IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF: M.C., A MINOR,

M.C.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64839

ORDER OF AFFIRMANCE

This is an appeal from a district court order adjudicating appellant as a delinquent child. Eighth Judicial District Court, Family Court Division, Clark County; William O. Voy, Judge.

North Las Vegas Police monitored the Facebook activity of approximately 130 individuals by befriending them under a fictitious name. M.C. was one of the individuals monitored. North Las Vegas Police Officer Richard Arnold found a two-day-old posting on M.C.'s Facebook stating, "Killing spree by myself. I got four clips that hold seventeen and five hundred bullets. And I don't give a fuck no more." That post was viewed by several of M.C.'s Facebook friends. M.C. was arrested after a search of his house that revealed no weapons or ammunition. M.C. claimed he was not serious when he made the post and said he made the post because he was upset after fighting with his girlfriend. The State ultimately charged M.C. with making a terrorist threat under NRS 202.448.

After a contested hearing, the hearing master recommended that M.C. be adjudicated delinquent. Specifically, the hearing master

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concluded that M.C. violated NRS 202.448(1) by making a terroristic threat via Facebook with the intent to (1) alarm or intimidate others, (2) cause panic or civil unrest, and (3) interfere with police operations. Additionally, the hearing master concluded that the First and Fourth Amendments did not prevent M.C. from being adjudicated as delinquent. The district court approved the hearing master's findings, conclusions, and recommendations over M.C.'s objection. M.C. now appeals.

On appeal, M.C. contends that (1) the State violated his Fourth Amendment rights by monitoring his Facebook account, (2) the First Amendment requires the State to prove he subjectively intended to make a threat when he made the Facebook post, and (3) the district court erred in admitting testimony from Officer Arnold about the contents of M.C.'s Facebook page.

The State Did Not Violate M.C.'s Fourth Amendment Rights by Observing His Facebook Activity

The Fourth Amendment prohibits unreasonable searches. U.S. Const. amend. IV. However, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). Therefore, "to assert a violation under the Fourth Amendment, one must have a subjective and objective expectation of privacy in the place searched or items seized." *State v. Taylor*, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998).

Here, M.C. had no objectively reasonable expectation of privacy. As soon as he released the post to a third party—specifically, his Facebook friends—M.C. lost any objectively reasonable expectation of privacy in its contents. *See Smith v. Maryland*, 442 U.S. 735, 743-44 (1979) ("[A] person has no legitimate expectation of privacy in information

he voluntarily turns over to third parties."); *see also United States v. Heckenkamp*, 482 F.3d 1142, 1146-47 (9th Cir. 2007) ("A person's reasonable expectation of privacy may be diminished in 'transmissions over the Internet or e-mail that have already arrived at the recipient.'" (quoting *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004))). Therefore, the State did not violate M.C.'s Fourth Amendment rights by monitoring his Facebook activity.

The State Did Not Violate M.C.'s First Amendment Rights by Adjudicating Him Delinquent for His Online Speech

The State may not make a law abridging the right of free speech. *See Virginia v. Black*, 538 U.S. 343, 358 (2003). It may, however, criminalize "true threats" without violating the First Amendment's free speech protections. *United States v. Elonis*, 730 F.3d 321, 328 (3d Cir. 2013) *cert. granted*, 134 S. Ct. 2819 (2014). Presently, it is unclear if the First Amendment allows states to punish a speaker for speech that, although threatening, was not subjectively intended to be threatening. *Compare United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) (proof of subjective intent to threaten required), *with United States v. Jeffries*, 692 F.3d 473, 480-81 (6th Cir. 2012) (it is only necessary to show that a reasonable person would feel threatened by the communication); *see also Elonis v. United States*, 134 S. Ct. 2819 (2014) (granting certiorari to potentially resolve this circuit split). Although this is an issue of great constitutional importance, it is not implicated in this matter.

M.C. was adjudicated delinquent for violating NRS 202.448, which punishes speakers who "knowingly make any threat . . . with the intent to . . . (a) [i]njure, intimidate or alarm . . . (b) [c]ause panic or civil unrest . . . (c) [e]xtort or profit thereby . . . or" (d) cause a governmental agency to expend resources. "Questions of statutory construction are

reviewed by this court de novo. Unless a statute is ambiguous, we attribute the plain meaning to the statute's language." *Moore v. State*, 122 Nev. 27, 31-32, 126 P.3d 508, 511 (2006) (footnote omitted).

NRS 202.448's plain language unambiguously promulgates a specific intent crime, meaning the State must prove that a defendant made a threat subjectively intending to injure, intimidate, alarm, cause unrest or panic, extort or profit, or cause a governmental agency to expend resources. Therefore, even if the First Amendment requires proof of the speaker's subjective intent, NRS 202.448 unambiguously fulfills that requirement. Further, the hearing master's findings of fact and recommendations, which the district court adopted, concluded under NRS 202.488 that M.C. intended to (1) alarm or intimidate others, (2) cause panic or civil unrest, and (3) interfere with police operations.[1] As such, the State did not violate M.C.'s First Amendment rights by punishing his online speech.

The Hearing Master Did Not Err in Allowing Officer Arnold to Testify About the Content of M.C.'s Facebook Page

M.C. argues that the hearing master erred in allowing Officer Arnold to testify about the contents of M.C.'s Facebook page because (1) Officer Arnold did not have personal knowledge regarding who actually made various posts on M.C.'s Facebook account, and (2) Officer Arnold's

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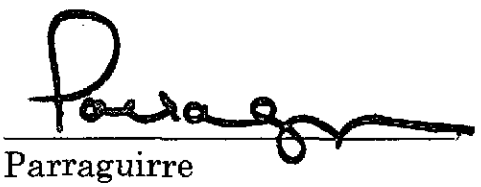
[1]These findings contain troubling errors, but those errors were not raised on appeal. Even if this court performed a plain error analysis, M.C. has failed to contest any particular finding, meaning he is not entitled to a remedy because he failed to meet his burden of showing actual prejudice or a miscarriage of justice. *See Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

testimony constituted inadmissible hearsay. M.C.'s arguments lack merit. First, there was "sufficient direct or circumstantial corroborating evidence of authorship" to authenticate M.C.'s Facebook posts as his own. *Rodriguez v. State*, 128 Nev. ___, ___, 273 P.3d 845, 849 (2012). Specifically, he admitted making the killing-spree post, subsequent communications referred back to that post, and there is no indication that someone else accessed his Facebook account. *Cf. id.* at ___, 273 P.3d 849-50 (authenticating text messages was complicated by the fact that multiple defendants had access to the relevant phone). Second, Officer Arnold's statements about the contents of M.C.'s Facebook page (namely, that he referred to himself as "Murder Man" and claimed an affiliation with the 004 Hoodsman street gang) did not constitute hearsay because they were party admissions. *See* NRS 51.035(3)(a) (party admissions are exempt from the general hearsay rule). Therefore, the district court did not err in relying on testimony from Officer Arnold about the contents of M.C.'s Facebook page.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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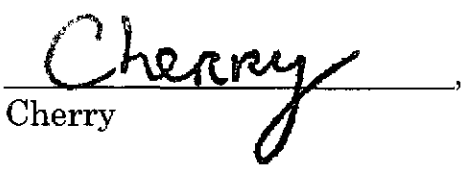
Douglas



_____, J.
Cherry

cc: Hon. William O. Voy, District Judge, Family Court Division
Aaron Grigsby
Attorney General / Carson City
Clark County District Attorney
Eighth Judicial District Court Clerk