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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 163

THOMAS HORTON,

Appellant.

20 Eagle Street
Albany, New York 12207
September 16, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 163, People v.
2 Horton.

3 Okay, counselor. Do you want any rebuttal
4 time, counselor?

5 MR. BLUE: Two minutes, Your Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes. Sure,
7 go ahead.

8 MR. BLUE: May it please the court, Tyson
9 Blue for the appellant, Thomas Horton. As I said in
10 my brief, this appears to be a case of first
11 impression in New York. Last week I did find - - -

12 CHIEF JUDGE LIPPMAN: Counselor, it's a - -
13 - it is a case of first impression to say - - - say -
14 - - it's a case also of the modern world.

15 MR. BLUE: Yes, Your Honor.

16 CHIEF JUDGE LIPPMAN: And Facebook and
17 these kinds of vehicles to get information out to a
18 lot of people in a very short period of time.

19 MR. BLUE: That's correct, Your Honor. It
20 did find one federal case last week. It's a District
21 Court case out of - - - out of Puerto Rico. It's
22 Maldonado v. Municipality of Barceloneta involving a
23 - - - a Facebook message that was sent to someone who
24 may be a - - - might be a witness in a trial. And in
25 that case the court found that - - - that it was - -

1 - did not support any of the elements of the federal
2 witness tampering statute.

3 CHIEF JUDGE LIPPMAN: What's the - - -
4 what's the purpose of this communication by
5 defendant?

6 MR. BLUE: Mr. Horton's testimony was that
7 it was simply to disclose Ms. Shove's identity as - -
8 - as a "snitch" as he put it, as a confidential
9 informant, because she had informed on - - - on his
10 friend and codefendant, Mr. Jackson.

11 JUDGE SMITH: Is it - - - but I mean - - -

12 JUDGE GRAFFEO: Is it that far a stretch to
13 think that he was trying to get community pressure on
14 this individual?

15 MR. BLUE: Yes, Your Honor, in this
16 particular case because the - - - the evidence at - -
17 - at - - - at trial was that my client didn't believe
18 that there was going to be a trial in Mr. Jackson's
19 case, because Mr. Jackson had allegedly told him that
20 - - -

21 JUDGE SMITH: Suppose - - - suppose he was
22 trying - - -

23 MR. BLUE: - - - that he was going to make
24 a plea.

25 JUDGE SMITH: Suppose he was trying to put

1 - - - get community pressure on - - - on the witness.
2 Is that a crime?

3 MR. BLUE: That might depend on - - - on
4 the reason or what the evidence pointed to - - -

5 JUDGE SMITH: I mean suppose - - -

6 MR. BLUE: - - - as the reason.

7 JUDGE SMITH: - - - suppose I say on my
8 Facebook page I think the war on drugs is an outrage.
9 The drug laws are an outrage. And anyone who
10 cooperates with the enforcement of those laws should
11 be ashamed of herself. I'm allowed to say that?
12 That's not witness tampering, is it?

13 MR. BLUE: I don't believe so, Your Honor.
14 I don't think it would be.

15 JUDGE SMITH: Even - - - even if I happen
16 to have a drug case and I have a particular person in
17 mind that I want not to cooperate? Is it still wit -
18 - - is it - - - does - - - does that make it witness
19 tampering?

20 MR. BLUE: Well, there'd be an argument
21 there that the - - - the prosecution could - - -
22 could make. It - - - it's conduct that they could
23 point to in con - - - in a context that they could
24 say this is something that would - - - that indicates
25 that he could have really been intending to induce

1 this person not to testify.

2 JUDGE READ: How - - - what in the record
3 tells us that at the time he made the posting he
4 either knew she'd been called or expected she would
5 be called or - - - I mean how do we - - - we - - -
6 I'm - - - that's what's confusing me, I guess, is the
7 sequence of events and the timing.

8 MR. BLUE: Well, based on what was - - -
9 what was testified to at trial, there's nothing to
10 indicate that he knew that - - - that she was a - - -
11 a potential witness in - - - in any proceeding.
12 There was no - - -

13 JUDGE SMITH: There was test - - - there
14 was testimony - - - I mean that I - - - like Judge
15 Read, I find the testimony incredibly confusing, but
16 there does seem to be some testimony that says that
17 Jackson was indicted in March and these posts went up
18 in April. Could you infer from that that he knew
19 there was a proceeding pending against Jackson?

20 MR. BLUE: I guess that would - - - I guess
21 that would depend on - - - on a fact that wasn't
22 induc - - - adduced at trial, which was when Mr.
23 Horton learned that Mr. Jackson was going to - - - to
24 take a plea in the case.

25 JUDGE SMITH: Well, he - - - he testified

1 that he believed at the time he posted that either
2 Jackson had already pleaded or agreed to a plea,
3 right?

4 MR. BLUE: Yeah, yeah.

5 JUDGE SMITH: Is there any - - - any
6 evidence from which the jury could have disbelieved
7 that testimony?

8 MR. BLUE: I don't believe so, Your Honor.

9 JUDGE GRAFFEO: What do you think is
10 missing here? What causes the insufficiency? Is it
11 the lack of a direct communication between your
12 client and the witness? Is - - - is that what - - -
13 what's missing?

14 MR. BLUE: No, it's - - - it's more to the
15 - - - to the elements of the - - - of the statute of
16 20.5 - - - or 215.10 itself indic - - -

17 JUDGE GRAFFEO: Because he could talk to a
18 third person and have that third person threaten a
19 witness. Would that be witness tampering?

20 MR. BLUE: That - - - that would be, but
21 there's no indication in the evidence - - -

22 JUDGE GRAFFEO: So - - - so tell me - - -

23 MR. BLUE: - - - that that took place.

24 JUDGE GRAFFEO: - - - tell me what's - - -
25 what's missing here.

1 MR. BLUE: Something indicating that
2 there's something that you can point conclusively and
3 say this shows that he was in - - - that he knew this
4 person was going to be a witness in a trial and he is
5 using this to induce them not - - - not to testify or
6 - - -

7 JUDGE READ: So it's knowledge element?

8 MR. BLUE: - - - or to absent themselves -
9 - -

10 JUDGE READ: It's - - - it's the knowledge
11 element?

12 MR. BLUE: Yes.

13 JUDGE GRAFFEO: So if he had e-mailed her
14 directly and said you should be ashamed of yourself
15 for being a snitch and, you know - - -

16 MR. BLUE: Then that would be something - -
17 -

18 JUDGE GRAFFEO: - - - said you should think
19 twice about going to the courthouse - - -

20 MR. BLUE: That's - - -

21 JUDGE GRAFFEO: - - - that would be a
22 different scenario than what's presented here?

23 MR. BLUE: Yes, Your Honor. I think that
24 would much - - - be much more clearly - - -

25 JUDGE GRAFFEO: I just want to see the

1 distinctions, because we're going to be - - -

2 MR. BLUE: Yeah.

3 JUDGE GRAFFEO: - - - issuing a rule that
4 affects a lot more than this case.

5 MR. BLUE: Yes, Your Honor.

6 JUDGE GRAFFEO: And there's a lot of
7 electronic communication.

8 CHIEF JUDGE LIPPMAN: And if you - - - and
9 if you say you should be ashamed of yourself for
10 being a snitch but don't say you should think twice
11 about going to the courthouse, why is it so
12 different?

13 MR. BLUE: Then I - - - I - - -

14 CHIEF JUDGE LIPPMAN: Isn't it - - -

15 MR. BLUE: - - - think it's - - - I think
16 it's - - - it's - - -

17 CHIEF JUDGE LIPPMAN: Couldn't it be quite
18 clear that you - - - you wanted the same result?

19 MR. BLUE: Not necessarily, Your Honor. I
20 think in - - - in the case of that example they could
21 just be simply saying you should be ashamed of
22 yourself. I don't think that would rise to the level
23 of saying you shouldn't show - - -

24 CHIEF JUDGE LIPPMAN: No, no. You should
25 be ashamed of yourself for being a snitch.

1 MR. BLUE: For being - - - yes.

2 CHIEF JUDGE LIPPMAN: Which has certain
3 implications - - -

4 MR. BLUE: Yeah.

5 CHIEF JUDGE LIPPMAN: - - - especially when
6 the defendant and Jackson are kind of involved with
7 each other. What - - - why can't you put two and two
8 together here and make four?

9 MR. BLUE: I just don't think it quite
10 rises to the level where you could say it's more than
11 an expression of an - - - of - - - of an opinion as
12 opposed to - - -

13 CHIEF JUDGE LIPPMAN: If - - - if you were
14 able to assume - - - or that he thought it was a
15 pending case and you say you should be ashamed of
16 being a snitch knowing that you're in this new world,
17 this electronic world, and that people are going to
18 respond and say oh, those snitches. They should get
19 what you - - - what they deserve, or that was the
20 intention, them saying it. And knowing that - - -
21 let's say that he knows that she's friended on
22 Facebook, or whatever the term is - - -

23 MR. BLUE: Yes.

24 CHIEF JUDGE LIPPMAN: Why isn't that wrong
25 and - - - and certainly could conceivably be witness

1 tampering?

2 MR. BLUE: At the - - - at the same time as
3 - - - as we have to - - - to safeguard the - - - you
4 know, the - - - the trial process and the ability of
5 witnesses to - - - to give evidence. On - - - on the
6 other hand, people have a right under the First
7 Amendment to express their opinions on things. And I
8 think - - - I believe there's a - - -

9 CHIEF JUDGE LIPPMAN: Yeah, yeah, but
10 there's a different dimension today, though, right,
11 with things - - -

12 MR. BLUE: Yes.

13 CHIEF JUDGE LIPPMAN: - - - like Facebook?

14 MR. BLUE: Yes, Your Honor, but - - -

15 JUDGE GRAFFEO: Was there a constitutional
16 challenge presented to the trial court?

17 MR. BLUE: No.

18 JUDGE PIGOTT: Does it make a difference
19 that she was, at least in the - - - in the record, a
20 confidential informant and nobody knew she was an
21 informant until the defendant sent this guy the
22 video?

23 MR. BLUE: I - - - I don't believe so, Your
24 Honor, because the video was going to be played at
25 trial any - - - at any rate. And if she were going

1 to testify, her status as a confidential informant
2 would have been revealed at that point at any rate.

3 JUDGE ABDUS-SALAAM: Does it - - - counsel,
4 does it matter - - - you said earlier that the
5 knowledge of the - - - of your client that the
6 witness - - - or that his friend was going to take a
7 plea distinguishes this from something else. So does
8 it have to - - - I mean pleas can always be taken
9 back, so if the defen - - - if the defendant Jackson
10 didn't go forward with his plea and wanted to go to
11 trial, would - - - would your answer be different
12 about whether this might be witness tampering?

13 MR. BLUE: I - - - it - - -

14 JUDGE ABDUS-SALAAM: Case isn't over.

15 MR. BLUE: No.

16 JUDGE ABDUS-SALAAM: He hasn't taken the
17 plea. So that's essentially my question.

18 MR. BLUE: It - - - it - - - it could be,
19 and the answer to your question might depend on
20 whether or not Mr. Horton knew that - - - that he
21 hadn't entered his plea or he changed his mind. And
22 it would be, again, a matter of timing.

23 CHIEF JUDGE LIPPMAN: Okay - - - I'm sorry.

24 JUDGE ABDUS-SALAAM: He said he was going
25 to take a plea. He didn't say he had actually taken

1 a plea?

2 MR. BLUE: No, but - - -

3 CHIEF JUDGE LIPPMAN: You could change your
4 mind, right?

5 MR. BLUE: Yeah.

6 CHIEF JUDGE LIPPMAN: Okay, let - - - well,
7 you'll have more on rebuttal.

8 MR. BLUE: Thank you.

9 CHIEF JUDGE LIPPMAN: Counselor?

10 MR. BOKELMAN: Good afternoon, Christopher
11 Bokelman for Wayne County.

12 CHIEF JUDGE LIPPMAN: Counselor, what makes
13 this a crime?

14 MR. BOKELMAN: What makes this a crime is
15 the conduct that Mr. Horton did in not only posting
16 the identity of the confidential informant but also
17 linking the video that shows the crime, which he
18 participated in, on the Internet amongst him and his
19 several hundred friends, some of which were the
20 confidential informant and her family.

21 JUDGE SMITH: Is - - - is - - - is exposing
22 a confidential informant witness tampering in itself,
23 according to you?

24 MR. BOKELMAN: I guess it depends on how
25 the nature of the exposure comes about. If I go in -

1 - - in court, say I'm going to have a confidential
2 informant, and here's her name, no. In this case Mr.
3 Horton, who is - - -

4 JUDGE SMITH: You mean - - - you mean - - -
5 you mean if you, the DA, do it?

6 MR. BOKELMAN: Well, right.

7 JUDGE SMITH: You mean it's okay for the DA
8 but not for the defendant?

9 MR. BOKELMAN: It's not okay for this
10 defendant in this circumstance to do it in the way
11 that he did.

12 JUDGE SMITH: Okay, is it - - - I mean is
13 it ever okay - - - I mean is it always witness
14 tampering to make the identity of a confidential
15 informant public? Assume you know it - - - assume
16 you lawfully know the name and you - - - you're not
17 under any order to keep it secret, well, what - - -
18 what obligation do you have?

19 MR. BOKELMAN: You just release that this
20 person's a confidential informant? Probably not.

21 JUDGE SMITH: And in fact, if you - - -

22 MR. BOKELMAN: Because there's no intent
23 there to try and - - -

24 JUDGE SMITH: - - - if - - - if you - - -
25 is it against the law to - - - to shame a

1 confidential informant, to say - - - to say peop - -
2 - people who - - - who inform in - - - in - - - in
3 the - - - in the - - - who inform on the fascist
4 government's war on drugs should be ashamed of
5 themselves?

6 MR. BOKELMAN: Just saying the word shame
7 or trying to embarrass them or even to identify them
8 as cooperating, that is not a crime.

9 JUDGE SMITH: Um-hum, so what makes this
10 different?

11 MR. BOKELMAN: What makes this a crime is
12 that Mr. Horton is not only revealing her identity
13 and putting out the fact that she has committed this
14 cooperation and showing the evidence of that
15 cooperation. He is putting it out into a forum where
16 his intention is to affect her later actions.

17 CHIEF JUDGE LIPPMAN: How do we know that's
18 his intention?

19 MR. BOKELMAN: I think that the reasonable
20 inference from the facts are that - - - in the record
21 here - - - he was under a indictment that included
22 the conspiracy to distribute for the same time frame.
23 He is there - - -

24 JUDGE ABDUS-SALAAM: Are you talking about
25 Mr. Jackson or - - -

1 MR. BOKELMAN: He, Horton.

2 JUDGE ABDUS-SALAAM: - - - Mr. Horton?

3 MR. BOKELMAN: Horton is under a federal -
4 - - a felony federal indictment at that time of this
5 - - -

6 JUDGE SMITH: Did this - - - did - - -

7 MR. BOKELMAN: - - - disclosure.

8 JUDGE SMITH: Did - - - was that - - - was
9 that proved before jury?

10 MR. BOKELMAN: He acknowledged it during
11 cross-examination. I would consider that the - - -
12 the jury could have found that to be believable
13 proof.

14 JUDGE SMITH: Was that - - - was that the
15 theory of the prosecution's case? That he was trying
16 to deter her from testifying in her - - - in his own
17 case?

18 MR. BOKELMAN: In - - - in - - - in both
19 cases, because Jackson and Horton, and then there
20 were other unnamed actors who were also charged
21 federally, that she was a linchpin, because she got
22 into Horton who then got into the expansion, which
23 originally became a wiretap case, which wasn't in
24 front of the jury. But he knew that, and he was
25 trying to influence her behavior. And his - - -

1 JUDGE SMITH: Let me back a - - -

2 MR. BOKELMAN: - - - intention to influence
3 her behavior was the cross - - -

4 JUDGE SMITH: Let me back up a minute to -
5 - - to the - - - the conversation we had a minute ago
6 about you said that they'd be - - - it's - - - it's
7 lawful for somebody to - - - to make speeches that
8 informants who testify against drug - - - drug
9 dealers are terrible people. But is it your view
10 that if - - - if the guy who says that happens to be
11 a drug dealer who wants this particular informant not
12 to testify, then it's - - - then it's witness
13 tampering?

14 MR. BOKELMAN: Does he want that in his own
15 mind, or does he do something to express that in a
16 way that he believes will - - -

17 JUDGE SMITH: He says - - -

18 MR. BOKELMAN: - - - have an effect?

19 JUDGE SMITH: He says - - - he says people
20 - - - he says not only people; this particular drug
21 informant is a terrible person, and when he says it
22 he hopes she'll be so embarrassed she won't testify.
23 Is that - - - is that witness tampering?

24 MR. BOKELMAN: No, I don't think that is,
25 because there's no evidence that he is intending to

1 influence her behavior.

2 JUDGE SMITH: I just said - - - I just said
3 he was. I said he hoped - - -

4 MR. BOKELMAN: You said he - - - he hopes
5 that she won't.

6 JUDGE SMITH: Right, he hopes that - - -

7 MR. BOKELMAN: And then he revealed it.

8 JUDGE SMITH: - - - as a result of his
9 saying that - - -

10 MR. BOKELMAN: Right.

11 JUDGE SMITH: - - - she will become ashamed
12 and not testify.

13 MR. BOKELMAN: I think as a - - - as a - -
14 - as a person who's going to represent the DA's
15 office, I can't prove his intent based on the facts
16 that you've given me, which are not the facts that we
17 have.

18 CHIEF JUDGE LIPPMAN: So what are you
19 proving his intent here on? What - - -

20 MR. BOKELMAN: The intent here is, even by
21 his own testimony, he says that he put that up there
22 for self-defense both for himself and for Jackson and
23 for other unnamed people. He exposed her identity
24 because her actions with police exposed him to
25 criminal liability. He put it out where she knew - -

1 - she and her family - - -

2 JUDGE SMITH: But couldn't it - - -
3 couldn't it be read more as revenge that as trying to
4 prevent her from testi - - - I mean he refers to
5 Jackson in the past - - - to what happened to Jackson
6 in the past tense. He says she ruined some kid's
7 life. Is that - - - could - - - could it be that - -
8 - isn't it a fair reading of what he said oh, she did
9 this terrible thing, and I'm posting this - - - thi -
10 - - thi - - - I'm posting this video so that she and
11 all other potential informants will learn their
12 lesson and never do it again?

13 MR. BOKELMAN: I don't think that's a fair
14 reading based on the facts that are in the record. I
15 don't think that that's the jury's inferences there
16 because Jackson's case was still pending.

17 JUDGE SMITH: Um-hum.

18 MR. BOKELMAN: And his case was still
19 pending. And the evidence - - -

20 JUDGE READ: Mr. Horton's case you mean?

21 MR. BOKELMAN: Horton's case, right.

22 CHIEF JUDGE LIPPMAN: But he knows both of
23 these things. That's - - - that's why you're - - -
24 you take - - -

25 MR. BOKELMAN: Horton does know both of

1 those things.

2 CHIEF JUDGE LIPPMAN: Right.

3 MR. BOKELMAN: And it came out through the
4 testimony, I believe, of Investigator LeClair on
5 cross-examination that the grand jury - - - she was
6 going to have to testify at the federal grand jury,
7 and that case was still pending there for other
8 cases. So Horton was aware.

9 JUDGE SMITH: Is it - - - how - - - how
10 clear is it from the record that he knew his case - -
11 - not Jackson's but his case was pending at the time
12 he put up those Facebook posts in April?

13 MR. BOKELMAN: I believe that the questions
14 were that I asked him that he knew that he was under
15 indictment from this time frame, and he said yes.

16 JUDGE PIGOTT: That - - - that's in his
17 case, right?

18 MR. BOKELMAN: That is in his case.

19 JUDGE PIGOTT: Did - - - in terms of
20 sufficiency, what did you have in your case?

21 MR. BOKELMAN: Sufficiency for his
22 intentions?

23 JUDGE PIGOTT: No, at the end of - - - at
24 the end of the People's case - - -

25 MR. BOKELMAN: Right.

1 JUDGE PIGOTT: - - - there was a motion to
2 dismiss.

3 MR. BOKELMAN: Right.

4 JUDGE PIGOTT: Horton hadn't testified yet.

5 MR. BOKELMAN: Correct.

6 JUDGE PIGOTT: So what were you relying on
7 at that point to - - - to establish your case?

8 MR. BOKELMAN: The content of the Facebook
9 postings, putting not only the verbal content up and
10 the conversations that he participated in over the
11 three-and-a-half to four-day period but the posting
12 of the video and the photograph of the location. And
13 that conversation, in context, I think showed his
14 intention that he was trying - - -

15 JUDGE SMITH: Well, what - - - what proved
16 - - - what proved the existence of an action or
17 proceeding involving - - - involving Horton on your
18 case?

19 MR. BOKELMAN: On our case? That was - - -
20 that was not there.

21 JUDGE SMITH: So do you - - - do you claim
22 that he - - - that the jury could find that he
23 intended physical intimidation, that he intended her
24 to think she was going to get hurt?

25 MR. BOKELMAN: I think that would have been

1 a - - - a reasonable conclusion, but that's not a
2 requirement of the - - - that statute that I'm - - -
3 was questioning about.

4 JUDGE SMITH: Okay, maybe - - - maybe - - -
5 maybe you're right, but assume for the moment that
6 you do have to prove that. You think - - - you say
7 you proved it?

8 MR. BOKELMAN: If I had to prove that
9 element? No, not based on the context of that, no.
10 Because of there was no overt statement by him.
11 There were some things that were nearly adoptive but
12 not quite adoptive admissions in the context of that.

13 JUDGE SMITH: But couldn't - - - couldn't -
14 - - couldn't you say that he must have known
15 perfectly well when he put that - - - put that video
16 up that he was going to get some - - - some of the
17 sort of comments he got?

18 MR. BOKELMAN: Based on the context of the
19 conversation that went on for three days? Yes, he
20 perfectly knew well, because at one point he actually
21 tries to affirmatively back up and say "you're
22 saying" stitches get stitches - - - stitches - - -
23 "snitches get stitches but I'm not meaning that,
24 LOL". So he was clearly aware of the content and
25 what would it then cause, and he was trying to back

1 away from that where there was a record.

2 CHIEF JUDGE LIPPMAN: Is this case based
3 on, really, the power of something like Facebook?
4 It's very unusual and, as you say, not the kind of
5 things that we normally deal with. Is that - - - is
6 that so much a part of what's wrongdoing here that -
7 - - that he recognized the power of this kind of
8 social media?

9 MR. BOKELMAN: I think it was just a - - -
10 a convenient means for him to spread out amongst the
11 community of his friends, her friends, her family the
12 message he was trying to convey.

13 CHIEF JUDGE LIPPMAN: Recognizing - - -
14 recognizing - - -

15 MR. BOKELMAN: Right.

16 CHIEF JUDGE LIPPMAN: - - - what this could
17 do?

18 MR. BOKELMAN: He could have easily put up
19 handbills around the village in town, but that would
20 have taken more time. This was just an easy
21 mechanism - - -

22 JUDGE SMITH: And - - - and you say - - -

23 MR. BOKELMAN: - - - to do it.

24 JUDGE SMITH: But you say that if - - - if
25 his object in doing this is only to embarrass her,

1 there's no plan to make her - - - put her in physical
2 fear, just to embarrass her, you say it's still
3 witness tampering?

4 MR. BOKELMAN: If her - - - if his
5 intention was only to embarrass?

6 JUDGE SMITH: To embarrass her for the
7 purpose of getting her not to testify.

8 MR. BOKELMAN: That would be an attempt to
9 induce someone to not go forward in - - - in a
10 proceeding, so that probably would qualify.

11 JUDGE SMITH: So - - - and - - - and - - -

12 MR. BOKELMAN: I wouldn't like the case,
13 but it would probably qualify.

14 JUDGE SMITH: Take - - - take it - - - take
15 it away from Facebook for a minute. Ordinary case,
16 he knows who the informant is. There's no protective
17 order, nothing prevent - - - he calls her up on the
18 phone and says Amber what you did was a terrible
19 thing. I hate you for that, and you should be
20 ashamed of yourself. When he says that he's hoping
21 that she will change her mind about cooperating with
22 the police; is that - - - was that witness tampering?

23 MR. BOKELMAN: Unless I have something
24 where he has affirmatively said this was my intention
25 when I made that statement, I don't think it is.

1 Because based on the content of that statement
2 communicated privately, I can't prove what his intent
3 was.

4 CHIEF JUDGE LIPPMAN: Okay.

5 MR. BOKELMAN: Thank you very much.

6 CHIEF JUDGE LIPPMAN: Thanks, counselor.

7 Counselor, rebuttal?

8 MR. BLUE: Just briefly, Your Honor.

9 Again, I think that - - - that Judge Smith's analogy,
10 hits on the - - - the main - - - the main problem
11 with - - - with the case. And that - - - that is
12 proving Mr. Horton had the necessary intent or the
13 necessary knowledge.

14 CHIEF JUDGE LIPPMAN: Why can't you infer
15 it from the context of what's gone on and his use of
16 this powerful instrument, Facebook?

17 MR. BLUE: It's - - - it - - - it - - -
18 looking at the - - - the discussion on Facebook as a
19 whole, it's - - - it's - - - it's so innocuous that I
20 don't think it would rise to the level of being
21 overtly intimidating.

22 CHIEF JUDGE LIPPMAN: Even - - - even when
23 - - -

24 JUDGE PIGOTT: Apparently, there's enough
25 for the jury - - -

1 CHIEF JUDGE LIPPMAN: I'm sorry. Go ahead.

2 JUDGE PIGOTT: Yeah, no. Apparently
3 there's enough for the jury to conclude that it was.

4 MR. BLUE: That's true, Your Honor.

5 CHIEF JUDGE LIPPMAN: Also, remember it's
6 linked to the video.

7 MR. BLUE: Yes, but the video - - -

8 CHIEF JUDGE LIPPMAN: Well, that was pretty
9 powerful, the video though, right?

10 JUDGE RIVERA: Well, was - - - was he able
11 to take - - - take down any of the material after
12 there's a response that says snitches get stitches?
13 It seems much more of a physically intimidating
14 response. I know it's not his.

15 MR. BLUE: No.

16 JUDGE RIVERA: Is he - - - is he able to,
17 at that point, remove anything?

18 MR. BLUE: I'm not sure whether he would or
19 not. The evidence in the case doesn't indicate that
20 he was the one who actually posted the video online.
21 So he may not have been able to - - - to take it down
22 at that point.

23 JUDGE PIGOTT: He - - - he - - -

24 JUDGE RIVERA: But other than the video,
25 can he remove anything else that he's already posted?

1 He himself, no?

2 MR. BLUE: He might be able to if he added
3 it.

4 JUDGE RIVERA: Or close it down so that no
5 one else can access it?

6 MR. BLUE: I think he could have. I think
7 he may have been able to edit comments on his - - -
8 on his site. I know that since this case has come up
9 that Facebook itself can edit comments - - -

10 JUDGE RIVERA: Um-hum.

11 MR. BLUE: - - - it thinks are inflammatory
12 or - - - or for some other reason it wants to - - -
13 to remove.

14 CHIEF JUDGE LIPPMAN: Okay, counselor.
15 Thanks. Thank you both. Appreciate it.

16 (Court is adjourned)

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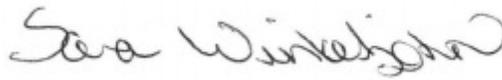
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Thomas Horton v. People, No. 163 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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