NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
IRA NEAL GOLDBERG,	:	
	:	
Appellant	:	No. 781 MDA 2012

Appeal from the Judgment of Sentence entered March 21, 2012
in the Court of Common Pleas of York County,
Criminal Division, at No: CP-67-CR-0004558-2011.

BEFORE: PANELLA, OTT, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: Filed: January 3, 2013

Ira Neal Goldberg (Appellant) appeals from the judgment of sentence entered following his conviction for the crime of terroristic threats.[1] We affirm.

Appellant and his wife (Wife) have been married for over 20 years. At some point prior to June 2011, Wife began undergoing treatment for a pelvic mass that doctors believed might be malignant. Wife was scheduled to have the mass surgically removed on June 16, 2011. The operation was to be performed by Dr. McCormick[2] at York Gynecologic Oncology at the Apple Hill Women's Center.

[1] 18 Pa.C.S. § 2706(a)(3).

[2] For reasons unknown to this Court, nothing in the certified record, including the notes of testimony, references Dr. McCormick's first name.

* Retired Senior Judge assigned to the Superior Court.

On June 14, 2011, two days before the scheduled surgery, the couple received a phone call from Dr. McCormick's office informing them that the surgery was cancelled. The office explained that it is their policy that surgical patients undergo pre-operative testing, including an electrocardiogram (EKG), a chest x-ray, and blood work. If any of these tests yields abnormal results, the patient is advised to see his or her family practitioner before he or she will be cleared for surgery. In this case, Wife's EKG was abnormal and she was instructed that the scheduled surgery would be cancelled to allow her to follow-up with her family doctor who would determine whether she could be medically cleared for surgery.

At approximately, 1:30 p.m., after learning the surgery was cancelled, Appellant telephoned Mr. McCormick's office and spoke with medical assistant April Reisinger (Reisinger). Reisinger testified that Appellant was irate, screaming and cursing. At some point, Appellant told her "[Appellant and Wife] were going to show up [June 16, 2011] for her surgery or Dr. McCormick would be attending his own fucking funeral." N.T., 2/7-8/2012, at 55-56, 62. Reisinger "told him that was considered a threat and [Dr. McCormick's office] could have him arrested for that." ***Id.*** at 56. She further informed him that she was not going to talk to him and he could call back once he had calmed down. ***Id.*** She instructed Appellant to contact Wife's primary care physician who "wanted her to have further cardiac testing before her surgery." ***Id.*** Reisinger reported the incident to her office manager, Karen Snider (Snider).

A few minutes after the first phone call, Appellant called Dr. McCormick's office again. ***Id.*** at 66-67. This time he spoke with office assistant Annette Travis (Travis). In contrast with the previous phone call to Reisinger, Travis described Appellant's voice as "calm." ***Id.*** Appellant told Travis "the phone call has been made, my guns are on order and either [Wife's] surgery will be done or Dr. McCormick will die on Thursday [June 16, 2011]." ***Id.*** Travis testified that she did not get the chance to respond because Appellant immediately disconnected the call. Travis reported the incident to Snider. Snider testified that after Travis reported the second phone call, she contacted York Hospital security and called the police.

At trial, Appellant admitted that he could have possibly made threats during the first phone call, ***id.*** at 109, but denied making any threats during the second phone call. ***Id.*** at 104-105, 107-109. Appellant also testified that he waited until he cooled down for a couple of minutes before making the second phone call.

Based on the above, Appellant was charged with terroristic threats and harassment.[3] On February 8, 2012, following a jury trial, Appellant was found guilty of terroristic threats. On March 21, 2012, Appellant was sentenced to a term of five years' probation and 250 hours of community service. No post-sentence motions were filed. Appellant filed a timely

[3] The charge of harassment was *nolle prossed* prior to trial.

notice of appeal on April 19, 2012. Both Appellant and the trial court complied with Pa.R.A.P. 1925.

Appellant raises three issues on appeal.

> [I.] Whether the Commonwealth presented insufficient evidence to prove beyond a reasonable doubt that Appellant had an intent to terrorize or a reckless disregard of the risk of causing such terror[?]
>
> [II.] Whether the trial court abused its discretion when it denied Appellant's request for a jury instruction on [spur-of-the-moment] threats made out of anger?
>
> [III.] Whether the trial court abused its discretion when it provided a jury instruction on the charge of terroristic threats without the element of public inconvenience[,] thus effectively removing the intent aspect of the crime?

Appellant's Brief at 5 (capitalization omitted, issues renumbered for ease of disposition).

Appellant first challenges the sufficiency of the evidence presented at trial.

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and

> all evidence actually received must be considered. Finally, the [trier] of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Hansley, 24 A.3d 410, 416 (Pa. Super. 2011), *appeal denied*, 32 A.3d 1275 (Pa. 2011) (citation omitted).

Our Crimes Code defines the offense of terroristic threats, in pertinent part, as follows:

> **§ 2706. Terroristic threats**
>
> **(a) Offense defined.—**A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to:
>
> * * *
>
> (3) otherwise cause serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience.

18 Pa.C.S. § 2706(a)(3).

"Neither the ability to carry out the threat, nor a belief by the person threatened that the threat will be carried out, is an element of the offense." ***Commonwealth v. Reynolds***, 835 A.2d 720, 730 (Pa. Super. 2003) (quoting ***In re J.H.***, 797 A.2d 260, 262 (Pa. Super. 2002)).

> Rather, the harm sought to be prevented by the statute is the psychological distress that follows from an invasion of another's sense of personal security. Section 2706 is not meant to penalize mere spur-of-the-moment threats which result from anger. ***In re J.H.***, 797 A.2d at 262-63. ***See also*** [***Commonwealth v. Tizer***, 684 A.2d 597, 600 (Pa. Super. 1996)] (indicating statute is not meant to penalize spur-of-the-moment threats arising out of anger during a dispute); ***Commonwealth v. Anneski***, 362

> Pa.Super. 580, 525 A.2d 373 (1987) (concluding where defendant threatened to retrieve and use gun against her neighbor during argument, in which the neighbor also threatened to run over defendant's children with her car, did not constitute a terroristic threat because circumstances of the exchange suggested spur-of-the-moment threat made during heated exchange and defendant lacked a settled purpose to terrorize her neighbor). **However, [b]eing angry does not render a person incapable of forming the intent to terrorize. [T]his Court must consider the totality of circumstances to determine whether the threat was a result of a heated verbal exchange or confrontation.**

Reynolds, supra at 730 (some internal citations and quotation marks omitted) (emphasis added).

Instantly, Appellant argues that the trial court erred in its determination because "[Appellant's] reasons for calling [Dr. McCormick's office] and making such statements were not for the purposes of terror, but instead to vent his frustrations and demand satisfactory medical care for his wife" and did not cause "a serious public inconvenience" as required by the statute. Appellant's Brief at 15.

We are not persuaded by Appellant's argument. As discussed above, even were we to consider Appellant's comments as those made in the heat of anger, being angry does not render a person incapable of forming the intent to terrorize. ***See Reynolds, supra***. Moreover, Appellant himself testified that he "cooled down" after the first phone call and was calm during the second. N.T., 2/7-8/2012, at 105. This testimony belies Appellant's assertion that he acted out of spur-of-the-moment anger.

Additionally, Appellant's phone calls, the first in particular, caused the staff of Dr. McCormick's office to fear for their personal safety and the safety of the office's patients. N.T., 2/7-8/2012, at 57. Snider, the office manager, testified that she took Appellant's threats seriously. ***Id.*** at 86. As a result, York Hospital security and the police were contacted and an investigation was initiated. ***Id.*** at 91-96. In addition to increasing security at the Apple Hill Center, York Hospital security staff contacted other medical locations Appellant had contact with and warned those offices of the threat. ***Id.*** at 96. Viewed in the light most favorable to the Commonwealth, the evidence is sufficient to prove that Appellant acted with the requisite intent to terrorize and that he caused a public inconvenience. Accordingly, we find that Appellant's first claim is without merit.

Appellant next claims that the trial court erred in denying Appellant's counsel's request to instruct the jury that it cannot convict a defendant of terroristic threats if the threat is made spur-of-the-moment and out of anger. Appellant's Brief at 10. Absent such an instruction, Appellant argues the court provided an inadequate and incomplete portrayal of the law. ***Id.*** at 12. We disagree.

"There is no requirement for the trial judge to instruct the jury pursuant to every request made to the court." ***Commonwealth v. Newman***, 555 A.2d 151, 158-59 (Pa. Super. 1989). "In deciding whether a trial court erred in refusing to give a jury instruction, we must determine

whether the court abused its discretion or committed an error of law." ***Commonwealth v. DeMarco***, 809 A.2d 256, 260-61 (Pa. 2002).

A jury charge is erroneous only if the charge as a whole is inadequate, not clear or has a tendency to mislead or confuse, rather than clarify, a material issue. ***Commonwealth v. Baker***, 963 A.2d 495 (Pa. Super. 2008). A charge is considered adequate unless the jury was palpably misled by what the trial judge said or there is an omission which is tantamount to fundamental error. Consequently, the trial court has wide discretion in fashioning jury instructions. ***Id.*** at 507.

> Error cannot be predicated on isolated excerpts of the charge…it is the general effect of the charge that controls … The trial court may use its own form of expression to explain difficult legal concepts to the jury, as long as the trial court's instruction accurately conveys the law. A verdict will not be set aside if the instructions of the trial court, taken as a whole, and in context, accurately set forth the applicable law.

Commonwealth v. Jones, 858 A.2d 1198, 1200 (Pa. Super. 2004). (internal citations and quotation marks omitted).

Instantly, the trial court instructed the jury, in pertinent part, as follows.

> Terroristic threats. [Appellant] has been charged with the offense of terroristic threats. To find [Appellant] guilty of this offense, you must find that both of the following two elements have been proven beyond a reasonable doubt:
>
> First, that [Appellant] communicated, either directly or indirectly, a threat. The term communicate means conveys in person or by written or electronic means, including telephone, electronic mail, internet, facsimile, telex and similar transactions;

> Second, that [Appellant] communicated the threat to commit any crime of violence, in this case specifically with the intent to terrorize another or with reckless disregard of the risk of causing such terror.
>
> A person acts recklessly when he or she consciously disregards a substantial and unjustifiable risk that such terror or inconvenience will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and intent of the defendant's conduct and the circumstances known to him or her, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the defendant's situation.

N.T., 2/7-8/2012, at 140-141.

Shortly thereafter, defense counsel renewed her objection to the trial court's denial of a "[spur-of-the-moment] anger instruction." ***Id.*** at 144. The court declined counsel's proposed instruction, noting that its instruction is "in accordance with [the] law." ***Id.*** at 147.

The court's refusal to charge the jury on spur-of-the-moment threats made in anger was not prejudicial error in this case. Nor did it make the instructions inadequate. As discussed previously, the facts at issue here do not support Appellant's contention that his exchange with staff at Dr. McCormick's office was made during a heated exchange. While Appellant was certainly angry, his exchanges with Reisinger and Travis could not be considered "heated arguments." The fact remains that Appellant took it upon himself to contact Dr. McCormick's office twice and threaten the doctor's life. That he was angry does not negate his intent, nor does it require additional instruction. Based upon the foregoing, we see no abuse of

discretion in the court's decision to deny Appellant's proposed jury instruction.

Finally, Appellant claims that "the trial court abused its discretion when it provided a jury instruction on the charge of terroristic threats without the element of public inconvenience[,] thus effectively removing the intent aspect of the crime." Appellant's Brief at 5.

We agree with Appellant that the trial court did not instruct the jury that they may find Appellant's conduct "otherwise cause[d] serious public inconvenience, or cause[d] terror, or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience." Pennsylvania Standard Suggested Criminal Jury Instruction 15.2706. However, the relevant portion of the statute states that a person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to:

> (3) otherwise cause serious public inconvenience, **or** cause terror **or** serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience.

18 Pa.C.S. § 2706(a)(3) (emphasis added). While the statute is not a model of clarity, causing a serious public inconvenience is an alternative, not a requirement under subsection (3). Instantly, the court addressed the essential elements of the offense of terroristic threats, including the requirement that the actor communicate a threat with the intent to terrorize

another or a reckless disregard for that risk. Thus, the charge was accurate and not misleading or confusing.

Additionally, we have held that "an instruction shall be given only when either the evidence of record supports the instruction or the instruction is as to a well[-]established principle of law." ***Commonwealth v. Robinson***, 5 A.3d 339, 344 (Pa. Super. 2010) *appeal denied*, 19 A.3d 1051 (Pa. 2011). ***See also Commonwealth v. White***, 415 A.2d 399, 400 (Pa. 1980) ("a trial court should not instruct the jury on legal principles which have no application to the facts presented at trial."). Instantly, there was no evidence supporting a theory that Appellant's actions caused a public inconvenience. Thus, we cannot agree that Appellant was prejudiced by the trial court's failure to instruct the jury on a possibility that does not apply under the facts established at trial. Accordingly, we affirm Appellant's judgment of sentence.

Judgment of sentence affirmed.