IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 824-CR-2016
	:	
ANDREA MAZZELLA,	:	
	:	
Defendant	:	

Joseph D. Perilli, Esquire — Counsel for the Commonwealth
Assistant District Attorney

Matthew J. Mottola, Esquire — Counsel for Defendant
Assistant Public Defender

MEMORANDUM OPINION

Serfass, J. – February 12, 2018

Andrea Mazzella (hereinafter "Defendant") brings before this Court a "Post-Sentence Motion" seeking entry of a judgment of acquittal on the charge of Terroristic Threats and a new trial on all other counts. For the reasons set forth hereinafter, we will deny the aforesaid motion.

FACTUAL AND PROCEDURAL BACKGROUND

On June 9, 2016, Pennsylvania State Police Trooper Marvin Shair was dispatched to 65 Autumn Lane, Penn Forest Township, Carbon County, Pennsylvania, in response to a reported protection from abuse ("PFA") order violation. There were no persons at the aforesaid residence when Trooper Shair arrived. He informed the dispatcher that there was no one at the residence, and the dispatcher told the complainant, Ida Mazzella, to return to the residence. Mrs. Mazzella then returned to

the residence and stated to Trooper Shair that her husband, the defendant, Andrea Mazzella, had stopped by the house earlier in violation of a PFA order entered against him by this Court. While the two were talking, Mrs. Mazzella observed a motorcycle drive past the residence. She was able to identify the driver as Defendant because he was not wearing a helmet. Trooper Shair promptly left Mrs. Mazzella and followed the motorcycle in his patrol vehicle. He found the motorcycle nearby at 169 Yellow Run Road. Trooper Shair checked the motorcycle's registration and determined that Defendant was the registered owner. He then received a second dispatch informing him that Mrs. Mazzella had called stating that Defendant was again at the residence. Trooper Shair left the motorcycle and returned to the residence where he found Defendant lying in the driveway.

Trooper Shair spoke with Defendant and observed bloodshot eyes, slurred speech, and the strong odor of alcohol emanating from Defendant's facial area. Defendant stated that he understood he was not supposed to be at the residence due to the PFA order. Trooper Shair asked Defendant to submit to standardized field sobriety testing, but Defendant refused. Trooper Shair then arrested Defendant. After he was placed in handcuffs, Defendant stated he would submit to a breath test. However, when given the breath test, Defendant was not cooperative. As a result, Trooper Shair placed Defendant in the patrol vehicle and transported him to Gnaden Huetten Memorial Hospital for a blood test. Defendant was read the DL-26 form and consented to the blood draw. En route to the hospital, Defendant

threatened to kill Trooper Shair and the trooper's family. These threats continued for hours throughout the night at the hospital and, later, at the Lehighton State Police Barracks. Moreover, Defendant threatened to blow up the barracks.

Defendant was charged with DUI: General Impairment/Incapable of Safe Driving – 1st Offense (M), 75 Pa. C.S.A. § 3802(a)(1), Terroristic Threats with Intent to Terrorize Another (M), 18 Pa. C.S.A. § 2706(a)(1), Harassment – Communicate Lewd, Threatening Language (M), 18 Pa. C.S.A. § 2709(a)(4), Public Drunkenness and Similar Misconduct (S), 18 Pa. C.S.A. § 5505, and Careless Driving (S), 75 Pa. C.S.A. § 3714(a).

On May 30, 2017, the parties filed a stipulation to suppress the blood drawn and the related toxicology report. This Court approved the stipulation via suppression order dated May 31, 2017.

On June 5, 2017, defense counsel filed "Defendant's Suggested Charge for Terroristic Threats" averring that the standard jury instruction did not adequately address the element of intent. This Court denied Defendant's suggested charge and retained the standard instruction.

A jury trial was held before the undersigned on June 6, 2017. On that same date, the jury returned its verdict. Defendant was found not guilty of DUI but guilty of Terroristic Threats and Harassment. Additionally, this Court found Defendant guilty of the two summary offenses, Public Drunkenness and Careless Driving.

On September 5, 2017, this Court sentenced Defendant to an aggregate period of incarceration in the Carbon County Correctional Facility of not less than six (6) months nor more than two (2) years less one (1) day. On September 15, 2017, Defendant timely filed the post-sentence motion now before us. In his motion, Defendant asks this Court to enter a judgment of acquittal on the charge of Terroristic Threats, and he requests a new trial on all other charges. On November 29, 2017, this Court granted Defendant's oral motion on the record for a thirty (30) day extension of time for this Court to render a decision on the post-sentence motion pursuant to Pa. R.Crim.P. 720(B)(3)(b). Oral argument on the post-sentence motion was held on January 29, 2018.

DISCUSSION

In his post-sentence motion, Defendant raises the following three (3) issues: 1) Whether there was sufficient evidence of intent to terrorize to sustain a conviction for terroristic threats; 2) Whether this Court erred by requiring Defendant to answer the Commonwealth's question regarding whether Mrs. Mazzella and Trooper Shair were lying; and 3) Whether this Court erred in not instructing the jury that Pennsylvania courts have held a defendant lacks intent to terrorize when the threat is spur-of-the-moment, resulting from transitory anger.

I. The evidence was sufficient to establish Defendant's intent to terrorize

Defendant claims that the Commonwealth failed to establish beyond a reasonable doubt that Defendant made the threats against Trooper Shair with intent to terrorize because Defendant claims that these statements were made in the spur-of-the-moment, as a result of transient anger. We disagree.

The elements necessary to establish a violation of the terroristic threats statute, 18 Pa. C.S.A. § 2706(a)(1), are (1) a threat to commit a crime of violence and (2) that the threat was communicated with the intent to terrorize. Defendant has conceded that he did threaten to commit crimes of violence.

The issue before us is whether the Commonwealth presented sufficient evidence to establish the requisite *mens rea*, not whether the defendant made the statements in the context of a heated discussion, because being angry does not render one incapable of forming the intent to terrorize. Commonwealth v. Walls, 144 A.3d 926, 936 (Pa.Super. 2016). We must consider the totality of the circumstances in making this determination. *Id.*

When two parties have an unplanned, heated confrontation, a threat made during the confrontation is often spur-of-the-moment in a period of transitory anger, and Pennsylvania courts have held that such threats are insufficient to find a defendant guilty of terroristic threats. *Id.* at 937.

Defendant maintains that his threats fit within this category. However, there are several material factual differences which show that the Commonwealth has provided sufficient evidence to prove intent

to terrorize. The cases in which our courts have found insufficient evidence of intent to terrorize generally involve chance encounters between persons who know each other, which result in an argument and culminate in a threat, or arguments between persons during which threats are made by each party. *See* Commonwealth v. Sullivan, 409 A.2d 888 (Pa.Super. 1979); Commonwealth v. Reynolds, 835 A.2d 720, 730 (Pa.Super. 2003). There was no argument in this case. Defendant was arrested by Trooper Shair without much incident. Defendant began threatening the trooper some time later without provocation. Defendant's threats, while the result of anger, cannot be described as transitory. Defendant made repeated, specific threats against Trooper Shair, his family, and the Pennsylvania State Police barracks at which he works. These threats continued throughout the night from the transport, to the hospital, to the barracks several hours later. Therefore, Defendant's anger was not spur-of-the-moment, and the Commonwealth has presented evidence sufficient to establish Defendant's intent to terrorize.

II. While this Court may have erred in overruling Defendant's objection to the Commonwealth's question regarding whether Mrs. Mazzella and Trooper Shair were lying, any error was harmless beyond a reasonable doubt

Defendant argues that this Court erred when we overruled defense counsel's objection and required Defendant to answer the Commonwealth's question about whether Trooper Shair and Mrs. Mazzella had lied during their testimony. Defendant claims that requiring

Defendant to answer this question alienated Defendant from the jury and made him appear antagonistic and accusatory. While the Court may have erred in requiring Defendant to answer this question, we find that any error was harmless.

The Superior Court has held that "were they lying" questions are generally prohibited in Pennsylvania. Commonwealth v. Yockey, 158 A.3d 1246, 1256 (Pa.Super. 2017)(citing the Supreme Court of Colorado's explanation that such questions are argumentative, offer little to no probative value, ignore alternative explanations that do not involve lying, and infringe upon the province of the fact-finder). However, an erroneous ruling on an evidentiary issue does not require a new trial where the error was harmless. *Id.* at 1254.

> Harmless error exists where: (1) the error did not prejudice the defendant or the prejudice was de minimis; (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Id. (quoting Commonwealth v. Chmiel, 889 A.2d 501, 521 (Pa. 2005)).

In this case, Defendant was asked whether Mrs. Mazzella had lied when she testified that she observed his motorcycle at Dom N Ali's restaurant on her way home and whether Trooper Shair had lied when he testified that Defendant told him that he had been drinking at Dom N Ali's. Any error in allowing the assistant district attorney to ask those questions either did not prejudice Defendant or the prejudice was de minimis beyond a reasonable doubt. Both of the

questions were related to the DUI charge against Defendant. Namely, whether Defendant had been drinking at Dom N Ali's just before his drive-by encounter with Mrs. Mazzella and Trooper Shair. Because the jury found Defendant not guilty of DUI, no prejudice resulted from any error as to that offense.

Defendant argues that these questions turned the jury against him with regard to the remaining two charges. However, the audio-video evidence of Defendant's threats and actions, combined with Trooper Shair's testimony of continued threats, provided overwhelming, uncontradicted evidence of guilt such that any prejudicial effect of judicial error was insignificant by comparison. Thus, any error was, at most, de minimis and could not have contributed to the verdict.

III. This Court did not err by instructing the jury pursuant to the standard jury instructions for a charge of terroristic threats

Finally, Defendant claims that this Court erred when it did not instruct the jury that a defendant lacks the intent to terrorize necessary for a conviction of terroristic threats when threats are made in the spur-of-the-moment during transitory anger.

> A jury charge will be deemed 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. 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. The trial court is not required to give every charge that is requested by the

> parties and its refusal to give a requested charge does not require reversal unless the [defend]ant was prejudiced by that refusal.

Commonwealth v. Thomas, 904 A.2d 964, 970 (Pa.Super. 2006). Even if a requested instruction is relevant, the judge need not include it if the point is adequately covered elsewhere in the charge. Commonwealth v. McCauley, 588 A.2d 941, 949 (Pa.Super. 1991).

A defendant is entitled to an instruction on any recognized defense which has been requested, which has been made an issue in the case, and for which there exists evidence sufficient for a reasonable jury to find in his favor. Commonwealth v. Borgella, 611 A.2d 699, 700 (Pa. 1992). Such recognized defenses include alibi, entrapment, and duress. *See* Commonwealth v. Willis, 553 A.2d 959, 962 (Pa. 1989)(alibi); Commonwealth v. Lightfoot, 648 A.2d 761, 764-65 (Pa. 1994)(entrapment); Commonwealth v. DeMarco, 809 A.2d 256, 261 (Pa. 2002) (duress).

Here, Defendant sought to expand the jury instructions to explain that intent to terrorize does not exist where the threat is made in the spur-of-the-moment during transitory anger. We refused Defendant's request and applied the standard jury instructions. Defendant's request was not for an instruction on a defense as he claims, which would require a jury charge explaining the elements of that defense. *See e.g.* DeMarco, 809 A.2d at 261-62 (explaining the elements of the defense of duress). But rather, Defendant's requested instruction related to the intent element of terroristic threats which was already adequately explained in the standard jury charge.

Even assuming *arguendo* that our refusal to instruct the jury as requested by Defendant was in error, that decision did not prejudice Defendant or, at most, produced de minimis prejudice. As stated above, the Commonwealth's audio-video evidence of Defendant's actions and Trooper Shair's testimony provided overwhelming, uncontradicted evidence of guilt such that any prejudicial effect of judicial error was insignificant by comparison. In particular, the Commonwealth provided uncontroverted evidence that Defendant's threats continued for hours, well past the point of a spur-of-the-moment threat made in transitory anger.

CONCLUSION

For the foregoing reasons, Defendant's "Post-Sentence Motion" will be denied, and we will enter the following

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ORDER OF COURT

AND NOW, to wit, this 12th day of February, 2018, upon consideration of Defendant's "Post-Sentence Motion" and for the reasons set forth in our Memorandum Opinion bearing even date herewith, it is hereby

ORDERED and DECREED that Defendant's "Post-Sentence Motion" is **DENIED.**

BY THE COURT:

_____
Steven R. Serfass, J.