

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

ANDREW PAUL OSANTOWSKI

Defendant-Appellant.

Supreme Court No. 134244

Court of Appeals No. 264368

Lower Court No. 05-314FH

MACOMB COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

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134244

SUPPLEMENTAL BRIEF FOR
DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

SUPPLEMENTAL ARGUMENT.....1

I. THE MICHIGAN COURT OF APPEALS’ DECISION TO OVERTURN THE TRIAL COURT AND DIRECT THE ASSESSMENT OF 100 POINTS FOR OFFENSE VARIABLE 20 (M.C.L. §777.49A(1)(A)) UPON RESENTENCING IN THE ABSENCE OF FACTS OR EVIDENCE THAT THE DEFENDANT ACTUALLY COMMITTED AN ACT OF TERRORISM IS AN INCORRECT APPLICATION OF THE PLAIN LANGUAGE OF THE STATUTE.

CONCLUSION.....5

TABLE OF AUTHORITIES

Cases:

Huddleston v United States, 415 US 814, 830-831 (1974).....4

Niles Township v Berrien County Board of Commissioners, 261 Mich App 308, 315 (2004) ...4

People v Parker, 417 Mich 556 (1983).....4

People v Peals, 476 Mich 636, 676 (2006).....4

People v Perez, 255 Mich App 703, 712-713 vacated in part on other grounds,
469 Mich 415 (2003).....3

United States v Wiltberger, 18 US (5 Wheat.) 76, 95 (1820)..... 4

United States v Lanier, 520 US 259 (1985).....4

Statutes:

M.C.L. §750.543b1, 2

M.C.L. §750.543b(h)1, 3

M.C.L. §750.543b(a).....3

M.C.L. §750.543b(a)(ii).....3

M.C. L. §750.543m(1)(a).....2, 3

M.C.L. §777.49A(1)(A).....1, 4

ARGUMENTS

- I. **THE MICHIGAN COURT OF APPEALS' DECISION TO OVERTURN THE TRIAL COURT AND DIRECT THE ASSESSMENT OF 100 POINTS FOR OFFENSE VARIABLE 20 (M.C.L. §777.49A(1)(A)) UPON RESENTENCING IN THE ABSENCE OF FACTS OR EVIDENCE THAT THE DEFENDANT ACTUALLY COMMITTED AN ACT OF TERRORISM IS AN INCORRECT APPLICATION OF THE PLAIN LANGUAGE OF THE STATUTE.**

SUPPLEMENTAL BRIEF

Mr. Osantowski incorporates by reference all arguments raised by him in the original application and supplements that pleading herein as directed by this Court on November 30, 2007.

The question posed by this Court in its most recent Order is whether the threat made by Mr. Osantowski standing alone constitutes an “act of terrorism,” as defined by M.C.L. §750.543b, in order for 100 points to be assessed under Offense Variable 20. Mr. Osantowski maintains that the threat does not warrant an assessment of 100 points as set forth in the plain language of the statutory authority for the offense variable, M.C.L. §777.49a.

A threat in and of itself can not constitute an “act of terrorism” in accordance with the definition set forth by the legislature:

- (a) “Act of terrorism” means a willful and deliberate act that is all of the following:
 - (i) An act that would be a violent felony under the laws of this state, whether or not committed in this state.
 - (ii) An act that the person knows or has reason to know is dangerous to human life.
 - (iii) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government

or a unit of government through intimidation or coercion.”
M. C. L. §750.543b.

Where a threat is not a “violent felony” nor is it “dangerous to human life”, it can not constitute an act of terrorism.

A. *Making a Threat of Terrorism is not a “Violent Felony”*

Michigan Compiled Law §750.543b(h) defines the phrase “Violent Felony”:

“Violent felony” means a felony in which an element is the use, attempted use, or threatened use of physical force against an individual, or the use, attempted use, or threatened use of a harmful biological substance, a harmful biological device, a harmful chemical substance, a harmful chemical device, a harmful radioactive substance, a harmful radioactive device, an explosive device, or an incendiary device.” (emphasis added).

The only elements of the crime of Making a Threat of Terrorism involved in this case were (1) that Mr. Osantowski *threatened* to commit an act of terrorism and (2) that he communicated this threat to another person. Trial Transcript of June 14, 2005, at 13 (jury instruction); *See also* M.C. L. §750.543m(1)(a). To be sure, the assistant prosecutor maintained from the start of the trial that he did not have to prove that an actual *act* of terrorism was committed, only that Mr. Osantowski made a threat of terrorism.¹

During deliberations the jurors asked for a definition or clarification of the phrase “civilian population”. Trial Transcript of June 15, 2005 at 24. In crafting a response, the assistant prosecutor wanted to ensure that he was not being held to an additional burden of

¹ “This is not a crime of terrorism, terrorism would be big and obvious.... It would be where it was a terrorist act, the courthouse being blown up, or a school or a massacre or a school like Klebold and Harris at Columbine. There’s a separate statute in Michigan for terrorists, Mr. Osantowski is not charged with terrorism.... The crime is making the threat of terrorism, not committing terrorism.” Assistant Prosecutor Steven Kaplan’s Opening Statement, June 10, 2005 at 23-24.

proving beyond a reasonable doubt that the *act* was committed where only the *threat* was charged: “I think it needs to be clear that he doesn’t have to commit the act of terrorism, or even take any steps toward implementing ... terrorism.” Trial Transcript of June 14, 2005 at 34.²

Factually as it relates to this case and legally in terms of the language as set forth in M.C.L. §750.543m(1)(a), the crime only has two elements at its core, (1) a threat and (2) communication of the threat. There is no independent element of a “violent felony” in the crime of False Report or Threat of Terrorism as required by defined by M.C.L. §750.543b and defined by M.C.L. §750.540b(h). Where all three requirements set forth in M.C.L. §750.543b(a) must be met, and the first part clearly has not been met, a scoring of 100 points for OV 20 is improper.

b. “Threats” Alone are not Dangerous to Human life.

Even though the threat does not constitute a “violent felony” as set forth above, scoring of 100 points is also not warranted because a threat, standing alone, is not “an act that the person knows or has reason to know is dangerous to human life.” M.C.L. §750.543b(a)(ii).

Threats are words. Threats can be written or spoken, shouted or whispered, impracticable or terrifying. Threats are often offensive. Threats can be unpleasant. Threats are potentially hurtful to one’s feelings. But threats are *not* inherently dangerous to human life. And in this context, an electronic message typed on a keyboard and sent off into cyberspace is not an act that Mr. Osantowski would know or would have reason to know is “dangerous to human life”. By way of comparison, this Court has held that words or threats alone can never be “dangerous

² Neither this statement nor the statement set forth in note 1, *supra*, was made in the context of supporting a score for the sentencing guidelines. Defendant-Appellant acknowledges that the standard for scoring an offense variable is only by a preponderance of the evidence. *People v Perez*, 255 Mich App 703, 712-713 vacated in part on other grounds, 469 Mich 415 (2003). In any event, the statements are of interest considering the specific question posed by this Court.

weapons” to support a conviction for armed robbery where that statute is concerned with weapons, not words. *People v Parker*, 417 Mich 556 (1983). It stands to reason then, that words, or even a threat, by itself, is not dangerous to human life.

Conclusion:

The legislature specifically requires, under M.C.L. §777.49a (1)(a) that to support a score of 100 points that “the offender committed an act of terrorism *by* using or threatening to use a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device.” The plain language of the statute reveals the intent of the legislature which is to assess points for this offense variable where one actually committed an act of terrorism, because the statute then goes on to describe *how* one can commit an act of terrorism (which includes, *inter alia*, various threats).³ The legislature is presumed to know the rules of grammar and its placement of words is intentional. *See Niles Township v Berrien County Board of Commissioners*, 261 Mich App 308, 315 (2004).

Under the plain language of the statute, a score is not warranted in the absence of a commission of an act of terrorism. Threats alone do not constitute an act of terrorism, as set forth above. The Court of Appeals decision must therefore be REVERSED and this Court must affirm the original sentence imposed upon Mr. Osantowski.

³ Defendant-Appellant does not believe that there is any ambiguity in the statute. Assuming *arguendo* that the statutory language is ambiguous, the ambiguity must be resolved in the defendant’s favor. *See generally People v Peals*, 476 Mich 636, 676 (2006) (Kelly, J., dissenting) citing the rules of lenity in construing criminal statutes established in *Huddleston v United States*, 415 US 814, 830-831 (1974), *United States v Wiltberger*, 18 US (5 Wheat.) 76, 95 (1820) and *United States v Lanier*, 520 US 259 (1985) (additional internal citations omitted).

SUMMARY AND RELIEF

For all of the reasons stated herein and in the original application for leave to appeal, Defendant-Appellant requests that this Court **GRANT** the within **APPLICATION FOR LEAVE TO APPEAL** or grant any other relief this Court deems just.

Respectfully submitted,

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