

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-1339

COMMONWEALTH

vs.

MARK W. THIBEAU.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In the West Roxbury Division of the Boston Municipal Court, the defendant was charged by complaint with witness intimidation in violation of G. L. c. 268, § 13B. After a nonevidentiary hearing, a judge allowed the defendant's motion to dismiss. The Commonwealth filed a timely notice of appeal. We reverse.

We review a judge's ruling to allow a motion to dismiss a complaint for lack of probable cause de novo. Commonwealth v. Humberto H., 466 Mass. 562, 566 (2013). In reviewing a motion to dismiss a complaint, we must decide whether the complaint application contains "sufficient evidence to establish the identity of the accused . . . and probable cause to arrest him." Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982). A motion to dismiss a complaint "is decided from the four corners of the complaint application, without evidentiary hearing,"

Commonwealth v. Huggins, 84 Mass. App. Ct. 107, 111 (2013), quoting Commonwealth v. Bell, 83 Mass. App. Ct. 61, 62 (2013), viewing the evidence presented in the application and the reasonable inferences therefrom in the light most favorable to the Commonwealth. See Commonwealth v. Rex, 469 Mass. 36, 41 (2014); Commonwealth v. Washington W., 462 Mass. 204, 210 (2012).

Here, the judge dismissed the case on the basis that the complaint did not establish probable cause that the defendant committed witness intimidation because the defendant's comment, "You snitches, why don't you fight fair and square with my friend Manuel [Reynoso] one on one," was separate and distinct from his picking up a tree branch and hitting Frank Chaparro. The judge further held that the complaint could not stand because the clerk's hearing in Reynoso's underlying case had only been scheduled but had not yet taken place. Neither of these was a valid basis to dismiss the complaint.

"[T]o convict a defendant of witness intimidation . . . the Commonwealth must prove that (1) a possible criminal violation occurred that would trigger a criminal investigation or proceeding; (2) the victim would likely be a witness or potential witness in that investigation or proceeding [or was a family member of such]; (3) the defendant engaged in intimidating behavior, as defined in the statute, toward the victim [or victim's family member]; and (4) the defendant did so with the intent to impede or interfere with the investigation or proceeding, or in reckless disregard of the impact his conduct would have in impeding or interfering with that investigation or proceeding."

Commonwealth v. Fragata, 480 Mass. 121, 122 (2018).

Here, the police reports submitted with the application for complaint provided ample probable cause to believe that the defendant had engaged in witness intimidation. According to the police report, Reynoso had committed an assault and battery on Daniel Chaparro, and that the matter was scheduled for a show cause hearing before a clerk-magistrate. In anticipation of that hearing, the defendant approached Daniel Chaparro and Daniel's brother and family member Frank, called them "snitches" and invited them to fight with Reynoso, the putative defendant in the pending clerk's hearing. When they declined the invitation, the defendant picked up a tree branch and beat Frank with it.

Viewed in the light most favorable to the Commonwealth, the defendant's comment "you snitches" supports that he knew that at least Daniel Chaparro would likely be a witness in a clerk's proceeding against Reynoso. This satisfies the second element of the crime and the "purpose of the statute . . . to deter interference with future communication of information."

Commonwealth v. King, 69 Mass. App. Ct. 113, 122 (2007).

Instead of applying the correct standard, the judge improperly parsed and interpreted the defendant's comment "why don't you fight fair and square with my friend Manuel, one on one" that followed on the heels of "you snitches," as only meaning that

the defendant thought the earlier encounter between Chaparro and Reynoso had not been fair.¹ The judge also believed the defendant's statements to the Chaparros was not connected to the defendant beating Frank with the tree branch. However, when the words and conduct are viewed in the light most favorable to the Commonwealth, the defendant's statements indicate that he wanted to discourage the victims from making use of the available legal process, and he wanted them to settle any disagreement with Reynoso one on one.

The defendant further emphasized to the victims what could happen to them if they pursued the legal case against Reynoso by repeatedly beating Frank Chaparro with a tree branch in the presence of Daniel, a witness in the impending show cause hearing. When all these facts are viewed through the proper lens, they amply support a conclusion that there was probable cause to believe the defendant had committed the crime of witness intimidation.

The judge's second justification for the dismissal failed to appreciate the breadth of G. L. c. 268, § 13B. See Commonwealth v. Morse, 468 Mass. 360, 367 (2014) (noting that § 13B is "[o]ne of the broader statutes in the category of

¹ The judge also improperly characterized the defendant's threat as merely "angry speech" protected by the First Amendment. See O'Brien v. Borowski, 461 Mass. 415, 422 (2012) ("fighting words" and "true threats" are not protected by First Amendment).

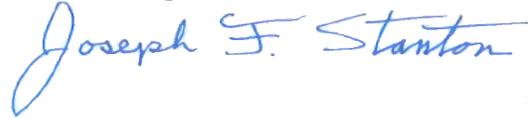
'crimes against public justice'). The judge mistakenly believed that the intimidation complaint could not stand because the clerk's hearing in Reynoso's underlying case had only been scheduled but had not yet taken place.² However, the witness intimidation statute does not require a pending criminal action on which process has issued. See Fragata, 480 Mass. at 125 (witness intimidation statute "does not require proof that an actual crime was committed before the act of intimidation"). Rather, § 13B is designed to protect victims of the intimidation who are "a witness or potential witness at any stage of a criminal investigation, . . . or other criminal proceeding." Id. at 124-125. The Supreme Judicial Court has previously observed that a "'criminal proceeding' within the meaning of § 13B . . . commences on the investigation of a possible criminal violation" -- not an actual crime. Commonwealth v. Figueroa, 464 Mass. 365, 371 (2013). The fact that the case

² Defense counsel on appeal admirably conceded that the judge's second justification for the dismissal was improper.

had only been scheduled for a clerk's hearing was not a proper basis for dismissal.

Judgment reversed.

By the Court (Vuono, Meade & Wolohojian, JJ.³),



Clerk

Entered: June 25, 2020.

³ The panelists are listed in order of seniority.