

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

BOSTON MUNICIPAL COURT  
DOCKET NO. 2107CR003064

COMMONWEALTH OF MASSACHUSETTS

v.

JOAO G. DEPINA

COMMONWEALTH'S OPPOSITION TO THE  
DEFENDANT'S MOTION TO DISMISS

The Commonwealth of Massachusetts does hereby oppose the defendant's motion to dismiss. As grounds therefor, the Commonwealth states that there was sufficient evidence presented to the clerk-magistrate to establish probable cause to believe that the defendant committed the crime of intimidation of a witness.

**Prior Proceedings**

On November 12, 2021, a complaint charging the defendant with intimidation of a witness, G.L. c. 268, § 13B, was issued by this Court. On January 6, 2022, the defendant filed a motion to dismiss. A hearing on the defendant's motion to dismiss is scheduled for March 31, 2022.

**Facts**<sup>1</sup>

On November 9, 2021, around 6:10 p.m., then-Suffolk County District Attorney Rachel Rollins<sup>2</sup> ("D.A. Rollins") was holding a press conference at Ferndale Street and Norfolk Street, regarding a shooting incident that had occurred earlier that day. The area had been cordoned off for the press to assemble. As D.A. Rollins began making her statement, the defendant began to

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<sup>1</sup> The Commonwealth's statement of facts is based upon the statement of facts filed in support of the application for criminal complaint, which the Commonwealth has attached as Comm. Exhibit A.

<sup>2</sup> Rachel Rollins is currently the United States Attorney for the District of Massachusetts.

“loudly heck[le] her” and “mak[e] multiple offensive comments of a personal nature directly at her.” Indeed, the defendant repeatedly invoked her name. The defendant, at the time, had three separate and open cases pending in District Court which were being prosecuted by the Suffolk County District Attorney’s Office, of which D.A. Rollins was then in charge. One of the defendant’s cases had an upcoming pretrial court date on November 16, 2021. The defendant’s comments “appeared as an intent to [a]ffect or interfere with these pending Suffolk County cases.” The defendant “made several indirect references to these cases during his verbal offensive.”

Boston Police Detective Dante Williams and Detective Jeffrey Cecil were in close proximity to both D.A. Rollins and the defendant and witnessed this incident. The defendant recorded this incident and uploaded the recording to his Facebook account. Detective Williams was able to obtain a copy of this recording. The defendant has “made multiple attempts to contact” D.A. Rollins to “talk directly” about his pending cases but has been unsuccessful. This incident “appears to be an escalation” from a prior incident at the Caribbean Festival on August 2, 2021. The defendant’s behavior immediately ceased once D.A. Rollins finished her statement and stepped away from the press.

### Argument

**This Court should deny the defendant’s motion to dismiss, where there was sufficient evidence presented to the clerk-magistrate to establish probable cause to believe that the defendant committed the crime of intimidation of a witness.**

A complaint cannot be issued unless there has been a determination of probable cause to believe that a crime was committed and that it was committed by the defendant. *Commonwealth v. Valchuis*, 40 Mass. App. Ct. 556, 560 (1996). A motion to dismiss a complaint may be appropriate if the complaint is not supported by probable cause. *Commonwealth v. DiBennadetto*, 436 Mass. 310, 313 (2002). “A motion to dismiss for lack of probable cause is evaluated from the

four corners of the application for a complaint.” *Commonwealth v. Richardson*, 479 Mass. 344, 352 (2018). “The complaint application must allege facts sufficient to establish probable cause as to each element of the offense charged.” *Commonwealth v. Ilya I.*, 470 Mass. 625, 627 (2015). “The probable cause standard on a motion to dismiss a complaint is identical to that applied in the analysis of a motion to dismiss an indictment for lack of probable cause.” *Id.*

“In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Commonwealth v. Cullen*, 62 Mass. App. Ct. 390, 402 (2004) (citation omitted), *rev. denied*, 443 Mass. 1103 (2005). “[P]robable cause requires considerably less evidence than that which is required to support a finding of guilty.” *Commonwealth v. Goldstein*, 54 Mass. App. Ct. 863, 866 (2002).

Circumstantial evidence, which “is competent to establish guilt beyond a reasonable doubt,” *Commonwealth v. Gilbert*, 423 Mass. 863, 868 (1996), may certainly establish probable cause. *See Commonwealth v. Torres*, 442 Mass. 554, 563 (2004) (“The evidence, although entirely circumstantial, was sufficient to support” the conviction); *Commonwealth v. Guerrero*, 32 Mass. App. Ct. 263, 266 (1992) (“web of circumstantial evidence” supported conviction). “An inference drawn from circumstantial evidence need only be reasonable and possible; it need not be necessary or inescapable.” *Gilbert*, 423 Mass. at 868 (citation omitted). “Whether an inference is warranted or is impermissibly remote must be determined, not by hard and fast rules of law, but by experience and common sense.” *Commonwealth v. Gonzalez*, 452 Mass. 142, 146 (2008) (citation omitted). The evidence alleged, and reasonable inferences therefrom, must be “viewed in the light most favorable to the Commonwealth.” *Commonwealth v. Rodriguez*, 75 Mass. App. Ct. 235, 238 (2009) (citation omitted).

The defendant claims that there was insufficient evidence presented to establish probable cause to believe that he committed the offense of intimidation of a witness. Because there was sufficient evidence presented to support a finding of probable cause for the charge, this Court should deny the defendant's motion to dismiss.

In the relevant context, a person commits the crime of intimidation of a witness when he "willfully, either directly or indirectly ... intimidates or harasses another person who is a[n] ... attorney... with the intent to or with reckless disregard for the fact that it may; (1) impede, obstruct, delay, prevent or otherwise interfere with: a criminal investigation at any stage, a grand jury proceeding, a dangerousness hearing, a motion hearing, a trial or other criminal proceeding of any type...." G.L. c. 268, § 13B; *Commonwealth v. Carvalho*, 88 Mass. App. Ct. 840, 845 (2016) (in order to establish intimidation of a witness, the Commonwealth is required to prove that the defendant, either directly or indirectly, made a willful effort to intimidate or harass another person who is an attorney at any stage of a criminal investigation or proceeding). The term "harass" shall mean "to engage in an act directed at a specific person or group of persons that seriously alarms or annoys such person or group of persons and would cause a reasonable person or group of persons to suffer substantial emotional distress." G.L. c. 268, § 13B. "Intimidation is putting a person in fear for the purpose of influencing his or her conduct." *Commonwealth v. McCreary*, 45 Mass. App. Ct. 797, 799 (1998).

"Words do not need to be expressly intimidating, threatening, or harassing" to fall within the meaning of intimidation. *Hrycenko v. Commonwealth*, 459 Mass. 503, 511 (2011). "The assessment whether the defendant made a threat is not confined to a technical analysis of the precise words uttered[;] ... the jury may consider the context in which the allegedly threatening statement was made and all of the surrounding circumstances." *Carvalho*, 88 Mass. App. Ct. at

845-46 (citations omitted). “The Commonwealth does not need to prove that the victim of witness intimidation was actually intimidated or frightened.” *Commonwealth v. Nordstrom*, 100 Mass. App. Ct. 493, \_\_\_, 179 N.E.3d 593, 602 (2021). “An action does not need to be overtly threatening to fall within the meaning of ‘intimidation.’” *Commonwealth v. Casiano*, 70 Mass. App. Ct. 705, 708 (2007).

Here, during a press conference, the defendant was heckling and making numerous offensive comments of a personal nature towards D.A. Rollins. At the time, D.A. Rollins’s office was prosecuting the defendant on three separate cases. As alleged in the complaint, during his verbal barrage, the defendant made indirect references to these cases and his comments demonstrated an intent to interfere with or affect these upcoming cases. Finally, the defendant has repeatedly attempted to contact D.A. Rollins to discuss his cases and this incident was an escalation of a prior incident in August. Taking these facts together, there was sufficient evidence presented to establish probable cause to charge the defendant. *See Carvalho*, 88 Mass. App. Ct. at 347 (defendant landlord’s approaching tenant victim, after victim obtained a harassment prevention order, and asking her if she “feel(s) good about yourself,” was sufficient to sustain defendant’s witness intimidation conviction); *Commonwealth v. Rivera*, 76 Mass. App. Ct. 530, 531 (2010) (intimidation of witness where defendant yelled at victim, who was about to be questioned by police, “we were just joking around right”); *Hrycenko*, 459 Mass. at 505-10 (defendant’s sending letter to judge’s home after judge had sentenced defendant, referencing his long criminal record and knowing the judge’s address and asking judge to reconsider sentence, constituted intimidation of a witness).

Moreover, in arguing that there was insufficient evidence to sustain the charge, the defendant refers to facts outside the complaint, including newspaper articles and a transcript of the

defendant's recording. A motion to dismiss a complaint, however, "is decided from the four corners of the complaint application, without evidentiary hearing." *Commonwealth v. Humberto H.*, 466 Mass. 562, 565 (2013) (citations omitted). "A motion to dismiss a complaint, in which the defendant challenges whether the charge is supported by probable cause, is a very limited remedy analogous to a postindictment [*McCarthy*] motion to dismiss." *Commonwealth v. Huggins*, 84 Mass. App. Ct. 107, 111 (2013). Thus, this Court is limited to the facts outlined in the complaint when deciding the defendant's motion. As argued above, there was sufficient evidence presented therein to charge the defendant.

The defendant, nevertheless, argues that the comments he made at the press conference are protected free speech under the First Amendment, and, as such, cannot constitute a crime.

"While most speech is protected from government regulation by the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights, ... there are 'certain well-defined and narrowly limited classes of speech' that are not protected because they are 'no essential part of any exposition of ideas, and are of such slight social value as a step to truth' that whatever meager benefit that may be derived from them is 'clearly outweighed' by the dangers they pose."

*O'Brien v. Borowski*, 461 Mass. 415, 422 (2012) (citations omitted). Among these well-defined and narrowly limited classes of speech are "fighting words" and "true threats." *Id.* True threats have been defined as the following:

those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.... The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'

*Commonwealth v. Walters*, 472 Mass. 680, 690-91 (2016) (citations omitted). A true threat "need not take the form of an explicit statement that the speaker intends to cause imminent, physical harm to the victim, but may comprise 'words or actions that—taking into account the context in

which they arise—cause the victim to fear such harm now or in the future.’” *Id.* at 691 (citations omitted). “The term ‘true threat’ has been adopted to help distinguish between words that literally threaten but have an expressive purpose such as political hyperbole, and words that are intended to place the target of the threat in fear, whether the threat is veiled or explicit.” *Commonwealth v. Chou*, 433 Mass. 229, 236 (2001). Fighting words are “limited to words that are likely to provoke a fight: face-to-face personal insults that are so personally abusive that they are plainly likely to provoke a violent reaction and cause a breach of the peace.” *O’Brien*, 461 Mass. at 423. “In considering the First Amendment’s protective reach, ‘critical’ to the examination is the context and content of the speech at issue. *Commonwealth v. Bigelow*, 475 Mass. 554, 562 (2016). “The regulation of threatening speech has been held not to violate the First Amendment where the speech harasses or is a ‘true threat.’” *Chou*, 433 Mass. at 236.

In the present case, the defendant’s speech was neither lawful nor protected. The purpose of the defendant’s comments was to harass D.A. Rollins and attempt to intimidate her so that her office would address his current cases in a different manner. The offense of intimidation of a witness exists to protect the integrity of court proceedings, among other reasons (*Rivera*, 76 Mass. App. Ct. at 532-35), and the defendant does not have a protected right to use speech to interfere with a court proceeding. Thus, the defendant’s comments are not protected by the First Amendment. *See Commonwealth v. Johnson*, 470 Mass. 300, 309-10 (2014) (where the sole purpose of defendants’ speech was to harass victims and where speech was integral to criminal conduct, such speech is not protected by First Amendment); *Chou*, 433 Mass. at 235-37 (defendant producing and putting up numerous missing persons flyers about his ex-girlfriend/victim, where flyers contained identifying information and sexually explicit language, did not constitute protected free speech). Moreover, the issue of whether the defendant’s comments constitute

constitutional protected speech or “whether the speech fits within a category of unprotected speech constitutes a question of fact for the fact finder to decide” with the appropriate jury instructions. *Bigelow*, 475 Mass. at 571-72.

**Conclusion**

Based upon the foregoing, this Court should deny the defendant’s motion to dismiss.

Respectfully submitted,  
For the Commonwealth

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document was served upon Marc J. Randazza, Esquire, electronically at [ecf@randazza.com](mailto:ecf@randazza.com), on March 22, 2022.

  
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Anthony H. Melia