of instilling fear. Based on defendant's use of the words "mutt" "mongrel" and "spic" and his admission that he "takes offense to biracial relationships and children of those relationships," defendant was evidently targeting A.P. and her daughter because of the young girl's race and because of A.P.'s interracial relationship. As a white woman who chose to have relations with a non-white man and bear his child, A.P. was purposely targeted by defendant because of her race and defendant's distaste for interracial relationships.

The statute for bias intimidation does not require the victim be of a minority race; simply that the intimidation be race-based. The evidence presented to the grand jury established that defendant's terroristic threats were motivated by both A.P.'s race and her daughter's. It is unlikely that the threats would have been leveled at A.P. if she was Hispanic, given defendant's statement to police that he "takes offense to interracial relationships and children of those relationships."

Additionally, the child is a victim of defendant's threats as defendant told her mother he would "strangle" the "mongrel" child and "bash [her] head in." Defendant made these threats because of his distaste for interracial relationships

and children of those relationships.

Other jurisdictions focus on the relationship between the recipient of the threat and the intended victim. See United States v. Bellrichard, 779 F. Supp. 454, 460 (D. Minn. 1991); State v. Fenton, 30 F. Supp. 2d 520 (W.D. Pa. 1998).

The Appellate Division has thus far refrained from ruling on whether the State must prove the intended victim of the terroristic threat actually knew of the threat. State v. Ortisi, 308 N.J. Super. 573, 597 (App. Div. 1998) (explaining that "we leave for another day the issue of whether victims must be made aware of the threat"). In Ortisi, the defendant called the Clerk's Office of the Appellate Division and stated he was "taking the law into [his] own hands now" and that he would "start with those jackasses in the Prosecutor's Office, Fava and Murphy." Id. at 581. The Ortisi court was satisfied that the evidence would permit the jury to infer that both victims were aware of the defendant's threats. Id. at 597. Although it is unclear whether the present child's knowledge of defendant's threats is required, when viewed in the light most favorable to the State, the grand jury could have reasonably inferred that the child was made aware of the threats when she was sent to stay with her grandmother. Whether or not the child knew of the threat, it was made with the purpose to intimidate her mother.

As to the elements of bias intimidation, "with purpose to intimidate" or

"with knowledge," State v. Pomianek, 221 N.J. 66 (2015), the State is not required to produce witnesses to testify to a defendant's state of mind at the time of a particular act. Rather, a grand jury may make reasonable inferences about a defendant's state of mind based upon evidence presented by the State. The State provided adequate evidence that defendant repeatedly posted threatening messages on A.P.'s meetme.com pictures. Again, the State's evidence to the grand jury indicated that defendant made these posts because of his distaste for interracial relationships and children. It was not unreasonable for the grand jury to infer that defendant knowingly threatened A.P. and her daughter because of his racial prejudice. Therefore, the State presented sufficient evidence to sustain a charge for second degree bias intimidation.

Sufficient evidence was presented to establish all elements of bias intimidation pursuant to N.J.S.A. 2C:16-1(a)(2).

V. Conclusion

For the foregoing reasons, defendant's motion to dismiss counts one and four of the indictment is denied.