

THREAT TO COMMIT CRIME

The defendant is charged with having threatened to commit a crime against the person or property of another. Threatening [a person with a crime against his or her person or property] [a person by threatening a crime against someone else or their property] is itself a crime.

In order to prove the defendant guilty of this offense, the Commonwealth must prove four 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 his (her) threat be conveyed to a particular person;

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

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.

G.L. c. 275, §§ 2-4. *Commonwealth v. Chalifoux*, 362 Mass. 811, 816-817, 291 N.E.2d 635, 639 (1973) (victim's testimony of prior assault relevant to issue of apprehension); *Commonwealth v. DeVincent*, 358 Mass. 592, 594-595, 266 N.E.2d 314, 315-316 (1971); *Commonwealth v. Maiden*, 61 Mass. App. Ct. 433, 436, 810 N.E.2d 1279, 1281 (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, 795 N.E.2d 594, 596 (2003); *Commonwealth v. Ditsch*, 19 Mass. App. Ct. 1005, 475 N.E.2d 1235 (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, 424 N.E.2d 1138 (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, 871 N.E.2d 433 (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 he (she) was apprehensive in determining whether the Commonwealth has proved the fourth thing that it must prove — namely, 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.**

Chalifoux, supra; Commonwealth v. Winter, 9 Mass. App. Ct. 512, 528, 402 N.E.2d 1372, 1381 (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." *Maiden*, 61 Mass. App. Ct. at 436, 810 N.E.2d at 1282.

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 it 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. The proof may be by direct or circumstantial evidence.

See Instruction 2.240 (Direct and Circumstantial Evidence). *Commonwealth v. Hughes*, 59 Mass. App. Ct. 280, 283; 795 N.E.2d 594, 596 (2003); *Maiden*, 61 Mass. App. Ct. at 435, 810 N.E.2d at 1281 (“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, 776 N.E.2d 1032 (2002); *Commonwealth v. Meier*, 56 Mass. App. Ct. 278, 776 N.E.2d 1034 (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 he (she) intended would reach the [alleged victim] , even if he (she) 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, 871 N.E.2d 433 (2007); *Commonwealth v. Maiden*, 61 Mass. App. Ct. 433, 436, 810 N.E.2d 1279, 1281 (2004); *Commonwealth v. Hughes*, 59 Mass. App. Ct. 280, 283; 795 N.E.2d 594, 596 (2003); *Commonwealth v. Furst*, 56 Mass. App. Ct. 283, 776 N.E.2d 1032 (2002); *Commonwealth v. Meier*, 56 Mass. App. Ct. 278, 776 N.E.2d 1034 (2002).

NOTES:

1. **Warrantless arrest.** General Laws c. 275, §§ 2-6 does not authorize warrantless arrest for threats. *Commonwealth v. Jacobsen*, 419 Mass. 269, 644 N.E.2d 213 (1995).

2. **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, 739 N.E.2d 236, 241 (2000). The term “true threat” distinguishes 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. *Commonwealth v. Chou*, 433 Mass. 229, 236, 741 N.E.2d 17, 23 (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, 741 N.E.2d at 23 (2001) (missing person flyer describing ex-girlfriend in sexually offensive and abusive language was a “true threat”).

3. **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, 896 N.E.2d 644 (2008).

4. **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, 945 N.E.2d 877, 882 (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.