IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. 02-11,382**
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	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
RICHARD E. MITCHELL, JR.,	**:**	
Defendant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this court's Judgment of Sentence docketed June 30, 2003 and its Order denying the defendant's Post Sentence Motion docketed October 7, 2003. The relevant facts follow.

Around 6:30 or 7:00 a.m. on July 27, 2002, Richard E. Mitchell, Jr. (hereinafter "the defendant") was arguing with a woman in a white car in the middle of the street in the 500 block of Wilson Street in the City of Williamsport. N.T. at 14, 22-23. The volume of the argument and its accompanying profanities disturbed residents in the area. One resident, Jeffrey McMahon, left his residence and walked toward the white car to tell the people to quiet down and leave the neighborhood. N.T. at 15. When Mr. McMahon was almost to the white car and before he could say anything to the people arguing, the defendant saw him, pulled out a weapon, held it in the air and said something to the effect of "Ain't nothing going to happen to me while I got this." Id. When the defendant said this, he looked at Mr. McMahon and worked the slide action of the weapon three times. N.T. at 16. Mr. McMahon turned around and walked away because he didn't want to get shot. Id. When he

got back to his house, he called the police. N.T. at 15.

Another resident, Kenneth Pentz, also heard the argument in the street. He looked out his window and saw the defendant holding a gun over his head and clicking the action while saying something like "No one's going to mess with me as long as I have this." N.T. at 23-24. Mr. Pentz was concerned for the safety of his girlfriend who was sleeping near the window. N.T. at 25. He called 911. Id. He was sufficiently frightened that his hands were shaking and he had trouble dialing the phone. Id.

County communications received Mr. McMahon's and Mr. Pentz' phone calls and dispatched the police to the area. N.T. at 33. Officer Trent Peacock responded and apprehended the defendant approximately four to five minutes after the call. N.T. at 37. Officer Peacock found a loaded Bryco Arms automatic weapon at the small of the defendant's back. Id. There were six bullets in the magazine or clip in the gun. Id. Although none were in the chamber, simply fully working the slide would put a round in the chamber. N.T. at 38-39, 41. At the time of the defendant's arrest, there was a trigger lock on the gun, but it could be removed within seconds. N.T. at 41-42.

The defendant was charged with terroristic threats, simple assault, and recklessly endangering another person. A jury trial was held on May 23, 2003. The jury found the defendant guilty of terroristic threats and not guilty of simple assault.[1]

1 The defense filed a Petition for Writ of Habeas Corpus, which the Honorable Dudley N. Anderson granted with respect to the recklessly endangering charge because the Commonwealth did not present any evidence at the preliminary hearing to show that the gun was loaded.

The court sentenced the defendant to undergo incarceration in the Lycoming County Prison for a minimum of one month and a maximum of twelve months but suspended this sentence and placed the defendant on probation for twelve months. The defendant filed a Post Sentence Motion, which the court denied in an Order dated October 3, 2003 and docketed October 7, 2003.

The defendant filed a timely notice of appeal. The sole issue raised in this appeal is the sufficiency of the evidence to establish the terroristic threats charge beyond a reasonable doubt.

In reviewing the sufficiency of the evidence, the court must determine whether the evidence, and all reasonable inferences deducible therefrom, viewed in the light most favorable to the Commonwealth as verdict-winner, are sufficient to establish all the elements of the offense beyond a reasonable doubt. Commonwealth v. Ogrod, 839 A.2d 294, 318 (Pa. 2003); Commonwealth v. Hall, 830 A.2d 537, 541-42 (Pa. 2003); Commonwealth v. Reynolds, 835 A.2d 720, 725-26 (Pa.Super. 2003). In Reynolds, the Superior Court summarized the elements under 18 Pa.C.S. §2706(a)(1) and the harm that statute seeks to prevent as follow:

> Appellant was also convicted on one count of terroristic threats … under 18 Pa.C.S. § 2706(a)(1), which provides that '[a] person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to commit any crime of violence with intent to terrorize another.' 18 Pa.C.S. §2706(a)(1). 'The Commonwealth must prove that 1) the defendant made a threat to commit a crime of violence, and 2) the threat was communicated with the intent to terrorize another or with reckless disregard for the risk of causing terror.' Commonwealth v. Tizer, 454 Pa. Super. 1, 684 A.2d 597, 600 (Pa. Super. 1996). 'Neither the ability to carry out the threat, nor a belief by the person threatened that the threat will be carried out, is an element of the offense.' In the Interest of J.H., 2002 PA Super 108, 797 A.2d 260, 262 (Pa. Super. 2002). '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.' Tizer, 684 A.2d at 600.

Reynolds, 835 A.2d at 730.

The defendant first asserts the evidence was insufficient because his statement, "Nothing's going to happen to me; I've got this," while holding a gun is not a threat to commit a crime of violence. The court cannot agree. The defendant did not merely hold a gun while he made the statement. Instead, he looked at Mr. McMahon and worked the slide action three times, conveying to Mr. McMahon that he intended to use the weapon against him if he came any closer. See N.T. at 15-16, 18, 20, and 24. Although the defendant did not directly tell Mr. McMahon he would shoot him if he came any closer, the actions that accompanied the defendant's statement indirectly communicated a threat of violence to Mr. McMahon. In fact, Mr. McMahon testified he turned around and walked away from the defendant because he really didn't want to get shot. N.T. at 16.

The defendant next asserts the evidence failed to show he acted with intent to terrorize or with reckless disregard that he would terrorize. Again, the court cannot agree. The defendant stood in the middle of a public thoroughfare, pulled out a weapon, raised it in the air and worked the slide action three times. Two residents of the neighborhood observed these actions and were afraid. Mr. McMahon was afraid the defendant would shoot him if he came any closer to the defendant, and Mr. Pentz was afraid the gun would go off and ricochet in any direction, including the direction of the window near where his girlfriend was sleeping. The court finds this evidence is sufficient to show the defendant acted with reckless disregard that his actions would terrorize residents in the neighborhood. Moreover, Mr. McMahon testified that the defendant was looking right at him when he pulled the weapon

out and worked the slide three times. Mr. McMahon also testified he believed the reason the defendant worked the slide action so many times was to intimidate and threaten him. N.T. at 20-21. From this evidence the jury also could reasonably infer that the defendant had the intent to terrorize Mr. McMahon.

The defendant's third and final argument is that the evidence was insufficient because the statement was made in the heat of anger during a dispute on the street with his girlfriend. The court acknowledges that section 2706 is not meant to penalize spur-of-the-moment threats arising out of anger in the course of a dispute. See Commonwealth v. Tizer, 454 Pa. Super. 1,7, 684 A.2d 597, 600 (Pa. Super. 1996). However, in cases where the victim has not threatened to do anything or otherwise harm the defendant, the Superior Court has rejected the appellant's characterization of his or her actions as spur-of-the-moment. See Tizer, supra; Commonwealth v. Hudgens, 400 Pa. Super. 79, 91, 582 A.2d 1352, 1359 (Pa. Super. 1990). Here, Mr. McMahon was not involved in a dispute with the defendant. Mr. McMahon never threatened to harm the defendant or do anything to him. Mr. McMahon never had a chance to say anything to the defendant. When the defendant saw Mr. McMahon, he pulled out the weapon and worked the slide several times.

Based on the foregoing, the court finds the evidence was sufficient to sustain the defendant's conviction for terroristic threats.

DATE: _____ By The Court,

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Kenneth D. Brown, P. J.

cc: Henry Mitchell, Esquire (ADA)
Nicole Spring, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work file