

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-119

COMMONWEALTH

vs.

XANDER X., a juvenile.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Commonwealth appeals from an order dismissing a two-count complaint charging the juvenile with disturbing the peace, G. L. c. 272, § 53, and communicating a bomb or hijack threat, G. L. c. 269, § 14 (b). We affirm.

A motion to dismiss a complaint for lack of probable cause "is decided from the four corners of the complaint application, without evidentiary hearing." Commonwealth v. Newton N., 478 Mass. 747, 751 (2018). A motion to dismiss will be allowed if the application does not establish probable cause. Commonwealth v. DiBennadetto, 436 Mass. 310, 313 (2002). "To establish probable cause, the complaint application must set forth 'reasonably trustworthy information sufficient to warrant a reasonable or prudent person in believing that the defendant has committed the offense'" (citation omitted). Newton N., supra.

"Probable cause requires 'more than mere suspicion,' but 'considerably less than proof beyond a reasonable doubt, so evidence that is insufficient to support a guilty verdict might be more than sufficient to establish probable cause'" (citations omitted). Id. We review the judge's probable cause determination de novo and we assess the application in the light most favorable to the Commonwealth. See id.; Commonwealth v. Geordi G., 94 Mass. App. Ct. 82, 85 (2018).

Here, the application was supported by a police report that showed the charges rested on the juvenile's statement during a discussion on gun control in history class on March 2, 2018. Specifically, the juvenile said, "It's a good thing I don't have a gun because half the school would be dead because I fucking hate them." According to students who heard the statement, the juvenile was joking around and laughing when he made it. Nonetheless, against a background that included previous statements in which the juvenile referred to shooting himself and wanting an AK-47, a fellow student was sufficiently alarmed that she reported the comment to her mother, who in turn alerted school officials. Commendably and suitably, school officials took the matter seriously and turned to the local police to investigate. Based on interviews with other students, the police were able to confirm that they, too, heard the juvenile's statement and that it was made in a joking way. Those students

were concerned about whether the juvenile would hurt himself, and one noted that if the juvenile's behavior continued, he would be concerned about whether the juvenile would hurt others.

On appeal, the Commonwealth no longer presses its opposition to the dismissal of the disturbing the peace charge.¹ The Commonwealth does, however, continue to maintain that probable cause existed to charge the juvenile under G. L. c. 269, § 14 (b). The statute "requires that the Commonwealth prove beyond a reasonable doubt (1) that the defendant wilfully communicated, or caused to be communicated, a threat (2) to use or have present (3) one of an enumerated list of dangerous devices, substances, or items capable of causing death, serious bodily injury, or substantial property damage (4) at a place or location." Commonwealth v. Kerns, 449 Mass. 641, 651 (2007). "[T]he Legislature intended to punish the communication of any threat that a deadly, dangerous, or destructive device, substance, or item is or will be present or used at a specified place or location." Id. at 652. Although we acknowledge that the statute does not require "an actual ability or intention to carry out the threat," id. at 651, the threat itself must nonetheless convey that the defendant will use or have present

¹ Although the Commonwealth argued against the dismissal of the disturbing the peace charge in its brief, at oral argument the Commonwealth represented that it no longer challenged the dismissal of that charge. We see no reason to disagree with the Commonwealth's changed position.

one of the enumerated weapons (in this case, a firearm) at the specified place. Here, the juvenile's statement did just the opposite; it made clear that he did not have a gun. The juvenile did not state or suggest that a gun was or would be present at school. Although the juvenile's statement, especially against the backdrop of school shootings in our country and the juvenile's other comments and behavior, was disturbing and alarming, it does not follow that it was a crime to utter it.

Order dismissing delinquency
complaint affirmed.

By the Court (Green, C.J.,
Wolohojian &
Sullivan, JJ.²),

Clerk

Entered: March 17, 2020.

² The panelists are listed in order of seniority.