

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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

24-P-1456

COMMONWEALTH

vs.

ANTONIO P. CANDELLO.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was convicted after a jury trial of violation of an abuse prevention order, see G. L. c. 209A, § 7, and of intimidation of a witness, see G. L. c. 268, § 13B. The defendant raises no claims with respect to the charge of violation of an abuse prevention order but only as to the intimidation of a witness charge. His claims were not raised below. Consequently, we review them only to determine if there was error, and if so, whether it created a substantial risk of a miscarriage of justice.

Background. Viewing the facts in the light most favorable to the Commonwealth, as we must, see Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), the jury could have found the

following facts. On August 2, 2022, the defendant was delivered in hand, by a process server, a copy of an abuse prevention order obtained by the victim in this case. He signed the order, and the process server went over the provisions of the order with him. The terms of the order included that the defendant stay at least fifty yards away from the victim's residence and have no contact with the victim.

Two days before a hearing on the order, on September 18, 2022, David Schmidt, a friend and former employer of the defendant, offered to drop off groceries at the victim's house after the defendant cried and said he was upset that he had not seen the children he has with the victim, and that he did not think they were eating well.

Schmidt dropped the defendant off at a spot fifteen hundred yards north of the victim's home. Schmidt was aware of the order and its terms and that it was in effect. Schmidt had previously sent a text message to the victim, advocating that she modify the order so the defendant could see their children and come to the victim's house when the victim was not there.

The victim was mowing the lawn at her house when Schmidt pulled up and walked towards her with a bag of groceries. The defendant called out to the victim from a tree fort near the property, approximately one hundred and fifty to two hundred

feet from the house, and seventy-five to one hundred feet from the driveway. He then slid down a hillside and came onto the property.

The victim heard the defendant's voice come closer and then she saw him. He said that he wanted to talk with her. He said he wanted to talk and get back into the house. She said, "No," and backed away. The defendant became tearful, and the victim gave him a hug. The defendant whispered in her ear that she was sleeping with a jail guard.

At about this time, a police sergeant on patrol noticed an unfamiliar car at the base of the driveway of the residence. The sergeant pulled up behind the unfamiliar car and then talked with Schmidt. The victim joined them. The sergeant asked her if everything was okay. She was nervous because Schmidt was standing right behind her, and therefore she did not tell the sergeant that the defendant was on the property. Schmidt said that the victim needed to go into the house to feed her children. After the sergeant departed, the victim took the food inside the house and had no further interaction with the defendant.

Discussion. On appeal, the defendant raises three constitutional issues. None of these were raised before the trial court. We therefore review them to determine only if

there was error and if so, whether it created a substantial risk of a miscarriage of justice. See Commonwealth v. Francis, 485 Mass. 86, 106 (2020).

1. Recklessness standard. The defendant argues first that the recklessness standard contained within the witness intimidation statute, G. L. c. 268, § 13B, violates the First Amendment to the United States Constitution. Section 13B provides criminal punishment for anyone who

"willfully, either directly or indirectly: (i) threatens, attempts or causes physical, emotional or economic injury or property damage to; (ii) conveys a gift, offer or promise of anything of value to; or (iii) misleads, intimidates or harasses another person who is a [witness] . . . with the intent to or with reckless disregard for the fact that it may . . . impede, obstruct, delay, prevent or otherwise interfere with [a proceeding]. . . ."

The premise of the defendant's argument is that none of the conduct described, though conveyed through words (e.g., threatening, misleading, intimidating, harassing, etc.), is protected speech, and that it is permissible to criminalize it so long as the person who engages in it has the intent to impede, interfere, etc., with a proceeding.¹ He argues, however,

¹ Because the defendant does not argue that the statute criminalizes any protected speech, we need not decide the question. We note that in a recent case, the United States District Court for the District of Massachusetts concluded that the statute does cover protected speech, but that it is narrowly tailored to serve a compelling governmental interest. See O'Neil v. Canton Police Dep't, 761 F. Supp. 3d 299, 306-307 (D. Mass. 2024).

that if this speech is undertaken with only a reckless disregard for whether it would impede, interfere, etc., with a proceeding, it may not be criminalized.

In Counterman v. Coleman, 600 U.S. 66 (2023), the United States Supreme Court considered what level of intent was required to prosecute someone for true threats. The Court recognized that whether something is a threat refers to how it is taken by the listener. The question that was asked was whether the threats had to be intentional or knowing, in order to be proscribable, or whether a speaker could be prosecuted for them if he or she was aware that others could regard his statements as threatening violence, but delivered them anyway, that is if they were made recklessly. See id. at 79.

The Court held that indeed, true threats that are delivered recklessly are actionable criminally. By contrast, it noted that the Court's decisions with respect to incitement require more. There must be specific intent, which the Court concluded was equivalent to purpose or knowledge.

Recognizing that the purpose of placing limitations on the intent with which this speech may be prohibited is to give breathing space and avoid chilling protected speech -- after all, true threats and all incitement are outside the protection of the First Amendment -- the Court explained that in the case

of incitement, what is prohibited is but a "hair's-breadth" away from protected political speech. Counterterm, 600 U.S. at 81. The rule prohibiting punishment for reckless incitement, the Court explained, is "a way to ensure that efforts to prosecute incitement would not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core." Id. By contrast, what is a hair's breadth away from true threats, "is neither so central to the theory of the First Amendment nor so vulnerable to government prosecutions." Id.

The premise of the defendant's argument in this case, again, is that all of the speech prohibited by the witness intimidation statute is not protected by the First Amendment. Accepting that as true, we are not persuaded that any of these things edges on protected speech in the way that incitement was said to. These are far more like threats. Indeed, threatening is one of the things that is listed among the speech that may amount to witness intimidation. Threats, attempts to cause physical harm, emotional or economic injury or property damage, misleading, intimidating or harassing -- none of these are just a hair's breadth away from advocacy.

The defendant argues that in fact, there is protected speech right on the other side of the line. But the examples he

gives are not on the other side of the line at all. He describes cases in which the motive for the conduct is that justice be done. For example, he describes a hypothetical in which the prohibited speech is designed to persuade a witness to recant a false allegation. Its purpose, the defendant says, is justice. But a threat made with reckless disregard of the fact that it may intimidate a witness is not made lawful because the witness is lying, any more than a threat to use violence if someone fails to give one a piece of property is not excused from criminal prosecution if the one doing the threatening is the property's rightful owner.

We are unpersuaded by the defendant's primary argument.

2. Substantial overbreadth. The defendant's second argument is that the statute is substantially overbroad. Under overbreadth doctrine of course, if a law that can be constitutionally applied to a defendant is substantially overbroad and prohibits a substantial amount of protected speech, even though his own speech was unprotected, that defendant may seek to have the statute invalidated on First Amendment grounds. See, e.g., Commonwealth v. Jones, 471 Mass. 138, 142 (2015).

The defendant's argument fails in this case, however, because he has not identified the substantial amount of speech

that is covered. Again, he talks about laudable motives for engaging in this prohibited speech, such as threats, that he has posited is unprotected. But, to give a clear example, harassment intended to interfere with a proceeding does not have, as the defendant argues, "an additional legitimate and protected purpose" because the victim's allegations may be false.

Indeed, this can be seen in the fact that the defendant uses his own case as an example, "Here for example," the defendant writes, "the evidence indicated that Candello's intent was to advocate for reunification with his wife and his family. Section 13B, however, does not account for the fact that Candello's communication had a lawful and protected purpose."

Threatening someone, for example, by claiming knowledge of their sexual relationship with a third party, is not a lawful way "to advocate for reunification" with that person and her family. To the extent, if any, that the defendant intends to argue that the protected speech that is prohibited by § 13B includes, "[e]ncouraging a witness to recant false testimony, urging a prosecutor to drop politically motivated charges, or exposing judicial misconduct," none of those things is prohibited at all. They do not involve any of the speech that

is prohibited, threats, harassment, misleading, intimidating, and so forth.

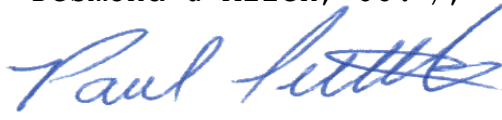
3. Vagueness. Finally, the defendant argues that the emotional injury provision and the intimidation provision are facially invalid because they are void for vagueness. The defendant argues that with respect to emotional injury, different peoples' thresholds for injury and emotional vulnerabilities differ and therefore, it is vague. With respect to intimidation, he argues that the intimidation provision might depend on idiosyncrasies of the victim.

Even if these phrases had ambiguous outer edges, something we need not decide, there is no substantial risk of a miscarriage of justice here, because the defendant's conduct, coming onto the victim's property in violation of an abuse prevention order, telling her that he wanted to get "back in the house" and that he knew she was sleeping with a jail guard, all while his friend, who had already told her to amend the order, was standing by, is not borderline conduct. Objectively viewed, such conduct could intimidate and cause emotional harm to a reasonable person. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of

the law as applied to the conduct of others." Hoffman Estates
v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982).²

Judgments affirmed.

By the Court (Rubin,
Desmond & Allen, JJ.³),


Clerk

Entered: September 22, 2026.

² As our conclusion above about the threatening conduct here makes clear, the defendant's final argument, that the evidence was insufficient to establish his guilt, is without merit.

³ The panelists are listed in order of seniority.