

IN THE MATTER OF

[REDACTED]

A MINOR

**: IN THE COURT OF COMMON PLEAS
: OF ERIE COUNTY, PENNSYLVANIA
: JUVENILE DIVISION**

: Docket No. [REDACTED] of 2003

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR JUDGMENT OF ACQUITTAL**

AND NOW, comes the above-named juvenile, [REDACTED], by and through his attorney, Ines M. Massella, Assistant Public Defender, and files the within Memorandum Of Law pursuant to the directive of the Master.

BACKGROUND

[REDACTED] is a 16-year-old juvenile with a date of birth of January 23, 1987. On October 27, 2003, Joshua was charged with one allegation of terroristic threats for statements allegedly made to a school psychologist on October 10, 2003. On December 3, 2003, the Juvenile court Master convened a hearing on the charge. The Commonwealth presented the testimony of [REDACTED] school psychologist.

Ms. [REDACTED] testified that she had gone to talk with [REDACTED] after an incident occurred at school. She wanted to talk to him about a possible hospitalization based on mental health issues. The conversation upset [REDACTED]. During the conversation, [REDACTED] asked her if she "wanted another Columbine." She stated that Joshua was "very upset" when he made the statement. She also testified that she specifically asked him two times if he intended the statement to be a threat and both times he said no.

After Ms. ██████ testified, the Commonwealth rested. The Defense then moved for judgment of acquittal alleging that the Commonwealth did not meet its burden under the terroristic threats statute in that it did not prove that Joshua acted with the intent to terrorize or with reckless disregard of the risk of causing terror in another. The Master then determined to hold the hearing in abeyance pending the filing of memoranda on the issue by both counsel.

ARGUMENT

Pursuant to statute, a person commits the crime of terroristic threats if he directly or indirectly communicates a threat to:

- (1) commit any crime of violence with intent to terrorize another;
- (2) cause evacuation of a building; place of assembly or facility of public transportation; or
- (3) otherwise cause serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience.

18 Pa.C.S.A. § 2706(a).

This purpose of the statute has been interpreted to be to impose criminal liability on persons who make threats, which seriously impair personal security or public convenience. *Commonwealth v. Butcher*, 644 A.2d 174, 176 (Pa. Super. 1994). Thus, to obtain a conviction for making a terroristic threat the Commonwealth must prove, first, that a threat was made to commit a crime of violence, and, second, that the threat was communicated with the intent to terrorize or with reckless disregard for the risk of causing terror.

Commonwealth v. Fenton, 750 A.2d 863, 864 (Pa. Super. 2000); ***In Re B.R.***, 732 A.2d. 633, 636 (Pa. Super. 1999); ***Butcher*** at 176.

Neither the ability to carry out the threat nor a belief by the person threatened that it will be carried out is an essential element of the crime. Rather, the harm sought to be prevented by the statute is the psychological distress that follows from an invasion of another's sense of personal security. ***Fenton*** at 864; ***Commonwealth v. Tizer***, 684 A.2d 597, 599 (Pa. Super. 1996). Similarly, the intent to carry out the threat is not required; the intent to terrorize is required. Moreover, it is unnecessary for the defendant to articulate specifically the crime of violence he intends to commit where the type of crime may be inferred from the nature of the statement and the context and circumstances surrounding the utterance of the statement. Even a single verbal threat might be made in such terms or circumstances as to support the inference that the actor intended to terrorize. ***In Re B.R.*** at 636.

Yet, the courts have held that the statute is not intended to penalize mere spur-of-the-moment threats, which result from anger, or in the course of a dispute, or from hysteria, that do not trigger foreseeable immediate or future danger. ***Butcher*** at 176; ***Tizer*** at 599; ***In Re B.R.*** at 638. In other words, the statute is not intended to criminalize merely a statement made during a "transitory" moment of anger. However, being angry does not render one incapable of forming the intent to terrorize. Thus, the issue ultimately becomes whether the Commonwealth has presented sufficient evidence to establish the

required *mens rea* – the requisite intent to terrorize or a settled purpose to terrorize. *Commonwealth v. Walker*, 2003 Pa. Super LEXIS 4079, ¶¶ 7-8 (November 17, 2003), citing, *Fenton, supra*, at 865.

In *Butcher*, the female victim was getting into her car in a parking lot one evening after work. Suddenly, the car door was yanked open and Butcher was standing there. She screamed and got out of the car. He grabbed her, pushed her up against the car, pressed up against her and said "Don't make me get physical." On appeal he argued that his statement was too vague to constitute a terroristic threat and that the circumstances surrounding his conduct showed lack of intent to cause terror. 644 A.2d at 175. The court disagreed finding that Butcher's conduct was proscribed by the statute because he, at the least, showed reckless disregard for terrorizing the victim. His conduct was aggressive and menacing and placed the victim in fear of harm, which in context was both rational and founded. Butcher's conduct, the court concluded was precisely the type the statute was intended to criminalize. *Id.* at 176-177.

Here it may be argued that ██████'s statement was, in fact, too vague to constitute a threat, however, as other cases have shown the statement must be judged in the context of the times and that issue will be addressed, *infra*. However, counsel does assert that Joshua did not display any of the menacing conduct critical with regard to Butcher.

In *In Re B.R.*, a group of male students were in the hallway waiting to see the principal. B.R. stated he would bring a gun to school. Another student

said he would bring a gun to school and shoot all the teachers. A teacher who was with the students stated that the statements appeared to be directed to him and he was concerned. B.R. was charged with terroristic threats and conspiracy. 732 A.2d at 635. The court determined that B.R.'s statements were made with the intent to create fear or apprehension and that such intent or reckless disregard could be concluded from the statements themselves. The context in which the statements were made was that it shortly followed several incidents of shootings at school; in particular the April 1998 shooting that occurred at the school dance in Edinboro. *Id.* at 637. The court found that B.R.'s statements were not the product of a heated verbal exchange, but were made in a deliberate matter of fact manner. They were not idle chit-chat as he alleged, but rather, given the school tragedies they were words with powerful and disturbing ramifications. *Id.* at 638. Such a statement by a student, the court concluded, must be regarded as an attempt to create fear of future violence or, at the least, a reckless disregard of the risk of creating such fear. *Id.* at 639

Clearly, the Columbine shooting qualifies as one of the school tragedies that, when mentioned, gives rise to powerful and disturbing ramifications. However, we must examine ██████'s statement within the totality of the circumstances as the court examined B.R.'s statement. First, there is nothing in Ms. ██████'s testimony to indicate that the context of the situation indicates a clear intent to terrorize on ██████'s part. He made no threats to bring weapons to school and in fact told Ms. ██████ he did not have access to weapons. Second,

we contend that, unlike B.R., ██████ did make his statement while angry or in the course of a heated exchange regarding whether he should be hospitalized.

However, being angry alone does not take a statement out of the realm of the statutory admonition. In *Fenton*, the defendant was having problems with his insurance company paying for repairs to his car. The problems had continued for some months. Fenton called his agent and threatened him, said he would kill several named and unnamed individuals, and then kill himself. 750 A.2d at 853. On appeal Fenton alleged that his statements were not made with the intent to terrorize but were the product of transitory anger. The court disagreed. The fact that Fenton was angry did not mean he could not form the intent to terrorize. Fenton's problems spanned several months, and he obviously spent time reflecting on his frustrations. His threats were premeditated and deliberate and did not reflect spur-of-the-moment frustration. His threats were made to individuals beyond his insurance agent demonstrating that they were neither transitory or unthinking. His "festering anger" showed ample desire to terrify with threats of violence. The insurance agent was subjected to precisely the type of psychological harm the statute seeks to prevent. *Id.* at 864.

Clearly, ██████ and Mr. Fenton were angry when they made their statements. However, Mr. Fenton's anger, as the court stated, festered until it turned into a cause or basis for his threats of violence. ██████'s anger was, on the other hand, transitory, spur-of-the-moment, and clearly the product of the situation that was occurring at the time the statement was made. The spur-of-

the-moment nature of the statement also removes it from the realm of reckless disregard. Lacking the intent to terrorize Ms. ██████, we contend, ██████ also did not demonstrate a reckless disregard for whether his statement risk terrorizing Ms. ██████.

The court's position in *Fenton* was adopted by the court in *Walker*. In that case Walker had been picked upon parole violations while celebrating his mother's birthday. Walker, who was known to be HIV positive, told the arresting officers, as he dug his fingernails into the officer's hands, that he had open cuts on his hand, that life was short, and that he was taking the officer with him. 2003 Pa. Super LEXIS 4079, ¶¶ 2-3. The court noted here also that being angry does not necessarily preclude the ability to form the *mens rea* to terrorize and found the evidence sufficient to support a conclusion wither that Walker acted to terrorize or with reckless disregard for the risk that he would evoke terror. *Id.* at ¶12.

In reaching its conclusion, the court compared Walker to the defendant in *Commonwealth v Kidd*, 442 A.2d 826 (Pa.Super. 1982). Kidd was arrested for public drunkenness. He was taken to the hospital to treat cuts sustained from falling down. At the hospital he repeatedly yelled obscenities and threatened to machine-gun the police if he had the chance. The court reversed Kidd's conviction stating that his conduct did not evidence a settled purpose to terrorize. The record, the court stated, was insufficient to support a conclusion that Kidd intended to place the officers in a state of fear. His statement, the

court concluded, exemplified the sort of hyperbole from which a jury could not properly infer, beyond a reasonable doubt, either the intent to terrorize or reckless disregard of the risk of causing terror.

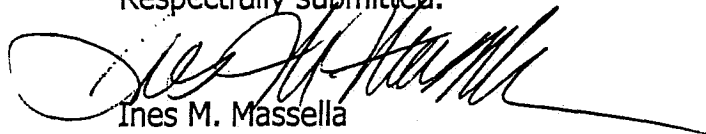
██████████ contends that his statement was more characteristic of that made by Kidd than that made by Walker.

CONCLUSION

██████████ submits that the statement he made to the school psychologist was not that type of statement the statute intended to penalize. Even if, given the school violence experienced by this country, this court would view his statement as a threat to commit a crime of violence, the intent or *mens rea* element of the crime has not been met.

██████████ exhibited the transitory spur-of-the-moment type of anger from which the intent to terrorize should not be inferred. Moreover, he stated to Ms. ██████████ that it was not his intent to terrorize anyone. Thus, there was no evidence submitted of settled purpose to terrorize or, in the alternative, of reckless disregard for the risk of causing terror. The juvenile, ██████████ therefore, requests that the Master dismiss the terroristic threat allegation.

Respectfully submitted.



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JAN 12 2003

MASTER'S REPORT REGARDING ALLEGATION HEARING

<u>DATE</u> December 3, 2003	<u>TIME</u> 11:00 a.m.
<u>JUVENILE J</u> [REDACTED]	<u>D.O.B.</u> 1/23/87
<u>ADDRESS</u> 1168 Amy Ave., Erie	<u>DOCKET NO.</u> 555-03
<u>PARENT</u> [REDACTED]	<u>DEFENSE COUNSEL</u> Massella
<u>PROBATION OFFICER</u> Bitters	<u>DISTRICT ATTORNEY</u> Connelly

FINDINGS OF FACT

[REDACTED] denied Allegation 5, Terroristic Threats.

On October 10, 2003 [REDACTED] was a student at McDowell High School. On that date he was informed that he was suspended from school (for unrelated behavior) and sent to the Millcreek Education Building where his mother was employed. While there, in the company of his mother, he was spoken to by school psychologist [REDACTED]. She attempted to talk to [REDACTED] about a possible mental health hospitalization, which made him, in the words of [REDACTED], "very upset." He asked her "Do you want another Columbine?" She inquired of him if that was a threat, to which he responded "No" and indicated that he had no access to guns, only kitchen knives, and with those could only hurt four or five others before being stopped. Upon the completion of [REDACTED]'s testimony the Commonwealth rested and the defense moved for a judgment of acquittal. The issue to be decided is whether [REDACTED] utterance was either a "threat to commit a crime of violence" communicated "with intent to terrorize another" (18 PaCSA §2706(a)(1) or was made with "reckless disregard of the risk of causing . . . terror or (serious public) inconvenience." 18 PaCSA §2706(a)(3).

After reviewing the memoranda of law provided by defense and Commonwealth, and after reviewing the cases, the Master finds that the phrase "Do you want another Columbine", although a form of shorthand, is indeed a threat to communicate a crime of violence. The fact that [REDACTED] made his statement in the heat of the moment, while extremely upset, then quickly denied that it was meant as a threat and disavowed his ability to obtain weapons, might well have vitiated his actual intent to cause terror in those who heard it.

The Master finds, however, that [REDACTED] made the statement with supreme indifference, amounting to reckless disregard, to the risk of causing terror or serious public inconvenience in its hearers, and that considering the totality of the circumstances the Commonwealth has established a violation of subsection 3 of the Terroristic Threats statute.

CONCLUSION OF LAW

The Master is convinced beyond a reasonable doubt that [REDACTED] did commit the crime of Terroristic Threats as alleged in Allegation 5.

RECOMMENDATION

The Master recommends that Allegation 5 be sustained.

Date 1-12-04

Respectfully submitted,

Confirmed John J. Trucillo
Judge

By [Signature]
Master

This Court's confirmation of the Master's findings and recommendations shall be final unless a rehearing pursuant to 42 Pa.C.S.A. §6305(d) is requested prior to the dispositional hearing.

Court Reporter _____