

THREAT TO COMMIT A CRIME
G.L. c. 275, § 2

The defendant is charged with having threatened to commit a crime against the person or property of another.

To prove the defendant guilty of this offense, the Commonwealth must prove five things beyond a reasonable doubt:

***First:* That the defendant expressed an intent to injure a person, or property of another, now or in the future;**

***Second:* That the defendant intended that the threat be conveyed to a particular person;**

***Third:* That the injury that was threatened, if carried out, would constitute a crime, namely, _____;**

***Fourth:* That the defendant made the threat under circumstances which could reasonably have caused the person to whom it was conveyed to fear that the defendant had both the intention and the ability to carry out the threat; and**

***Fifth:* That the defendant was aware of or consciously disregarded a substantial risk that the communication would be viewed as threatening violence or injury. This element requires that the defendant was aware that others could regard their statement as**

threatening violence or injury and yet the defendant made it anyway.

G.L. c. 275, §§ 2-4. *Commonwealth v. Cruz*, 495 Mass. 110, 118 (2024) (instruction in appendix). See also *Commonwealth v. DeVincent*, 358 Mass. 592, 594-595 (1971); *Commonwealth v. Hughes*, 59 Mass. App. Ct. 280, 283 (2003); *Commonwealth v. Ditsch*, 19 Mass. App. Ct. 1005 (1985) (immediate or personal ability to carry out threat unnecessary, only “intention and ability in circumstances which would justify apprehension on the part of the recipient”); *Commonwealth v. Daly*, 12 Mass. App. Ct. 338 (1981) (under Mass. R. Crim. P. 4[b], others beside victim may bring complaint). See also *Wagenmann v. Adams*, 829 F.2d 196, 207 (1st Cir. 1987); *Robinson v. Bradley*, 300 F. Supp. 665, 668 (D. Mass. 1969) (3-judge court); *Commonwealth v. Kerns*, 449 Mass. 641 (2007).

SUPPLEMENTAL INSTRUCTIONS

1. Victim’s apprehension. It is not required that [alleged victim] actually became apprehensive because of any threat that was made. But you may consider whether or not they were apprehensive in determining whether the Commonwealth has proved that the defendant made the threat under circumstances which *could* reasonably have caused [alleged victim] to fear that the defendant had both the intention and the ability to carry out the threat.

Commonwealth v. Chalifoux, 362 Mass. 811, 816-817 (1973) (victim’s testimony of prior assault relevant to issue of apprehension); *Commonwealth v. Winter*, 9 Mass. App. Ct. 512, 528 (1980). The test for victim apprehension is objective: “Whether the threat by its contents in the circumstances was such as would cause the target of the threat to fear that the threatened crime and injury might be inflicted.” *Commonwealth v. Maiden*, 61 Mass. App. Ct. 433, 436 (2004).

2. Threat made indirectly. The Commonwealth is not required to prove that the threat was communicated directly to [alleged

victim. **This element is satisfied if is proved beyond a reasonable doubt that the defendant *intended* the threat to be conveyed to alleged victim. This can be done directly or indirectly through a third party or by some other means.**

See Instruction 2.240 (Direct and Circumstantial Evidence). *Commonwealth v. Hughes*, 59 Mass. App. Ct. 280, 283 (2003); *Commonwealth v. Maiden*, 61 Mass. App. Ct. 433, 435 (2004) (“the legal definition of threat requires ‘communication’ of the threat in the sense that it must be uttered, not idly, but to the target, to one who the defendant intends to pass it on to the target, or to one who the defendant should know will probably pass it on to the target”); *Commonwealth v. Furst*, 56 Mass. App. Ct. 283, 285 (2002); *Commonwealth v. Meier*, 56 Mass. App. Ct. 278 (2002); *Commonwealth v. Troy T.*, 54 Mass. App. Ct. 520, 526-527 (2002).

3. Unsuccessful communication. **The Commonwealth is not required to prove that the threat was successfully communicated to alleged victim. It must prove beyond a reasonable doubt that the defendant made a communication that they intended would reach alleged victim, even if the defendant was unsuccessful in doing so. That proof may be by direct or circumstantial evidence.**

See Instruction 2.240 (Direct and Circumstantial Evidence). *Commonwealth v. Kerns*, 449 Mass. 641 (2007); *Commonwealth v. Maiden*, 61 Mass. App. Ct. 433, 436 (2004) (actual receipt by victim of threat not a necessary element; intent that threat be conveyed to target is sufficient, whether or not it was successfully communicated); *Commonwealth v. Hughes*, 59 Mass. App. Ct. 280, 283 (2003); *Commonwealth v. Furst*, 56 Mass. App. Ct. 283, 285 (2002); *Commonwealth v. Meier*, 56 Mass. App. Ct. 278, 281-282 (2002).

NOTES:

1. First Amendment. The offense of threatening to commit a crime only reaches cases of “true threats,” which do not qualify as protected speech. *Commonwealth v. Sholley*, 432 Mass. 721, 727

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Revised February 2026

(2000). The term “true threat” distinguishes between words that literally threaten but have an expressive purpose such as political hyperbole, where the defendant either intended to place the target of the threat in fear or was aware of or consciously disregarded a substantial risk that the communication would be viewed as threatening violence. See *Commonwealth v. Cruz*, 495 Mass. 110, 111, 113 (2024); *Commonwealth v. Chou*, 433 Mass. 229, 236 (2001). Compare *Watts v. United States*, 394 U.S. 705, 706, 708 (1969) (per curiam) (statement at political rally that, if inducted into Army and made to carry rifle, “the first man I want to get in my sights is L.B.J.,” was, given its conditional nature and context in which it was made, political hyperbole and, therefore, not a “true threat” under 18 U.S.C. § 871[a]), with *United States v. Fulmer*, 108 F.3d 1486, 1490, 1492 (1st Cir. 1997) (voicemail message to Federal agent that “[t]he silver bullets are coming. . . . Enjoy the intriguing unraveling of what I said to you” was, given defendant’s history of threats against the agent, reasonably understood as a “true threat” under 18 U.S.C. § 875[c]). See also *Chou*, 433 Mass. at 237 (2001) (missing person flyer describing ex-girlfriend in sexually offensive and abusive language was a “true threat”). “A true threat may be punished criminally only if the speaker had ‘some subjective understanding of the threatening nature of [the] statements.’” *Cruz*, 495 Mass. at 113, quoting *Counterman v. Colorado*, 600 U.S. 66, 69 (2023).

2. Length of probationary sentence. General Laws c. 275, § 4 authorizes a maximum sentence of six months imprisonment or, alternatively, a peace bond for a maximum period of six months. There is no six-month limitation on any probationary period. *Commonwealth v. Powers*, 73 Mass. App. Ct. 186 (2008).

3. Threat against a third person. The alleged victim of the threat, and of the threatened crime, need not be the same person. *Commonwealth v. Hamilton*, 459 Mass. 422, 428 (2011) (probation officer threatened with harm to her daughter). In that circumstance, the judge should inquire of the Commonwealth who the alleged victim is and instruct accordingly.

4. Specific unanimity instruction. A specific unanimity instruction is required where more than one threatening statement is made. See *Commonwealth v. Palermo*, 482 Mass. 620, 629 (2019).

5. Warrantless arrest. General Laws c. 275, §§ 2-6 does not authorize warrantless arrest for threats. *Commonwealth v. Jacobsen*, 419 Mass. 269, 271-272 (1995). However, dismissal is not the appropriate judicial remedy. See *id.* at 275.