UNITED STATES V. FLEURY: ELEVENTH CIRCUIT HOLDS THAT SOCIAL MEDIA MESSAGES CONTAINING TRUE THREATS VIOLATES FEDERAL CYBERSTALKING LAW

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In *United States v. Fleury*, the United States Court of Appeals for the Eleventh Circuit addressed as a matter of first impression whether the federal cyberstalking statute was unconstitutionally overbroad, among other issues. [1] The appellant, Brandy Fleury ("Fleury"), was convicted by a jury in the United States District Court of the Southern District of Florida for transmitting interstate threats in violation of 18 U.S.C. § 875(c) and cyberstalking in violation of 18 U.S.C. § 2261A(2)(B) after Fleury posed as different mass murderers on Instagram and sent threatening messages to individuals who lost family members in a mass shooting. [2] Fleury appealed his conviction, challenging the constitutionality of the federal cyberbullying statute, the sufficiency of the indictment and evidence with regard to his intent, the admission of specific expert testimony, and the jury instructions.[3] After addressing each claim, the Eleventh Circuit affirmed Fleury's conviction on the grounds that 18 U.S.C. § 2261A(2)(B) is constitutional, both facially and as-applied Fleury's actions, and that the district court made no reversible errors.[4]

Fleury's indictment and conviction stemmed from the mass shooting that took place on February 14, 2018, when Nikolas Cruz murdered seventeen students and school employees with an AR-15 style semi-automatic rifle at Majority Stonerman Douglas High School ("MSD") in Parkland, Florida.[5] Between December 2018 and January 2019, Fleury sent "taunting and harassing" Instagram messages to the victims' families and friends using aliases such as "nikloas.killed.your.sister," "the.douglas.shooter," and "Teddykillspeople[.]"[6] The recipients claimed that the Fleury's messages made them fearful for their lives.[7]

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[1] United States v. Fleury, 20 F.4th 1353 (11th Cir. 2021).

[2] *Id*. at 1358.

[3] *Id.* at 1359.

[4] *Id*. at 1374. Following his conviction, Fleury was sentenced to sixty-six months imprisonment as well as three years of supervised release for each count following the sixty-six months. *Id.* at 1361.

[5] *Id.* at 1359.

[6] *Fleury*, 20 F.4th at 1359.

[7] *Id.*

In a private message sent on December 22, 2018, Fleury admitted that he had "[taken] it way too far with [his] trolling" after sending threatening messages to a MSD survivor.[8] Law enforcement was able to trace the IP address from which the messages were sent back to Fleury's home.[9] Fleury later confessed to sending the messages from usernames that were inspired by his attraction to "aggressive people with violent tendencies," like Ted Bundy and Nikolas Cruz.[10] Fleury was subsequently indicted by a grand jury for "interstate transmission of a threat to kidnap, in violation of 18 U.S.C. § 875(c) (Count 1), and interstate cyberstalking, in violation of 18 U.S.C. § 2261A(2)(B) (Counts 2–4)."[11]

At trial, the government focused its case-in-chief on messages sent to three individuals: Max Schachter, Jesse Guttenberg, and Alexis Sealy.[12] Beginning in December 2018, Schachter received "very scary messages"[13] from Fleury and testified that he was especially scared by two specific messages: "I'm your abductor I'm kidnapping you fool" and "With the power of my AR-15, I take your loved ones away from you PERMANENTLY."[14] Fleury sent these same and other similar messages to Guttenberg and Sealy.[15] Specifically, Guttenberg received messages from Fleury saying "I'm a murderer" and "I'm your abductor I'm kidnapping you fool[,]" among others.[16] Sealy likewise received similar taunting messages Fleury, in addition to the following message: "With the power of my AR-15 I erased their existence. Your grief is my joy[.]"[17]

Before the trial began, Fleury filed a motion to dismiss the cyberstalking charges challenging the constitutionality of the statute on its face and as applied to his conduct, but the district court denied his motion.[18] During the five-day trial, the defense argued that because Fleury suffered from autism spectrum disorder ("ASD"), he did not have the requisite intent to support conviction because he could not appreciate how his messages would impact the recipients.[19] Both the prosecution and the defense called

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[8] *Id.* at 1360 (second alteration in original).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Fleury*, 20 F.4th at 1359.
[13] Examples of the messages Fleury sent Schachter include "I killed Alex and it was fun" and "they had their whole lives ahead of them and I f**king stole it from them." *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Fleury*, 20 F.4th at 1361.
[19] *Id.* at 1360.

expert witnesses that offered conflicting testimony with respect to whether Fleury's ASD impacted is capability to understand the emotional distress his messages caused.[20] After the jury convicted Fleury for all four charges, Fleury appealed his conviction challenging "the constitutionality of 18 U.S.C. § 2261A(2)(B), the jury instructions, the sufficiency of the evidence for intent, the admissibility of Dr. Dietz's expert testimony, and the sufficiency of the indictment."[21]

The Eleventh Circuit addressed Fleury's constitutional challenges to the cyberstalking statute, 18 U.S.C. § 2261A(2)(B).[22] First, Fleury argued that the statute is facially overbroad "because it has a wide-ranging sweep that encompasses protected speech. . . ."[23] The cyberstalking statute applies to "whomever 'with the intent to harass, intimidate . . . uses . . . any interactive computer services . . . to engage in a course of conduct that' 'causes, attempts to cause, or would by reasonably expected to cause substantial emotional distress.'"[24] A statute is overbroad in violation of the First Amendment where it "prohibits 'a *substantial* amount of protected speech[,]'" and the party challenging the statute bears the burden of establishing the overbreadth of the statute in question.[25] The Eleventh Circuit found that Fleury failed to meet his burden of proof because he "ignore[d] key statutory elements that narrow the conduct the statute applies to—including, for example, proof that the defendant acted with 'intent to kill, injure, harass, [or] intimidate' and evidence that the defendant 'engage[d] in a course of conduct' consisting of two or more acts evidencing a continuity of purpose."[26] Thus, as a matter of first impression, the Eleventh Circuit joined other circuit courts that have addressed facial attacks to 18 U.S.C. § 2261A(2)(B) and held that the cyberstalking statute is facially constitutional.[27]

Regarding the second constitutional challenge, Fleury claimed that the statute as applied to his conduct violated the First Amendment because the speech at issue was a matter of public concern and because the restriction was content-based.[28] First, the court disagreed with Fleury's argument that

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[20] *Id.*
[21] *Id.* at 1361.
[22] *Id.*
[23] *Id*. at 1362.
[24] *Fleury*, 20 F.4th at 1362 (quoting 18 U.S.C. § 2261 A(2)(B)). Section 2266(2) defines "course of conduct" as, "a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose." *Id.* (internal quotation marks omitted) (quoting 18 U.S.C. § 2266(2).
[25] *Id*. (emphasis added) (quoting United States v. Williams, 553 U.S. 285, 292 (2008)) ("The Supreme Court has long recognized that 'the overbreadth doctrine is 'strong medicine' and ha[s] employed with hesitation, and then 'only as a last resort.'")
[26] *Id.* at 1362–63 (second and third alteration in original) (quoting 18 U.S.C. § 2261A(2)(B)).
[27] *Id.* at 1363.
[28] *Id*. at 1364.

his speech addressed a matter of public concern and thus should be afforded special protection.[29] Speech addresses a matter of public concern "when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[30] Likewise, "[w]hether speech is determined as a matter of public or private depends on 'the content, form, and context' of the speech."[31] The Eleventh Circuit agreed with the district court that Fleury's Instagram messages were a matter of private concern, as he clearly only sought to threaten the victims with future harm rather than attempting to engage in "a meaningful dialogue of ideas."[32]

Turning to Fleury's argument that § 2261A(2)(B) "unconstitutionally restricts the content of his speech," the Eleventh Circuit explained that laws and regulations are deemed content-based, and therefore "subject to strict scrutiny" when they, "by their terms[,] distinguish favored speech from disfavored speech on the basis of the ideas or views expressed."[33] The court agreed with Fleury that the application of § 2261A(2)(B) did "amoun[t] to a content-based restriction[;]" however, the Supreme Court has held that content-based restrictions against true threats are permissible.[34] This is because true threats, which are "statements 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[,]" are not protected by the First Amendment.[35] Considering the entirety of Fleury's conduct, the court found that Fleury's messages "create[d] the visual of an anonymous, persistent tormentor who desire[d] to harm the victims."[36] As a result, the Eleventh Circuit agreed with the district court that Fleury's messages constituted true threats, and thus the application of § 2261A(2)(B) to his messages was not unconstitutional.[37]

The court then quickly addressed Fleury's argument that the indictment was insufficient with respect to the cyberstalking charges because

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[29] *Fleury*, 20 F.4th at 1363–64.
[30] *Id.* at 1364 (alteration in original) (internal quotation marks omitted) (quoting Snyder v. Phelps, 562 U.S. 443, 453 (2011)).
[31] *Fleury*, 20 F.4th at 1364 (quoting *Snyder*, 562 U.S. at 453).
[32] *Id.* (internal quotation marks omitted) (quoting *Snyder*, 562 U.S. at 452).
[33] *Id.* (alteration in original) (quoting Turner Broad. Sys., Inc v. FCC, 512 U.S. 622, 643 (1994)).
[34] *Id.* at 1364–65 (citing United States v. Alvarez, 567 U.S. 709, 717 (2012)).
[35] *Id.* at 1365 (quoting Virginia v. Black, 538 U.S. 343, 359 (2003)).
[36] *Fleury*, 20 F.4th at 1366.
[37] *Id.* The Eleventh Circuit acknowledged that the content of his speech is what led to his conviction, "which included his threats to kidnap the three victims and to kill them and their loved ones." *Id.* at 1365.

it was based on the victims' emotional distress rather than true threats.[38] This challenge was raised for the first time on appeal, so the court could not question its sufficiency "unless it [was] gravely apparent that it does not, by any reasonable construction, charge an offense for which the defendant is convicted."[39] The court found the indictment was sufficient because it adequately notified Fleury of the charges that he was ultimately convicted, thus affirming the district court.[40]

Next, the court turned to Fleury's argument that there was insufficient evidence to prove that he had the requisite intent to be convicted of threatening the victims under § 2261A(2)(B).[41] Fleury specifically argued that the district court erred in denying his motions for acquittal because the prosecution did not present any evidence of Fleury's subjective intent to threaten anyone.[42] The Eleventh Circuit explained that a denial of judgment of acquittal is to be upheld "if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[43] At Fleury's trial, the prosecution and the defense brought expert witnesses to testify to Fleury's culpability and his ability to understand others' emotions.[44] The experts offered conflicting testimony; however, the Eleventh Circuit declined to question the jury's determination of the experts' credibility on appeal.[45] Rather, the court found that there was sufficient evidence to support the jury's conclusions that Fleury had the requisite intent for conviction.[46]

The court then addressed Fleury's argument that the prosecution's expert witness, Dr. Dietz, should not have been allowed to testify at trial.[47] Because Fleury raised this argument for the first time on appeal, the court used the plain error standard to review the district court's decision to admit this testimony.[48] First, Fleury argued that Dr. Dietz's testimony was irrelevant because Dr. Dietz is not an expert in ASD, but on serial killers, and

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[38] *Id*. at 1366.
[39] *Id*. (internal quotation marks omitted) (quoting United States v. Gray, 260 F.3d 1267, 1282 (11th Cir. 2001)).
[40] *Id*.
[41] *Fleury*, 20 F.4th at 1367.
[42] *Id*.
[43] *Id.* (internal quotation marks omitted) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).
[44] *Id*.
[45] *Id.*
[46] *Id.*
[47] *Fleury*, 20 F.4th at 1367–68.
[48] *Id*. "To find plain error, there must be: (1) error, (2) that is plain, and (3) that has affected the defendant's substantial rights." *Id.* (quoting United States v. Hesser, 800 F.3d 1310, 1324 (11th Cir. 2015))

thus was not qualified to offer an opinion on Fleury's ASD and mental state.[49] Second, Fleury argued that Dr. Dietz's testimony was unfairly prejudicial because he (1) testified regarding experience in cases of mass murderers, such as Jeffery Dahmer and Ted Kaczynski, which encouraged jury members to compare Fleury to other mass murders, and (2) testified to Fleury's sexual attraction to mass murderers, which caused the jury to find him guilty "based on fear of a crime he did not commit."[50]

Despite Fleury's arguments, the Eleventh Circuit found no plain error in district court's admission of Dr. Dietz's testimony.[51] The Eleventh Circuit reasoned that Dr. Dietz's testimony was neither irrelevant nor unfairly prejudicial because he explained that "Fleury's attraction to the domineering and taunting characteristics of serial killers motivated him to send the intimidating messages and [opined] that Fleury could appreciate the impact that his messages had on the recipients" following his "extensive eight-hour evaluation" of Fleury over a two day period.[52] The court also clarified that Dr. Dietz's expertise was not in mass murderers, but in forensic psychiatry.[53] Furthermore, the court found that the jury instructions "ensured that the jury could convict Fleury only of the crimes he was charged with."[54] Thus, the Eleventh Circuit affirmed the district court's decision to admit Dr. Dietz's testimony.[55]

Lastly, the court addressed Fleury's challenge regarding the district court's denial of his proposed jury instructions.[56] During the charge conference, the defense proposed an instruction that for the jury to find Fleury guilty, it must determine that Fleury had the subjective intent transmit a true threat.[57] The government argued the jury need not find evidence of subjective intent to find Fleury guilty because "the scienter that Congress has defined is intent to harass and intent to intimidate . . . ."[58] The district court agreed with the government and denied the defense's request, "concluding that § 2261A(2)(B) already includes a scienter element . . . ."[59] On appeal, the Eleventh Circuit agreed with the district court because §2261A(2)(B) already

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[49] *Id.*; *see* Fed. R. Evid. 401 (addressing with relevant evidence); Fed. R. Evid. 702 (addressing information on which an expert is allowed to testify).
[50] *Fleury*, 20 F.4th at 1368; *see* Fed. R. Evid. 702.
[51] *Fleury*, 20 F.4th at 1368.
[52] *Id*.
[53] *Id.*
[54] *Id.* at 1368–69.
[55] *Id*. at 1369.
[56] *Fleury*, 20 F.4th at 1368.
[57] *Id.* at 1369.
[58] *Id*. (internal quotation marks omitted).
[59] *Id.* at 1369 (internal quotation marks omitted). The district court defined true threat as "a serious threat . . . that is made under the circumstances that would a place a reasonable person in fear of being kidnapped, killed of physically injured." *Id.* at 1372.

includes a requisite mental state for conviction, therefore an additional instruction regarding subjective intent was unnecessary.[60]

Fleury also requested that the district court define true threat as "statements where the speakers means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group . . . ."[61] The district court denied this request but provided the jury with an instruction that encompassed Fleury's proposal.[62] Fleury challenged this decision on appeal, arguing that the district court "erroneously modified his theory of defense instruction."[63] The Eleventh Circuit agreed with Fleury that he did provide a correct definition of true threat; however, the court acknowledged the district court's broad discretion to provide appropriate jury instructions.[64] The Eleventh Circuit found that the district court acted within this discretion as it provided the jury with a correct definition of true threat.[65] The Eleventh Circuit additionally noted that the district court maintained the substance of Fleury's proposed instruction.[66]

In summation, the Eleventh Circuit held that 18 U.S.C. § 2261A(2)(B) is both facially constitutional and was properly applied to Fleury's conduct, the indictment was sufficient, there was sufficient evidence of Fleury's intent, the admission of Dr. Dietz's testimony was permissible, and the jury instructions were appropriate.[67] The Eleventh Circuit's decision in *Fleury* is significant as it affirms that threatening messages sent over social media—even messages sent as a joke or with no intent to be carried out—may violate federal law if the messages constitute a true threat and "causes, attempts to cause, or would by reasonably expected to cause substantial emotional distress."[68] As a result, social media users should be wary of not only what they message and to whom, but also how their messages may be received.

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[60] *Fleury*, 20 F.4th at 1371. Fleury incorrectly relied on *Elonis v. United States*, 575 U.S. 723 (2015), where the Supreme Court "analyzed the constitutionality of a jury instruction that included a definition of 'true threat' in the context of 18 U.S.C. § 875(a) . . . ." *Id.* at 1370.
[61] *Id.* at 1372.
[62] *Id*.
[63] *Id.*
[64] *Id*. at 1373. (citing United States v. Singer, 963 F.3d 1144, 1162 (11th Cir. 2020)).
[65] *Fleury*, 20 F.4th at 1373.
[66] *Id*.
[67] *Id*. at 1374.
[68] *Id*. at 1362 (quoting 18 U.S.C. § 2261A(2)(B)).