

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 23-482

JOHN MICHAEL CONNORS,

Petitioner/Appellee,

v.

JENNIFER MURRAY,

Respondent/Appellant.

OPENING BRIEF OF APPELLANT

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I. STATEMENT OF THE ISSUE(S) PRESENTED FOR APPEAL

1. Did the Justice Court err in granting the order of protection against the Appellant even though the only allegations supporting the order of protection involve constitutionally protected activity?
2. Is Montana's stalking statute that the Justice Court relied on to grant the order of protection unconstitutional under recent United States Supreme Court precedent established by *Counterman v. Colorado*, 600 U.S. 66, 69, 143 S.Ct. 2106, 216 L.Ed.2d 775, (2023)?

II. STATEMENT OF THE CASE

This is a case that involves an order of protection granted against the Appellant and her mother Hazel Noonan (“Noonan”). The allegations against the Appellant and Noonan are slightly different but all concern behavior directed by Appellant and Noonan towards E.C., a minor child of Appellee, following accusations of improper behavior by E.C. involving Murray’s daughter. After a hearing, the Lewis and Clark County Justice Court (“Justice Court”) granted a permanent order of protection against Appellant and Noonan.

Under Mont. Code Ann. § 40-15-201(1), an order of protection may be granted if a court finds that an individual engaged in conduct violating one of the criminal offenses listed in Mont. Code Ann. § 40-15-102. Under Mont. Code Ann. § 40-15-102(2)(a), the Justice Court found that Appellant committed the offense of

stalking and granted the order of protection on that basis. (App.).

The Justice Court reached its decision on March 21, 2023. Appellant timely appealed her decision to the Justice Court on April 17, 2023. On June 23, 2023 – nearly two months after the time to appeal the Justice Court’s decision expired – the United States Supreme Court found Colorado’s stalking statute unconstitutional because it allowed a stalking conviction on an objective “reasonable person” standard and not a subjective standard. *Counterman*, 600 U.S., at 82.

Appellant, through new appellate counsel and relying in part on *Counterman*, argued that the allegations against her were insufficient to support an order of protection against her for stalking under the First Amendment to the U.S. Constitution, and that Mont. Code. Ann. § 45-5-220 is unconstitutional based on the U.S. Supreme Court’s decision in *Counterman*. Despite the U.S. Supreme Court’s decision in *Counterman*, the district court affirmed the decision of the Justice Court. This appeal followed.

III. STATEMENT OF FACTS

Although the facts were disputed by the parties throughout the proceedings in Justice Court and are still contested, the factual findings made by the Justice Court in its Findings of Fact, Conclusions of Law, and Order (hereinafter “FOF/COL” or “App.” and attached hereto as the Appendix) are sufficient for the purposes of this appeal. This also conforms to the legal requirement that an appeal must be confined to a review of the record and questions of law. Mont. Code Ann. § 3-10-115(1).

All parties to this case are residents of Lewis and Clark County, Montana. FOF/COL, ¶ 1; App. Plaintiff John Michael Connors is the parent of a child on the Helena Lions Swim Team. FOF/COL, ¶ 2; App. Appellant is the mother of a child on the Helena Lions Swim Team. *Id.*

The dispute(s) between the parties began in early 2022 when E.C., a male child of Appellee John Michael Connors and a member of the Helena Lions Swim Team, was accused of improper behavior in the girl's locker room. FOF/COL, ¶ 3; App. Following the incident, the Appellee accused Appellant of harassing E.C. and the Connors family. This harassment allegedly included the following, which slightly differs from the harassment Noonan was accused of engaging in: illegally recording conversations (FOF/COL, ¶ 6; App.); emails about E.C.'s behavior (FOF/COL, ¶¶ 7, 9, 14; App.); complaints and accusations about E.C.'s behavior (FOF/COL, ¶¶ 7, 9, 14; App.); and physical positioning to observe the boy's locker room at a swim meet (FOF/COL, ¶ 11; App.).

IV. STANDARD OF REVIEW

On questions of law, the parties are entitled to full review by the appellate court without special deference to the views of the trial court. *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 18, 336 Mont. 105, 152 P.3d 727.

V. SUMMARY OF THE ARGUMENT

Appellant's alleged acts were protected speech under the First Amendment. Even if the speech itself was not protected, the basis that the Justice Court relied on

to grant a permanent order of protection is Montana's stalking statute, which is unconstitutional under the United States Supreme Court's decision in *Counterman v. Colorado*.

Montana's stalking statute contains an exception for constitutionally protected activity. Mont. Code Ann. § 45-5-220(3). The Montana Supreme Court has not provided an exhaustive list of what "constitutionally protected activity" means and has done so by design. *State v. Martel*, 273 Mont. 143, 902 P. 2d 14, 21 (1995). This Court has determined the meaning of § 45-5-220(3) on a case-by-case basis. Generally, this Court has focused its inquiry on constitutionally protected activity on protections guaranteed under the first amendment. *State v. Adgerson*, 2003 MT 284, ¶ 29, 318 Mont. 22, 78 P.3d 850. The allegations against Murray involve activity constitutionally protected by the First Amendment as pure speech (words contained in complaints and emails) and/or symbolic speech.

At the time of the Justice Court's decision, Montana's stalking statute used an objective standard, and still does. Mont. Code Ann. § 45-5-220(2)(b), MCA. In *Counterman*, decided approximately three months after the Justice Court granted the permanent order of protection, the US Supreme Court dismissed a conviction under Colorado's stalking statute and found the statute unconstitutional because the Colorado statute used an objective standard. For the purposes of this appeal, the Colorado statute is identical to the Montana statute. Therefore, the same result in *Counterman* is required here. Montana's stalking statute is unconstitutional under

the First Amendment and the U.S. Supreme Court's decision in *Counterman* because the Montana stalking statute uses an objective standard declared unconstitutional by the U.S. Supreme Court.

VI. ARGUMENT

A. The Justice Court erred in granting the order of protection against the Appellant because the Appellant engaged in constitutionally protected activity.

Montana's stalking statute contains an exception for constitutionally protected activity. § 45-5-220(3), MCA. The Montana Supreme Court has not provided an exhaustive list of what “constitutionally protected activity” means and has done so by design. *State v. Martel*, 902 P. 2d 14, 21. The Court has determined the meaning of § 45-5-220(3) on a case-by-case basis. Generally, the Court has focused its inquiry on constitutionally protected activity on protections guaranteed under the first amendment. *State v. Adgerson*, 2003 MT 284, ¶ 29, 318 Mont. 22, 78 P.3d 850.

The complaints against Appellant are constitutionally protected by the First Amendment as pure speech (words contained in complaints and emails) and/or symbolic speech.

The first category of speech, complaints about E.C. and the Helena Swim Team in general, are pure speech protected by the first amendment. Even in far more restrictive settings such as schools, such speech is protected. In *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038, 2043 (2021), a high school student, B.L., was frustrated with several things, including her school and extracurricular activities.

Mahanoy, 141 S. Ct. at 2043. B.L. posted an image to her social media with her middle fingers raised and the caption "fuck school fuck softball fuck cheer fuck everything." *Id.* The school suspended her for a year from cheerleading. *Id.* B.L. filed suit in federal district court and prevailed. *Id.* The U.S. Supreme Court affirmed, finding that the school's interest in regulating B.L.'s speech did not outweigh her right to free speech. *Mahanoy*, 141 S. Ct. at 2047-2048.

The U.S. Supreme Court has recently affirmed additional first amendment free speech protections concerning an individual's interactions with private persons since the Justice Court reached its decision. In a decision reached on June 30, 2023 entitled *303 Creative, LLC v. Elenis*, 600 US 570, 143 S. Ct. 2298, 216 L. Ed. 2d 1131 (2023), the U.S. Supreme Court found that the First Amendment protects an individual's right to speak his mind, or not speak at all, regardless of whether the government considers his speech sensible and well intentioned or deeply "misguided." *303 Creative, LLC*, 600 US at 586.

The decision in *303 Creative, LLC* and *Counterman v. Colorado*, are part of the rapid and significant expansion of First Amendment freedoms that protect the Appellant and other individuals whose pure and symbolic speech is used as the basis for a conviction for a crime (or, in this case, the granting of an order of protection based on the findings that an individual committed a violation of a criminal statute).

In this case, the complaints about the Helena Swim Team, E.C., and the Appellee and his family were all far less incendiary than B.L.'s comments and are

protected by the First Amendment as pure speech. Like *B.L.*, the speech in this case also involves words and gestures that arise from participation in extracurricular activities. They are also public comments outside of a school or organization with any interest in restricting free speech. Moreover, creating a jurisprudence that allows individuals or organizations to silence whistleblowers (i.e. people who complaint about inappropriate locker room behavior, as in this case) is against public policy and the first amendment and would lead to an environment that emboldens predators and retaliation against victims.

The Comments by the Appellant, although relayed in general and imprecise terms by the Justice Court, do not rise to the level where they would be outside of First Amendment protection, such as the exception for “fighting words.” *Chaplinsky v. New Hampshire*, 315 US 568, 573, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). The closest finding to "fighting words" was a direct taunt towards E.C. from Noonan and not Murray, causing E.C. to become upset. However, the U.S. Supreme Court has refined its fighting words doctrine to mean words that cause a breach of the peace and provoke one to engage in fisticuffs. *Texas v. Johnson*, 491 U.S. 397, 409, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). There is no indication that the taunt did so.

Symbolic speech, including facial expressions and gestures, is protected by the first amendment. The Sixth Circuit and U.S. Supreme Court have held that even the most extreme gestures that are often censored in other contexts, such as raising a middle finger, are protected symbolic speech. *Cruise-Gulyas v. Minard*, 918 F. 3d

494, 496, (6th Cir. 2019).

Appellant was accused of physically positioning herself close to the Appellee's son (FOF/COL, ¶ 11; App.). This behavior does not implicate any criminal behavior whatsoever of any criminal statute and are part of an individual's right to peaceably assemble under the First Amendment and is protected activity.

Because all the allegations of the Appellee that the Justice Court used to justify the issuance of the order of protection are constitutionally protected activity under the First Amendment and § 45-5-220(3), MCA, the order of protection must be dismissed.

B. Even if this Court does not find that all the Appellant's alleged improper behavior was constitutionally protected, Montana's stalking statute, MCA Section 45-5-220, is unconstitutional.

The stalking statute was the sole basis that the Justice Court used to grant the order of protection. Mont. Code Ann. § 45-5-220, MCA uses an unconstitutional standard as established in *Counterman v. Colorado*. Therefore, the order of protection must be dismissed. In order to conform to *Counterman* and survive constitutional scrutiny, the Montana legislature must change the stalking statute to use a subjective standard.

In Montana, regardless of an individual's relationship to another person, an individual may obtain an order of protection against an offender in limited circumstances set by statute. Mont. Code Ann. § 40-15-102(2)(a). The Justice Court made a finding that the Appellant committed stalking as defined in Mont. Code Ann.

§ 45-5-220. (FOF/COL, pp. 4-6; App.), which is one of the offenses listed in § 40-15-102(2)(a) that can be used by a court to issue a protective order. The Justice Court did not find that the Appellant committed a violation of any of the other offenses enumerated in § 40-15-102, MCA that could justify the issuance of an order of protection. App. The Justice Court determined that the Appellant violated Montana's privacy in communications statute. FOF/COL, pp. 2, 6; App. But a violation of Montana's privacy in communications statute does not provide a basis for an order of protection. § 40-15-102(2)(a), MCA.

In *Counterman v. Colorado*, Billy Counterman was prosecuted under Colorado's stalking statute for harassing C.W., a local musician. *Counterman*, 600 US at 71. The harassment was relentless and overwhelming, consisting of hundreds of Facebook messages sent over a 2-year period. *Counterman*, 600 US at 71. The text messages ranged from benign ("Good morning, sweetheart") to shocking, in one case telling C.W. to die. *Id.* Before trial, Counterman moved to dismiss the charges against him on First Amendment grounds. *Id.* His motion was denied. *Id.* After a trial, Counterman was convicted. *Id.*

At trial, Colorado prosecuted the case against Counterman using an "objective 'reasonable person' standard." *Id.* Under that standard, Colorado had to show that a reasonable person would have viewed the Facebook messages as threatening. *Counterman*, 600 U.S. at 71. By contrast, Colorado had no need to prove that Counterman had any kind of "subjective intent to threaten" C. W. *Id.*

On review, the United States Supreme Court determined that Colorado's stalking statute was unconstitutional. *Counterman*, 600 U.S. at 82. Counterman was prosecuted in accordance with an objective standard. *Id.* Colorado had to show only that a reasonable person would understand Counterman's statements as threats. *Id.* It did not have to show any awareness on *Counterman's* part that the statements could be understood that way, which the Court determined was a violation of the First Amendment. *Id.*

In this case, the Justice Court granted the order of protection upon finding that Appellant committed stalking. FOF/COL, pp. 4-6; App. The other offenses allowing a Court to grant a protective order were not addressed. Like the statutory framework at issue in *Counterman*, Montana's stalking statute explicitly uses an objective standard. As a result of the ruling in *Counterman*, stalking statutes across the United States that use an objective standard to prosecute offenders, including Montana's stalking statute, are unconstitutional.

Although the Justice Court could not have foreseen the outcome of *Counterman* months after reaching its decision in this case and had no input on the decision of the U.S. Supreme Court, the Justice Court nevertheless determined that the Appellant was entitled to a protective order based on the Appellant's violation of Montana's stalking statute, § 45-5-220, MCA. At the time of the Justice Court's decision, Montana's stalking statute used an objective standard. § 45-5-220(2)(b), MCA. Montana's stalking statute still uses an objective standard.

In *Counterman*, the US Supreme Court dismissed a conviction under Colorado's stalking statute because the case was prosecuted used an objective standard. The same result is required here. Montana's stalking statute is unconstitutional because it uses an objective standard declared unconstitutional by the U.S. Supreme Court.

CONCLUSION

Montana's stalking statute impermissibly allows the state to prosecute and convict a Defendant for stalking under a statutory framework that does not comport with clear and recent U.S. Supreme Court jurisprudence regarding the First Amendment. The Order of Protection granted against the Appellant must be overturned.

RESPECTFULLY SUBMITTED this 9th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2016 is 2,918, not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

RESPECTFULLY SUBMITTED this 9th day of December, 2023.

BY: /S/MICHAEL C. DOGGETT

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CERTIFICATE OF SERVICE

I, Michael Connor Doggett, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-09-2023:

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