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SUMMARY
February 17, 2022

2022COA19

No. 18CA1099, *People v. Brown* — Crimes — Retaliation Against a Judge or an Elected Official; Constitutional Law — First Amendment — Freedom of Speech — True Threats

A division of the court of appeals concludes that an in-court statement to the judge by an angry and irate respondent parent in a dependency and neglect case rises to the level of a true threat and is not constitutionally protected speech.

COLORADO COURT OF APPEALS **2022COA19**

Court of Appeals No. 18CA1099
Adams County District Court No. 17CR159
Honorable Stephen J. Schapanski, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Adrian Jeremiah Brown,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division III
Opinion by JUDGE CASEBOLT*
Furman, J., concurs
Lipinsky, J., dissents

Announced February 17, 2022

Philip J. Weiser, Attorney General, Brian M. Lanni, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Robert P. Borquez, Alternate Defense Counsel, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2021.

¶ 1 When does a statement by an irate and angry respondent parent in a dependency and neglect (D&N) case rise to the level of a "credible threat" that may be punished under section 18-8-615, C.R.S. 2021, which proscribes retaliation against a judge? In this case, Adrian Jeremiah Brown appeals the judgment of conviction entered on a jury verdict finding him guilty of violating that provision when, after being told by the D&N judge that he must undergo a domestic violence evaluation or anger management therapy, he stated, "Let me kidnap your daughter and see if you don't get angry. As a matter of fact, where do you live, Your Honor? Let's see if we can get this all resolved. See if you would be angry." We conclude that this statement, when coupled with other circumstances detailed below, was not constitutionally protected and constitutes a "true threat" under the recent Colorado Supreme Court case of *People in Interest of R.D.*, 2020 CO 44. We thus affirm Brown's conviction.

I. Background

¶ 2 This case arises from a D&N case involving Brown's infant daughter (the child). After learning that the child had been born with methamphetamine in her umbilical cord, a caseworker from

the Adams County Department of Social Services (the Department) obtained a judge's hold to place the child in the custody of the Department. In the hospital, Brown was verbally and physically aggressive towards the caseworker and medical staff upon learning that the Department intended to take the child from him and the child's mother. The caseworker, after obtaining a court order to take the infant into the Department's custody, wrote a report of what had occurred at the hospital, which became part of the case file.

¶ 3 Brown also acted in an accusatory and hostile manner at the initial hearing in the D&N case, which a magistrate conducted. The magistrate requested a sheriff's deputy at the hearing because Brown was "loud and kind of aggressive."

¶ 4 A district court judge, the victim in this criminal case, presided over the second hearing in the D&N case. The judge had read the case file and knew about Brown's aggression toward hospital staff and his conduct at the previous hearing before the magistrate. During that hearing, Brown raised his voice and exhibited hostility and anger. He characterized the Department

personnel who had taken his child as “kidnappers” and “terrorists.” His demeanor was an escalation from the previous hearing.

¶ 5 At the conclusion of that second hearing, the judge offered to make her courtroom available for Brown’s supervised visits with the child because employees of the Department had expressed concern about hosting the visitations. Brown and the child’s mother accepted the judge’s offer.

¶ 6 During one of the supervised visits in the judge’s courtroom, Brown walked up to the bench and looked at items she kept there, including a photograph of her infant child. A sheriff’s deputy told Brown to move away from the bench. Brown responded that he would change his daughter’s “shitty diaper” on the judge’s bench because there was “enough shit up there.” The judge was informed of this incident, and she testified in the criminal case against Brown that it caused her concern. She also testified that she kept personal and private items on her bench, including a photograph of one of her children.

¶ 7 Brown appeared before the judge at a third hearing to establish a treatment plan that, if successful, would allow reunification of the child with Brown and the child’s mother.

Brown again acted aggressively and was "[l]oud and angry." His aggressive behavior, which escalated from his conduct at the previous hearing, included clenching his jaw and his fists and shouting at the judge. He stated he would not comply with the judge's order for a drug test because it could reveal his past drug use.

¶ 8 The judge ordered a domestic violence evaluation for Brown based on a report that he had threatened to kill the child's mother, and the judge's own observations of Brown's behavior in the courtroom. In response to the order, Brown became "very angry" and told her to "look at the fucking file." The judge explained that, considering Brown's behavior in court, if she did not order a domestic violence evaluation, she would at least order "anger management."

¶ 9 The following exchange ensued:

> BROWN: Let me kidnap your daughter and see if you don't get angry. As a matter of fact, where do you live, Your Honor? Let's see if we can get this all resolved. See if you would be angry.
>
> JUDGE: Mr. Brown, you know, please. I have tried and tried.

> BROWN: You have tried nothing but to lie for them and shut me up. I'm a prominent activist in my community, and this entire thing has been made — has been designed to shut me up. I'm an activist against — I talk out against the abuses of our system, against our judges who aren't educated, against our terrorists who wear badges. That is what I do, that is my job. I'm an activist. And they're trying to shut me up. This whole case is designed to shut me up, and all you've done thus far is help them.

¶ 10 The judge did not immediately respond to Brown's statement about "kidnap[ping] your daughter" (the kidnapping statement). She proceeded with the hearing and entered several orders regarding the child. The judge said that she still did not "have any problem with [Brown's supervised] visits happening" in her courtroom but cautioned that she did not "want anybody at [her] bench" and that she would no longer allow the visits if Brown walked up to her bench again.

¶ 11 After Brown reiterated his comment that he thought it was appropriate to change his daughter's diaper on the judge's bench because there was "enough shit up there," the judge found Brown in direct contempt, and he was removed from the courtroom. The

contempt finding is not part of this appeal. The judge recused herself from the D&N case the next day.

¶ 12 The prosecution charged Brown with retaliation against a judge under section 18-8-615 based on the kidnapping statement, and two counts of failure to register as a sex offender. The trial court judge in that criminal case granted the prosecution's motion for entry of a protection order against Brown for the benefit of the judge.

¶ 13 The trial court severed the retaliation charge and set a trial on that charge alone. Brown filed a pretrial motion to dismiss on the grounds that the retaliation statute, which criminalizes "credible threats" against judges, is unconstitutionally overbroad and vague as applied to him because the kidnapping statement was not a true threat. He asserted that the kidnapping statement was protected speech because it was part of a "rhetorical exchange" with the judge. The trial court denied Brown's motion.

¶ 14 The judge testified at the criminal trial regarding her interactions with Brown and how the kidnapping statement affected her. She said that the day after her final hearing in the D&N case, she saw Brown "pok[e] his head into [her] courtroom," which made

her "concerned" because of "his anger towards [her]." After seeing him look into her courtroom, the judge immediately contacted courthouse security.

¶ 15 The judge also testified that, several weeks after that incident, she received documents by mail at the courthouse purporting to be a "criminal presentment" from a "De Jure people's Grand Jury in Colorado." The documents demanded that the judge vacate her office and pay over fourteen billion dollars in fines. The documents further stated that a lien would be placed on the judge's home but did not provide an address or a legal description for the home. Brown's signature and fingerprint appeared on the documents.

¶ 16 The judge also described her reaction to Brown's behavior and his statement about "see[ing] if [she] [would]n't get angry" if her child were kidnapped. She said that the kidnapping statement frightened her and that she "[a]bsolutely" believed it was a credible threat. She stated that she was "concerned that [Brown] would locate [her home], or knew where [she] resided," and was concerned for her children's safety because "[h]e knew about" them from viewing the photograph on her bench.

¶ 17 She said she perceived the kidnapping statement as a credible threat because of her familiarity with the record in the D&N case. In addition to an allegation that Brown had threatened to kill the child's mother, the judge said that the petition in the D&N case reported that Brown had allegedly threatened to bring a gun to the hospital where the child's mother was recovering from childbirth. She also testified that she had taken additional safety measures after Brown made the kidnapping statement, including installing motion-activated lights around her home and requesting that a security officer escort her to her car after work.

¶ 18 The jury found Brown guilty of retaliation against a judge based on the kidnapping statement. The trial court sentenced him to five years in prison.

II. True Threat

¶ 19 Brown first contends that the trial court erred by concluding that the kidnapping statement was a true threat, not constitutionally protected speech. He asserts that the retaliation statute is unconstitutional as applied to him. We disagree.

A. Standard of Review

¶ 20 "We review the constitutionality of a statute as applied to an individual de novo. We presume that a statute is constitutional, 'and the party challenging the statute has the burden of proving unconstitutionality beyond a reasonable doubt.'" *People v. Counterman*, 2021 COA 97, ¶ 32 (quoting *People v. Chase*, 2013 COA 27, ¶ 65).

¶ 21 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). Certain limited content-based restrictions on speech are constitutionally permissible, such as the restriction of true threats. *Counterman*, ¶ 25. "Any statute that criminalizes threats must, of course, be applied and interpreted consistently with the First Amendment." *People v. Stanley*, 170 P.3d 782, 786 (Colo. App. 2007). Thus, section 18-8-615 "must be interpreted to limit criminal culpability to statements constituting 'true threats.'" *Id.* (citation omitted).

¶ 22 The United States and Colorado Constitutions forbid governmental restrictions of expression based on "its message, its ideas, its subject matter, or its content." *United States v. Alvarez*,

567 U.S. 709, 716 (2012) (quoting *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 573 (2002)); *see* U.S. Const. amend. I; Colo. Const. art. II, § 10; *People v. Iannicelli*, 2017 COA 150, ¶ 26, *aff'd on other grounds*, 2019 CO 80. Both Constitutions safeguard speech that a listener may find vulgar, profane, or upsetting. *See Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. ___, ___, 141 S. Ct. 2038, 2042-43 (2021) (holding that student's video containing "vulgar language and gestures" and criticizing the school was protected speech, and thus her punishment violated the First Amendment); *People in Interest of R.C.*, 2016 COA 166, ¶ 18 ("Even vulgar and insulting speech that is likely to arouse animosity or inflame anger, or even to provoke a forceful response from the other person, is not prohibited."). These protections may bar criminal prosecutions for rhetorical attacks on judges and other public officials. *See Watts v. United States,* 394 U.S. 705, 706-08 (1969) (holding that defendant's statement at a political rally that "[i]f they ever make me carry a rifle the first man I want to get in my sights is [President Johnson]" could be interpreted only as "political hyperbole" in its context and thus could not be criminally proscribed).

¶ 23 But the constitutional protections accorded speech are not absolute. Words may be criminalized if they constitute a “true threat” directed to another. *See Virginia v. Black*, 538 U.S. 343, 359 (2003); *R.D.*, ¶ 4; *see also State v. Taupier*, 193 A.3d 1, 21-22 (Conn. 2018) (“Unlike passionate disagreement with existing laws and abstract advocacy of the violent overthrow of the government, true threats have no social value.”).

¶ 24 Thus, courts have affirmed convictions for true threats of retaliation against a judge. *See, e.g.*, *Taupier*, 193 A.3d at 33. But courts must be cautious in distinguishing between an emotional courtroom outburst of a frustrated litigant and a credible threat directed to a judicial officer. *See Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997) (“Even in a society of laws, one of the most indispensable freedoms is that to express in the most impassioned terms the most passionate disagreement with the laws themselves, the institutions of, and created by, law, and the individual officials with whom the laws and institutions are entrusted. Without the freedom to criticize that which constrains, there is no freedom at all.”).

¶ 25 “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. “But in First Amendment speech cases, an appellate court must [independently examine] the record to assure itself that the judgment does not impermissibly intrude on the field of free expression. Thus, whether a statement constitutes a true threat is a matter subject to independent review.” *Id.*

B. Applicable Law

¶ 26 The United States Supreme Court has defined a true threat as a statement “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.” *Black*, 538 U.S. at 359. The court clarified that “[t]he speaker need not actually intend to carry out the threat,” because the true threats exception exists to “protect[] individuals from the fear of violence,” “from the disruption that fear engenders,” and from “the possibility that the threatened violence will occur.” *Id.* at 359-60 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

¶ 27 Recently, the Colorado Supreme Court characterized 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." *R.D.*, ¶ 51. The court explained that "[i]n 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." *Id.* at ¶ 52. The analysis of context involves five factors:

> (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.

¶ 28 A reviewing court "should start, of course, with the words themselves, along with any accompanying symbols, images, and other similar cues to the words' meaning." *Id.* at ¶ 53. In addition, a reviewing court should consider "whether the threat contains accurate details tending to heighten its credibility" or "whether the

speaker said or did anything to undermine the credibility of the threat." *Id.*

C. Application

¶ 29 We reject Brown's contention that, under the supreme court's true threat analysis in *R.D.*, the kidnapping statement did not constitute a true threat.

1. The Words Themselves

¶ 30 We begin by examining the words of the kidnapping statement: "Let me kidnap your daughter and see if you don't get angry. As a matter of fact, where do you live, Your Honor? Let's see if we can get this all resolved. See if you would be angry."

¶ 31 Brown said, "Let *me* kidnap." He did not say, "Let *someone* kidnap." The statement identifies Brown as the actor, so it is not posing a hypothetical person as the actor. *Cf. State v. Locke*, 307 P.3d 771, 777 (Wash. Ct. App. 2013) (the defendant's message is that someone should kill the governor, not that he intends to do so).

¶ 32 Brown did not say "what if" your daughter "were kidnapped." The statement is not posing a hypothetical action by an unknown or unnamed party, but a concrete active proposal by the speaker.

Cf. id. (passive and impersonal phrasing blunts the implication that defendant is threatening to take action himself).

¶ 33 Brown employed the word "kidnap." He did not use less inflammatory words such as "take" or "remove from your custody." "Kidnap" by itself connotes violence because it encompasses taking a person "without consent" or "against one's will." *See* § 18-3-301(1)(a), C.R.S. 2021 (forcibly seizing another); § 18-3-301(1)(c) (imprisoning or forcibly secreting another); § 18-1.3-406(2)(a)(II)(D), C.R.S. 2021 (kidnapping is sentenced as a crime of violence).

¶ 34 Brown said "your" daughter. This was personally directed to the judge; she was the intended recipient of the message. And the statement did not use "someone's" or similar language to describe a hypothetical daughter. Additionally, the statement was face to face — no intermediary or filter was employed. It was not transmitted over a computer or via written note or telephone, so the immediacy is clear and apparent.

¶ 35 Even if the first sentence of the statement could be perceived as posing a hypothetical, Brown clarified it was not because he next said, "As a matter of fact, where do you live, Your Honor?" This inquiry conveys that Brown was not speaking hyperbolically or

hypothetically because of the phrase "as a matter of fact." It also presented a serious and direct escalation of the prior statement. *See Locke*, 307 P.3d at 778 (a threat lies in the escalation of the communication from passive abstraction to a more detailed plan). Brown wanted to obtain information to carry out the described action and resolve his conflicts with the judge by challenging and questioning her personally.

¶ 36 Further, although Brown did not say he knew or intended to ascertain where the judge lived, the words conveyed the implication that he would and could find that information. And Brown's contention that his statement was merely intended to put the judge in his shoes so that she would understand his feelings is belied by his suggestion that the D&N case could be "resolved" if he kidnapped the judge's child.

¶ 37 That Brown mailed the "criminal presentment" from the "De Jure people's Grand Jury" to the judge reinforces a finding that the statement was a true threat. Although the fact that he mailed the document to her at the courthouse suggests he did not know her home address, he clearly knew she had a child based upon his observation of a photograph on her bench depicting a youngster.

¶ 38 Brown's statement, "Let's see if we can get this all resolved, see if you would be angry," further demonstrated his escalating anger about not only the Department's involvement in his life, but also the judge's involvement.

2. Surrounding Circumstances

¶ 39 Concerning whether the threat contains "accurate details tending to heighten its credibility," the picture on the judge's bench that Brown observed was that of a son, not a daughter, but we note that pictures of younger children sometimes do not definitively reveal any gender. We also acknowledge that Brown did not apparently know where the judge lived, which militates against the threat's credibility, but his question shows that he had sufficient chutzpah to demand information from the judge about her personal address, and his going to the judge's bench and poking around it shows a failure to respect boundaries.

¶ 40 Concerning the context surrounding the statement, the record reflects escalating anger and frustration on Brown's part during the D&N proceeding. That anger began with Brown's hospital confrontation involving its staff and the Department caseworker and a threat to bring a gun into the hospital after learning that the

Department was considering removal of the child from his custody. He consistently referred to the Department as "terrorists" and "kidnappers."

¶ 41 The magistrate had requested security during the first hearing, and a sheriff's deputy was present in the courtroom for all the hearings following that first appearance before the magistrate. *See Brewington v. State*, 7 N.E.3d 946, 964-65 (Ind. 2014) (court considered how the defendant's rhetoric had escalated, defendant's violent and volatile behavior in the courtroom, his knowledge of and use of the judge's home address, and the presence of a law enforcement officer during the final hearings on the defendant's divorce in deciding that his statements constituted true threats to the judge).

¶ 42 In addition, there was physical behavior reflecting that anger as evidenced by Brown's clenching of fists and jaw during the proceeding, his shouting at the judge, and his consistent use of profanity. Brown also stood up during hearings at inappropriate times while thrusting out his chest in a confrontational way. These facts provide contextual support for the true threat characterization. *See id.*

¶ 43 It is true, as Brown asserts, that the D&N proceeding involved a hotly contested matter in which Brown's parental rights were at risk. It is also true that the kidnapping statement occurred in a public courtroom in which law enforcement agencies providing security were present or available nearby. But as the People note, that a threat is made openly in a courtroom does not mean it cannot have been a true threat. *See Stanley*, 170 P.3d at 790 ("Defendant cites no case, and we have not found one, holding that a criminal defendant has a First Amendment privilege to threaten violence against a judge if he does so in the context of a court proceeding."). Further, Brown's statement did not propose action in the courtroom where law enforcement could immediately act. It suggested action outside the courtroom at the judge's residence where no law enforcement ordinarily would be present.

¶ 44 Brown correctly notes that his final quoted statement accused the judge of working with the Department to silence him as "a prominent activist in my community" who had spoken out about alleged abuses "of our system, against our judges who aren't educated, against our terrorists who wear badges." That statement may be protected speech. *See Rice*, 128 F.3d at 243. But it is hard

to agree with his unqualified assertion that "these are not the words of a man seriously threatening to abduct the judge's child." Instead, they could provide a twisted justification for proposed future action.

¶ 45 It is also true that the statement did not include the kind of "accurate details tending to heighten [the statement's] credibility" as found in *Taupier*, 193 A.3d at 9 (holding that the defendant's email contained a true threat because he stated that the judge involved in his marriage dissolution proceeding "lives in [W]atertown with her boys and [n]anny . . . there [are] 245 [yards] between her master bedroom and a cemetery that provides cover and concealment" and detailing a specific gun and ammunition that could shoot that distance). But this does not detract from the immediacy of the courtroom confrontation.

¶ 46 We acknowledge, as the dissent notes, that the kidnapping statement was part of the ongoing and contentious D&N case in which the Department had taken custody of the child and the court had limited Brown's contact with the child to supervised visits. But at the second hearing in the D&N case, Brown had called the Department personnel who had taken his child "kidnappers" and

"terrorists." And Brown made the kidnapping statement in direct response to the judge's assertion that Brown needed a domestic violence or anger management assessment. In our view, the judge's observation was objectively correct.

¶ 47 We also acknowledge that the record does not indicate that Brown violated or threatened to violate the protection order entered for the judge's benefit in the criminal case. *Cf. Stanley*, 170 P.3d at 785 (noting that, in determining that the defendant's statement was a true threat, the defendant "refused to accept" protection orders issued for the victims). But this is conduct after defendant's arrest, and for that reason, we do not find it persuasive.

¶ 48 Concerning the subjective reaction of the judge, she testified during the criminal case that she believed Brown's statement was "absolutely" a credible threat and that she was frightened for herself and her children's safety. She noted that she had recused from Brown's D&N case. She had obtained and installed motion detecting lights at her home and had a sheriff's deputy walk her to her car following work, and she would call her husband to report that she had safely reached her car without incident before driving home. She became more protective of her children's safety and

their identities. She avoided the public areas of the courthouse and remained in the private areas of her chambers even throughout the trial, which occurred over a year after the incident. She testified that she was still frightened of Brown and referenced his volatility, past drug use, and possession of weapons. She also referenced the purported indictment and lien statement Brown had sent to her, although she acknowledged that those documents had been sent to her courthouse address and not her home, and that no lien had been filed.

¶ 49 These same facts support the conclusion that an objectively reasonable person in the judge's situation would recognize Brown's statements to be threatening. Reasonable people would consider their own knowledge about the person making the threat to determine whether they should take the threats seriously. *See Brewington*, 7 N.E.3d at 969-70. They would consider escalation of Brown's anger and his use of the phrases "terrorists" and "kidnappers" in referring to the Department. And they would consider his use of profanity and other actions during the hearings and the presence of law enforcement in determining whether a

person would recognize Brown's statements to be objectively threatening. *See id.*

¶ 50 We recognize that the judge did not find Brown in contempt when he made the kidnapping statement; instead, she found him in contempt for his statement about changing the child's diaper on her bench. Further, the judge did not have Brown removed from the courtroom in response to the kidnapping statement. But we have not been directed to any case holding that a true threat must immediately be followed by a victim's reaction. In other words, the victim need not feel immediate fear after hearing the statement for there to be a credible threat. *See R.D.*, ¶ 59 ("This [circumstantial] inquiry need not be limited to the recipient's immediate reaction."). Many true threats are couched in veiled words or actions and their effect may only be fully perceived after reflection.

¶ 51 We also recognize that the judge requested Brown to cooperate with her, stating that she "ha[d] tried and tried," and she proceeded with the hearing until she held Brown in contempt. The judge also said she did not have "any problem with [Brown's supervised] visits happening" in her courtroom, even after he made the kidnapping statement. While she cautioned him against approaching her

bench during the supervised visits, the judge did not cancel the visits. We acknowledge that this weighs against Brown's statement being a true threat. But it also shows that the judge did not want those statements to prevent visitation with the child.

¶ 52 After weighing all the factors noted by the court in *R.D.*, we conclude that the majority support a determination that the kidnapping statement could reasonably have been perceived as a serious expression of intent to commit an act of unlawful violence, and, therefore, constituted a true threat. Accordingly, we hold that the statement was not constitutionally protected speech.

¶ 53 Thus, section 18-8-615 is not unconstitutional as applied to Brown and the trial court properly denied his motions to dismiss and for judgment of acquittal and properly submitted the matter for the jury to determine.

III. Evidentiary Contentions

¶ 54 Brown asserts that the trial court abused its discretion by admitting irrelevant and prejudicial evidence about unsubstantiated threats to bring a weapon to the hospital following the child's birth, which threats were attributed to Brown by the Department investigator. He contends that the statements were hearsay,

violated his Sixth Amendment confrontation rights, constituted inadmissible propensity evidence under CRE 404(b), and violated CRE 403 because the probative value of the evidence was outweighed by the danger of unfair prejudice. We disagree.

A. Applicable Facts

¶ 55 Brown moved in limine to exclude evidence that the social worker had informed the judge that someone in the family threatened to bring a gun to the hospital where the child was born. The trial court ruled that this evidence would be admissible.

¶ 56 The judge testified that the judicial record from the D&N proceedings noted that the child had been taken from Brown and the mother because both mother and the child tested positive for methamphetamine. Following defendant's counsel's objection, she said the record also reflected that there were allegations by mother that Brown would kill her (although the mother may have been hallucinating), that Brown was being aggressive towards hospital staff, and that someone in "the family" was threatening to take a gun into the hospital.

B. Hearsay

1. Standard of Review

¶ 57 Trial courts have considerable discretion in determining the admissibility of evidence, and their evidentiary determinations will not be disturbed on appeal absent an abuse of discretion. *People v. Robinson*, 226 P.3d 1145, 1151 (Colo. App. 2009). "A trial court abuses its discretion when its evidentiary ruling 'was manifestly arbitrary, unreasonable or unfair,'" *People v. Clark*, 2015 COA 44, ¶ 14 (quoting *Yusem v. People*, 210 P.3d 458, 463 (Colo. 2009)), or reflects an erroneous understanding or application of the law, *People v. Dorsey*, 2021 COA 126, ¶ 29.

2. Law

¶ 58 Hearsay statements are statements other than those "made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." CRE 801(c). Such statements are presumptively unreliable, because the declarant is not present to explain the statement in context and to be cross-examined. *Blecha v. People*, 962 P.2d 931, 937 (Colo. 1998). But if an out-of-court statement is offered solely to show its effect on the listener, it is not being offered to prove the truth of the

matter asserted and is not hearsay. *Robinson*, 226 P.3d at 1151; *Blecha*, 962 P.2d at 937.

¶ 59 In *People v. Tenorio*, 197 Colo. 137, 140, 590 P.2d 952, 954 (1979), the police responded after receiving a radio dispatch describing an incident in a park involving a man matching the defendant's description. When asked why he approached the defendant with his weapon drawn, a police officer testified that a radio dispatch had warned that defendant had a gun. *Id.* The supreme court held that the testimony was not hearsay because the statements

> were elicited only to establish the officers' reasons for initially going to the park and for drawing their guns after arrival there. The statements were not offered to show the truth of the contents of the radio report or to establish that the defendant did in fact possess a weapon.

Id. at 145, 590 P.2d at 958.

3. Application

¶ 60 Here, like in *Tenorio*, the statements were not offered to show the truth of the "matter asserted" -- that is, to show that Brown actually intended to or did return to the hospital with a gun, or that he actually intended to kill his child's mother or that such threats

had actually been made at the hospital. Instead, they were offered to show the effect that such information had on the judge when Brown threatened to kidnap her child.

¶ 61 We acknowledge the possibility that such evidence could also have assisted the jury in deciding whether Brown was making a true threat to the judge. But the trial court instructed the jury that the evidence was being admitted to provide context to understand what occurred between Brown and the judge, and it was not the jury's task to determine whether the D&N petition was valid. The court also instructed the jury that the judge's testimony about the contents of the report were being admitted for the sole purpose of the effect such information may have had on the judge. The court further noted that "the person [who] wrote that down may or may not have written it down correctly, and the judge read this, and what she knew is relevant and it can only be received for that purpose."

¶ 62 The trial court gave an appropriate limiting instruction and, thus, we perceive no abuse of discretion by the trial court in admitting this evidence.

¶ 63 If Brown is asserting that the trial court erred in failing to address the application of CRE 404(b), we note that he mentions this issue only in passing (as he did in the trial court, citing just the rule without developing the argument), and does not address that rule's application in his appellate briefs. Under these circumstances, we decline to address that issue separately. *See In re Estate of Hays*, 127 Colo. 411, 413, 257 P.2d 972, 973 (1953) (writ of error dismissed where briefs were insufficient to advise the court of issues presented or merits thereof); *Middlemist v. BDO Seidman, LLP*, 958 P.2d 486, 495 (Colo. App. 1997) (declining to address propriety of trial court's orders where the plaintiff failed to identify specific errors and to provide legal authority); *Biel v. Alcott*, 876 P.2d 60, 64 (Colo. App. 1993) (affirming order of dismissal where appealing party failed to provide authority to support its contentions of error).

¶ 64 Nor does Brown develop his Sixth Amendment right of confrontation assertion except to assert that, because the trial court erred in its hearsay analysis, introduction of the statements about the gun at the hospital violated his confrontation rights. But as the People point out, the Confrontation Clause "has no application to

out-of-court statements that are not offered to prove the truth of the matter asserted." *Williams v. Illinois*, 567 U.S. 50, 57-58 (2012).

C. CRE 403

¶ 65 We reject Brown's assertion that admission of the evidence noted above violates CRE 403, requiring reversal of the judgment.

¶ 66 Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401.

¶ 67 Under CRE 403, trial courts are given broad discretion in balancing the probative value of the evidence against the danger of unfair prejudice. *People v. Ibarra*, 849 P.2d 33, 38 (Colo. 1993). Absent a showing of an abuse of discretion, we will not disturb a trial court's ruling about the relative probative value and prejudicial impact of the evidence. *People v. Dist. Ct.*, 869 P.2d 1281, 1285 (Colo. 1994).

¶ 68 CRE 403 strongly favors admissibility of relevant evidence, *id.* at 1286, and "the balance should generally be struck in favor of admission when evidence indicates a close relationship to the event charged," *People v. Dist. Ct.*, 785 P.2d 141, 146 (Colo. 1990)

(quoting *United States v. Moore*, 732 F.2d 983, 989 (D.C. Cir. 1984)). Thus, when reviewing a trial court's exercise of discretion in performing the balancing required by CRE 403, an appellate court must afford the evidence the maximum probative value attributable by a reasonable fact finder and the minimum unfair prejudice to be expected. *People v. Gibbens*, 905 P.2d 604, 607 (Colo. 1995).

¶ 69 To show an abuse of discretion for exclusion of relevant evidence, an appellant must establish that, under the circumstances, the trial court's decision was "manifestly arbitrary, unreasonable, or unfair." *Ibarra*, 849 P.2d at 38; *King v. People*, 785 P.2d 596, 603 (Colo. 1990). An appellant must meet the same rigorous standard to show an abuse of discretion based on an allegedly erroneous admission of relevant evidence. *People v. Czemerynski*, 786 P.2d 1100, 1108 (Colo. 1990).

¶ 70 In the present case, the trial court's determination that the potential prejudicial impact of the evidence did not outweigh its probative value was within the court's discretion. CRE 403 protects the parties against the danger of unfair prejudice. Unfair prejudice does not mean prejudice that results from the legitimate probative

force of the evidence. *Dist. Ct.*, 869 P.2d at 1286; *Dist. Ct.*, 785 P.2d at 147.

¶ 71 Although the evidence reflects poorly on Brown, the trial court could have reasonably concluded that the potential prejudice was not unfair. Unfair prejudice refers to "an undue tendency on the part of admissible evidence to suggest a decision made on an improper basis." *Dist. Ct.*, 869 P.2d at 1286. Thus, undue prejudice can result from the tendency of proffered evidence "to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, such as the jury's bias, sympathy, anger or shock." *Id.* (citation omitted).

¶ 72 Much of the testimony and other evidence could well have adversely affected the jury's perception of Brown's character. But the evidence about the hospital statements occupied a relatively brief portion of the judge's testimony, and the court limited the use of the evidence significantly. Viewed in this context, admission of the evidence did not create an unreasonable risk that the jury would base its decision on extraneous considerations.

¶ 73 Accordingly, the trial court acted within the bounds of its discretion when it determined that any potential prejudice could be

sufficiently mitigated by the limiting instruction provided to the jury. Assuming the maximum probative value that a reasonable fact finder might give the evidence and the minimum unfair prejudice to be reasonably expected, we cannot say that the trial court's ruling was manifestly arbitrary, unreasonable, or unfair. Nor did it reflect an erroneous understanding or application of the law. *Dorsey*, ¶ 29.

IV. Conclusion

¶ 74 The judgment of conviction is affirmed.

JUDGE FURMAN concurs.

JUDGE LIPINSKY dissents.

JUDGE LIPINSKY, dissenting.

¶ 75 I agree with the majority that courts must exercise caution when distinguishing between a frustrated litigant's emotional outburst and a "true threat" directed against a judicial officer. As the Fourth Circuit stated, "one of the most indispensable freedoms is that to express in the most impassioned terms the most passionate disagreement with the laws themselves, the institutions of, and created by, law, and the individual officials with whom the laws and institutions are entrusted." *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997). The *Rice* court eloquently noted that "[w]ithout the freedom to criticize that which constrains, there is no freedom at all." *Id.*

¶ 76 Although the majority accurately summarizes the applicable First Amendment case law, I respectfully disagree with its conclusion that Adrian Jeremiah Brown's words, while disrespectful and profane, constituted a true threat against the district court judge. For the reasons I explain below, I would hold that Brown's statement about kidnapping the judge's daughter (the subject statement) did not rise to the level of a true threat and, therefore, cannot support Brown's criminal conviction under

section 18-8-615, C.R.S. 2021, for retaliating against a judge and the deprivation of his liberty for five years.

¶ 77 "Any statute that criminalizes threats must . . . be applied and interpreted consistently with the First Amendment." *People v. Stanley*, 170 P.3d 782, 786 (Colo. App. 2007). A conviction for threatening a judge that falls short of a true threat infringes on the right of free expression enshrined in the First Amendment to the United States Constitution and article 2, section 10 of the Colorado Constitution.

¶ 78 I first turn to the Colorado case law determining when a statement is a true threat.

I. The Law Governing "True Threats"

¶ 79 As the majority notes, words may be criminalized if they constitute a "true threat." *Supra* ¶ 21. Our supreme court's decision in *People in Interest of R.D.*, 2020 CO 44, ¶ 53, 464 P.3d 717, 731-32, guides the analysis of whether the subject statement rose to the level of a true threat. *R.D.* explained that determining whether a statement presented a true threat requires not only examination of the words themselves, but also the context of those words. *Id.* at ¶ 52, 464 P.3d at 731. In reviewing a defendant's

words, we consider "whether the threat contain[ed] accurate details tending to heighten its credibility" or "whether the speaker said or did anything to undermine the credibility of the threat." *Id.* at ¶ 53, 464 P.3d at 731-32. The test is objective. *People v. Counterman*, 2021 COA 97, ¶ 29, 497 P.3d 1039, 1046.

¶ 80 After examining the words uttered, we consider five factors in assessing the context of the statement:

> (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).

R.D., ¶ 52, 464 P.3d at 731. These factors are not exhaustive. "Depending on the facts and circumstances, other considerations may be relevant to the overarching goal of examining a statement in

all its context to discern whether it is a true threat or protected expression." *Id.* at ¶ 62, 464 P.3d at 734.

A. The Words of the Subject Statement

¶ 81 Brown was convicted of the crime of retaliating against a judge based on the following colloquy at a hearing in Brown's dependency and neglect case:

> THE COURT: [As part of Brown's treatment plan, I order] mental health treatment, if recommended.
>
> . . . .
>
> [I order] an assessment for domestic violence treatment, both victim and perpetrator. And that the parents follow through with any recommended treatment.
>
> That the parents sign all releases of information.
>
> RESPONDENT FATHER [BROWN]: Maybe you should read the fucking file. Who's the perpetrator? Not in this courtroom? Not involved in this case?
>
> THE COURT: I don't have a crystal ball, I'm just simply entering orders that I typically order. And if not domestic violence, definitely anger management. That's been demonstrated in court ample times.
>
> RESPONDENT FATHER: Let me kidnap your daughter and see if you don't get angry. As a matter of fact, where do you live, Your Honor?

> Let's see if we can get this all resolved. See if you would be angry.
>
> THE COURT: Mr. Brown, you know, please. I have tried and tried.
>
> RESPONDENT FATHER: You have tried nothing but to lie for them and shut me up. I'm a prominent activist in my community, and this entire thing has been made — has been designed to shut me up. I'm an activist against — I talk out against the abuses of our system, against our judges who aren't educated, against our terrorists who wear badges. That is what I do, that is my job. I'm an activist. And they're trying to shut me up. This whole case is designed to shut me up, and all you've done thus far is help them.

¶ 82 Although the subject statement suggests potential harm to the judge and her child, I do not read it to mean that he intended to kidnap the judge's daughter or to appear on the judge's doorstep. As discussed below, he referred to "kidnap" in the context of the judge's order that he receive an anger management assessment. And, contrary to the majority's statement that Brown "wanted to obtain information to carry out the described action," *supra* ¶ 35, nothing in the record indicates that Brown knew, or intended to find out, where the judge lived.

¶ 83 I also note that the subject statement did not include "accurate details tending to heighten its credibility." *R.D.*, ¶ 53, 464 P.3d at 731-32. The subject statement lacked any details suggesting that Brown possessed specific facts about the judge's children. *Cf. State v. Taupier*, 193 A.3d 1, 9 (Conn. 2018) (holding that the defendant communicated a true threat because he stated that the judge involved in his marriage dissolution proceeding "lives in [W]atertown with her boys and [n]anny . . . there [are] 245 [yards] between her master bedroom and a cemetery that provides cover and concealment" and detailing a specific gun and ammunition that could shoot that distance) (alterations in original).

¶ 84 The prosecution asserted that Brown possessed specific knowledge of the judge's children because he had viewed a photograph of her infant son on the bench. Defense counsel countered that Brown had mentioned a daughter, and not a son. But we need not speculate on a viewer's ability to assess the gender of the baby depicted in the photograph on the judge's bench.

¶ 85 This is so because the record indicates that Brown was not referring to a specific child when he mentioned a daughter of the judge. Rather, he was attempting to justify his anger about losing

custody of his own daughter when he said to the judge that she, too, would become angry if someone "kidnap[ped]" her "daughter."

¶ 86 The examination of the words Brown used thus decreases the subject statement's credibility as a true threat.

B. The Subject Statement's Role in Brown's Exchange with the Judge

¶ 87 Brown made the subject statement during a hearing in his ongoing and contentious dependency and neglect case, in which the Department had taken custody of his daughter and the court had limited Brown's contact with the child to supervised visits. In my view, the rhetorical nature of the subject statement becomes apparent when juxtaposed against the judge's assertion that Brown needed a domestic violence or anger management assessment. Brown made the subject statement in direct response to the judge's assertion. In the subject statement, Brown was telling the judge in his own crude way that it was normal for a parent to feel anger about the loss of a daughter.

¶ 88 When viewed in context, Brown was not saying that he *would* kidnap the judge's daughter or that he *would* show up at the judge's home. Rather, he was making a hypothetical statement to

attempt to convince the judge to view the situation from his point of view. Brown was saying that the judge, too, would become angered if someone took her daughter away. He became frustrated when the judge said he needed an anger management assessment because, in his mind, any parent would feel anger if a child was taken away. He was saying, in effect, "wouldn't you feel angry, too, if your daughter was kidnapped?" In light of this context, I do not view the subject statement, as reprehensible as it was, as a true threat to kidnap the judge's daughter.

¶ 89 Brown's use of "kidnap" also must be viewed in context. He had previously characterized the Department personnel who had taken his child as "kidnappers." Brown used the same reference to kidnapping in his colloquy with the court. Brown was not making a true threat of kidnapping but was referring to the emotional impact of having government employees interfere with the parent-child relationship and remove a child from her parents. Although Brown's use of rhetoric was inexcusable, the vileness of his words should not shift our focus away from the context in which he uttered them.

¶ 90 In my view, the first *R.D.* context factor weighs heavily in favor of holding that the subject statement was not a true threat.

C. The Medium or Platform Through Which Brown Communicated the Subject Statement

¶ 91 Brown made the subject statement directly to the judge while she was on the bench. For this reason, the *R.D.* court's discussion of online communications and, specifically, the effects of a social media platform's "distinctive architectural features" do not apply here. *R.D.*, ¶ 56, 464 P.3d at 732-33.

¶ 92 Like the majority, I am not persuaded by Brown's contention that the subject statement could not have constituted a true threat because Brown made it in a courtroom, in the presence of security officers. *Supra* ¶ 43. A statement may be a true threat even if the speaker knows he faces serious consequences for uttering it. *See Virginia v. Black*, 538 U.S. 343, 359-60 (2003). And a determined individual can carry out a true threat made in a secured setting.

¶ 93 In any event, I conclude that the second *R.D.* context factor does not make it more or less likely that the subject statement was a true threat.

D. The Manner in Which Brown Conveyed the Subject Statement

¶ 94 Brown made the subject statement to the judge in person, in her courtroom, after she said Brown needed a domestic violence or anger management assessment. After making the subject statement, he characterized himself as an "activist" who spoke out against "abuses" of the system by judges and "terrorists who wear badges." He had expressed similar sentiments earlier in the dependency and neglect case.

¶ 95 These assertions demonstrate that the subject statement reflected Brown's frustration and anger at a system that he believed had wrongfully taken his daughter away from him. Indeed, the record shows that, at every stage of the dependency and neglect case, Brown expressed anger at the people and institutions who had taken custody of his daughter. This context indicates that, at the hearing, Brown was venting about the legal and social services systems generally. *Cf. Counterman*, ¶ 50, 497 P.3d at 1048 (noting, in case holding that the defendant's statements constituted a true threat, that the defendant directly targeted the victim and had the specific intent "to have an emotional effect" on the victim alone). He

was criticizing the judge as a participant in a system that, in his mind, kidnaps children by separating them from their parents.

¶ 96 Thus, I conclude that the third *R.D.* context factor weighs against a determination that the subject statement was a true threat.

E. The Relationship Between Brown and the Judge

¶ 97 Brown and the judge's interactions were limited to hearings in the dependency and neglect case. The record demonstrates the contentiousness of those interactions. As the majority notes, the judge held Brown in contempt after he persisted in making disrespectful comments about the judge's bench. *Supra* ¶ 50.

¶ 98 Although, after the hearing at which Brown uttered the subject statement, he mailed a "criminal presentment" from a "De Jure people's Grand Jury" to the judge *at the courthouse* and the judge saw him "pok[e] his head into [her] courtroom," nothing in the record suggests that Brown knew the judge's home address, made attempts to learn her address, or attempted to contact her after she recused herself from his dependency and neglect case.

¶ 99 Also, the record indicates that Brown did not violate or threaten to violate the protection order entered for the judge's

benefit in the criminal case against Brown. *Cf. Stanley*, 170 P.3d at 785 (in determining whether the defendant's statement was a true threat, giving weight to the defendant's refusal to accept protection orders issued for the victims). In my view, an objective review of the subject statement shows that Brown recognized there was a line he could not cross in his interactions with the judge and, despite his bitter words and anger, he did not cross that line. *See R.D.*, ¶ 23, 464 P.3d at 725 (explaining that "mere[] talk" is not a true threat).

¶ 100 For these reasons, I conclude that the fourth *R.D.* context factor weighs against a determination that the subject statement was a true threat.

F. The Judge's Subjective Reaction to the Subject Statement

¶ 101 The judge testified that she believed the subject statement was a credible threat and that she was frightened for her and her children's safety. But the judge did not find Brown in contempt for making the subject statement; she found him in contempt for his statement about changing his child's diaper on the bench. (Because the judge found Brown in contempt, Brown did not evade the consequences of his statements that "interfer[ed] with the court's administration of justice, [were] derogatory to the dignity of

the court, or tend[ed] to bring the judiciary into disrespect." *See People v. Aleem*, 149 P.3d 765, 774 (Colo. 2007).)

¶ 102 In addition, even after Brown referred to kidnapping the judge's daughter, the judge said that she did not have "any problem with [Brown's supervised] visits happening" in her courtroom. While she cautioned him against approaching her bench during those supervised visits, the judge did not cancel them.

¶ 103 Moreover, the judge did not have Brown removed from the courtroom in response to the subject statement and did not obtain a civil protection order against him, despite her testimony that she would seek such an order when the protection order in the criminal case lapsed.

¶ 104 While I acknowledge the sincerity of the judge's testimony about how the subject statement affected her, and do not mean to minimize the impact that the subject statement had on her, *R.D.* instructs that the subjective reaction of the recipient is only one of the factors we consider when determining whether a statement is a true threat. *See R.D.*, ¶ 61, 464 P.3d at 733-34 ("[W]hether a particular reader or listener will react with fear to particular words is far too unpredictable a metric for First Amendment protection.

Such a rule would not give sufficient 'breathing space' to the freedom of speech.").

¶ 105 In sum, in my view, the judge's reactions to the subject statement did not convey the impression that she contemporaneously viewed it as a true threat. I would hold that the fifth *R.D.* context factor also weighs against the subject statement being a true threat.

G. When Viewed in Context, the Subject Statement Was Not a True Threat

¶ 106 For the reasons discussed above, I agree with Brown that, given his assertions throughout the dependency and neglect case that the Department and the district court had wrongfully taken his daughter, the subject statement was not a true threat to kidnap a child of the judge. Rather, it was a rhetorical utterance that the judge, too, would become angered if someone wrongfully took her daughter, just as Brown felt angry that his daughter had been taken from him. I would hold that the *R.D.* context factors weigh in favor of a determination that the subject statement was not a true threat.

II. The Subject Statement Lacked Sufficient Detail to Constitute a True Threat

¶ 107 The majority opinion underscores why, in my view, the subject statement lacked sufficient detail to constitute a criminal act. As the majority notes,

- "[T]he fact that [Brown] mailed the document to [the judge] at the courthouse suggests he did not know her home address." *Supra* ¶ 37.
- Brown "did not say he knew or intended to ascertain where the judge lived." *Supra* ¶ 36.
- "[T]he picture on the judge's bench that Brown observed was that of a son, not a daughter." *Supra* ¶ 39.
- "The judge did not find Brown in contempt at the time he made the [subject] statement." *Supra* ¶ 50.
- The judge "did not have Brown removed from the courtroom" in response to the subject statement. *Supra* ¶ 50.
- The judge allowed Brown to continue his supervised visits with his daughter in her courtroom after he made the subject statement. *Supra* ¶ 51.

¶ 108 A comparison of the facts in other cases addressing convictions premised on threats to judges and other public figures with the facts described in the majority opinion confirms my conclusion that the subject statement was not a true threat.

¶ 109 For example, the defendant in *United States v. Turner*, 720 F.3d 411 (2d Cir. 2013), did not merely "express an abstract desire for the deaths" of three Seventh Circuit Judges, *id.* at 423, but posted on a publicly available website his belief that the judges "deserve to be killed" and that they "deserve to be made such an example of as to send a message to the entire judiciary: Obey the Constitution or die," *id.* at 415. Moreover, the defendant posted "photographs, work addresses and room numbers for each of the judges, along with a map and photograph of the courthouse." *Id.* at 423.

¶ 110 Here, Brown never said the judge should be killed or that any specific harm should come to her. He did not say, "I *will* kidnap your daughter." As noted above, he stated, in effect, "Wouldn't you be angry, too, if your daughter was taken away from you?" And Brown did not post any information that could assist individuals with malicious intent to track down the judge.

¶ 111 Similarly, a division of this court held that a defendant's threat to arrest a judge for treason, an offense punishable by death, constituted a "true threat." *See Stanley*, 170 P.3d at 785, 791 (The defendant had hand-delivered a document to a court demanding that the judge "overturn [defendant's] conviction . . . . Failure to do so will result in a treason charge against [the judge] for failure to uphold the oath of office to defend the Constitutions . . . . This treason charge[] will result in a Mutual Defense Pact Militia warrant for [the judge's] arrest if the [defendant's] conditions are not met . . . ."). In contrast, Brown did not say he would kidnap the judge's child if she took a specified action against him.

¶ 112 In a case involving a threat against a public official, our supreme court affirmed a criminal conviction for attempting to influence a public servant through a threat of violence or economic reprisal under section 18-8-306, C.R.S. 2021, based on the defendant's statement that

> [y]ou must pay up now or face a much pricier levy, as I'll tolerate your crap no longer. One way or another, I'll GUARANTEE that you pay. You could make it VERY expensive for yourself, if you insist. In fact you might give up everything, just as you would have me do,

> all for the perversion you cooked up in your mind . . . .
>
> . . . .
>
> Remember, everything you say can and will be used against you. Everything you do can and will be used against you. Better look over your shoulder.

People v. Janousek, 871 P.2d 1189, 1191 (Colo. 1994). As noted above, there is a material difference between saying something will happen if the official does not accede to the defendant's demands and the type of rhetorical statement that Brown made to the judge.

¶ 113 The Ninth Circuit affirmed a criminal conviction premised on a statement that included the following language: "I told them when I lost my home if I had not received a fair trial by jury I was going to kill the things. . . . As far as I am concerned the things are living on borrowed time." *Melugin v. Hames*, 38 F.3d 1478, 1481 (9th Cir. 1994). The defendant had "signed a quit claim" to his "home and property" and, therefore, in his mind, had "lost his home." *Id.* The defendant told a police officer that "the things" referenced in his statement included a state magistrate. *Id.* The court reasoned that a statement that one will kill a judicial officer upon the occurrence of a condition that, in fact, occurred is the type of threat that will

support a criminal conviction for "interference with official proceedings." *Id.* at 1486-87.

¶ 114 These cases convince me that the subject statement was hyperbole and not a true threat. For the reasons explained above, I would hold that the subject statement did not rise to the level of a true threat and, thus, that Brown's criminal conviction under section 18-8-615 must be reversed.

¶ 115 Despite my disagreement with the majority, there should be no misunderstanding about my view that the subject statement was improper and reprehensible. Our judicial system cannot condone the type of disrespect that Brown showed to the judge; the judge deservedly found Brown in contempt for his statement about changing the child's diaper on the bench. But, in this case, we are not called upon to issue a general condemnation of language that has no place in a courthouse. The law recognizes a material distinction between disrespectful words and a criminal prosecution for retaliation against a judge. That distinction convinces me that I must disagree with two colleagues for whom I have the utmost respect.