

IN THE SUPREME COURT OF TEXAS

No. 09-0236

THE STATE OF TEXAS, PETITIONER,

v.

K.E.W., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued February 18, 2010

JUSTICE GREEN, joined by JUSTICE WILLETT, concurring.

I concur with the Court’s judgment in this case, and in nearly all of its analysis. I write separately to pause, however, on the notion that a verbal statement, by itself, may be an “overt act . . . that tends to confirm . . . the likelihood of serious harm to the proposed patient or others,” TEX. HEALTH & SAFETY CODE § 574.034(d). Certainly some verbal statements—verbal threats—may constitute such overt acts, as the Montana Supreme Court held in a case the Court cites. *See In re Mental Health of E.M.*, 875 P.2d 355, 356–57 (Mont. 1994). Indeed, what the United States Supreme Court has called “true threats” are treated uniquely even in the First Amendment context, where other liberties are at stake:

“True threats” encompass those 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. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Virginia v. Black, 538 U.S. 343, 359–60 (2003) (quotations and citations omitted). By contrast, as the Court states here, “Dr. Ortiz acknowledged K.E.W. did not state that he intended to impregnate anyone against her will and to her knowledge K.E.W. did not directly proposition a particular staff member or patient at the hospital.” ___ S.W.3d at ___. Some of K.E.W.’s verbal statements in this case may not, by themselves, rise to the level of a verbal threat in my view, at least in the sense described by *Black*. For instance, “K.E.W.’s statement[] regarding his belief that he had an assignment to impregnate specific women” may not rise to the level of a threat if one considers it purely in the abstract. *See id.* at ___. Therefore, I would leave it as an open question in this case whether any of K.E.W.’s statements, by themselves, constitute an “overt act . . . that tends to confirm . . . the likelihood of serious harm to the proposed patient or others” for purposes of sanctioning “court-ordered temporary inpatient mental health services” under section 574.034.¹

In this case, I would not address this more difficult question as the Court does by indicating that some of K.E.W.’s verbal statements were “evidence on which a reasonable trier of fact could have formed a firm belief or conviction that . . . recent objectively observable acts by K.E.W. tended to confirm” a finding that “as a result of his mental illness, K.E.W. would likely cause serious harm

¹ Moreover, the same standard applies to “court-ordered *extended* inpatient mental health services.” *See* TEX. HEALTH & SAFETY CODE § 574.035(e) (emphasis added).

to others.” In my view, the facts that K.E.W. “had written plans detailing his mission and papers with the names of several women whom he believed he needed to impregnate” and “carried [these] papers with him” meet the overt act requirement. *See id.* at ___, ___. It is an overt act to write a list of women’s names as well as detailed plans to impregnate them (among other things), or to carry these documents on one’s person and hold them out to those providing one’s medical treatment, as K.E.W. did. Because these were overt acts that tend to confirm the likelihood of danger to others, I agree with the result in this case. My concern is only that in another case, where a verbal statement that does not rise to the level of a verbal threat is the only evidence, a person may be civilly committed for mental health treatment beyond the Legislature’s certain intent.

Paul W. Green
Justice

OPINION DELIVERED: July 2, 2010