CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: TP2

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER

-against-

[redacted],

Defendant.

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ELIZABETH N. WARIN, J.:

The defendant is charged with Aggravated Harassment in the Second Degree in violation of PL § 240.30(2) and Harassment in the Second Degree in violation of PL § 240.26(1). By motion filed on February 15, 2019, the defendant moves to dismiss both charges for facial insufficiency and pursuant to CPL § 30.30. On February 19, 2019, the defendant served and filed a supplemental motion to dismiss on the basis the charges were unconstitutional as applied to the instant case. On March 6, 2019, the People filed a response. For the following reasons, the defendant's motion to dismiss for facial insufficiency is GRANTED. As the Court grants the motion to dismiss for facial insufficiency in its entirety, the Court declines to consider the defendant's alternative grounds for dismissal.

MOTION TO DISMISS FOR FACIAL INSUFFICIENCY

A. Legal Sufficiency Standard

An information is facially sufficient if it alleges nonhearsay factual allegations of an evidentiary nature which, if true, provide reasonable cause for every element of the offense(s) charged and the defendant's commission thereof (*see* CPL 100.15(3); 100.40(1)(b) and (c); *People v Alejandro*, 70 NY2d 133, 137 [1987]; *People v Kalin*, 12 NY3d 225, 229 [2009]). The

"reasonable cause" burden is met where:

> evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it

(CPL § 70.10 (2)). Failure to establish a *prima facie* case according to these standards creates a jurisdictional defect to the criminal action, thus warranting dismissal of the accusatory instrument (*see Alejandro*, 70 NY2d at 137; *Kalin*, 12 NY3d at 229).

When reviewing an accusatory instrument for facial sufficiency, the court must give the factual allegations a "fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 360 [2000]; *Kalin*, 12 NY3d at 225). The instrument must "factually describe the elements of the crime and the particular acts of the defendant constituting its commission" in sufficient detail to satisfy the requirements of due process and double jeopardy, that is, to afford the accused a fair opportunity to prepare a defense and avoid being charged twice with the same offense (*Casey,* 95 NY2d at 360; *Kalin*, 12 NY3d at 225).

B. Factual Allegations

The superseding information alleges that on or about and between June 11, 2018 at 9:00 a.m. and June 20, 2018 at 3:00 p.m. at 45 Monroe Place in Kings County, the informant, Aprilanne Agostino, received "multiple" telephone calls from the defendant and that the defendant "repeatedly cursed and yelled at" Ms. Agostino and stated, in sum and substance, "I hope someone kicks the shit out of you and I wish cancer on your family." Ms. Agostino recognized the voice on the phone as the defendant.

The superseding information further alleges that at some point between the same dates and at the same location, the defendant called Patrasia Duncan and stated, in sum and substance, "April

is not doing April's job properly and that [the defendant] will chop April's head off." Ms. Duncan recognized the voice on the phone as the defendant.

C. PL § 240.30(2)

A person is guilty of aggravated harassment in the second degree when "with intent to harass or threaten another person, he or she makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication" (PL § 240.30(2)). The Court of Appeals has held that "no purpose of legitimate communication" means "the absence of expression of ideas or thoughts other than threats and/or intimidating or coercive utterances" (*People v Shack*, 86 NY2d 529, 538 [1995]). The *Shack* decision further held that while the determination that a telephone call has "no legitimate purpose of communication" may involve some measure of subjective analysis, the statute's additional requirement of specific intent by the caller to harass or threaten the person, provides sufficient guidance of conduct that will violate the statute to pass constitutional muster (*id.* at 539; *see People v Singh*, 1 Misc3d 73, 74 [App Term 2d Dept 2003]).

Defendant argues that the superseding information is facially insufficient as it fails to allege that the telephone calls had no purpose of legitimate communication (*see* Def. Motion dated February 14, 2019, p. 5). The People appear to concede that this allegation is not explicitly contained within the superseding information yet urge the Court to find that this element can be inferred from the other facts alleged, including the content of the telephone calls themselves (*see* People's Resp. p. 14).[1]

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[1] Alternatively, the People ask the Court to find that the element of "no legitimate purpose" need not be separately pled in the accusatory instrument (*see* People's Resp. pp. 14-15 citing *People v Williams,* 45 Misc3d 1202(A) [Crim Ct New York County 2014], *infra*). In light of the clear appellate authority to the contrary, and the limitations of the specific allegations in this case, the Court declines to make such a holding (*see Singh*, 1 Misc3d 73; *People v Lewis,* 52 Misc3d 134(A) [App Term 2d Dept 2nd, 11th and 13th Jud Dist 2016]).

Here, the superseding information alleges that "multiple" calls were made to Aprilanne Agostino at 45 Monroe Place, in Kings County. The Court takes judicial notice that the informant, Aprilanne Agostino, is the Clerk of the Court of the Appellate Division, Second Department, which is located at 45 Monroe Place in Kings County, as both the identity of the clerk as a public official and the location of the court itself are noncontroversial and the subject of common knowledge (*see Blonder & Co., Inc. v Citibank,* 28 AD3d 180, 189 [1st Dept 2008, Tom, J. dissenting] (judicial notice permitted on matters of "common and general knowledge, well established and authoritatively settled, not doubtful or uncertain"), *Gruber v New York City Ry. Co.,* 53 Misc 322 [Sup Ct App Term 1907] (judicial notice of location of streets and avenues in New York City permissible). *Accord People v Deer,* 39 Misc3d 677 [County Court St. Lawrence County 2013] (taking judicial notice of a highway as a major traffic artery).[2] The information does not specify the number of calls made over the nine-day period to the Appellate Division clerk's office. The content of the calls is generally alleged to include yelling and cursing, while two calls include comments "hoping" that the recipient is assaulted and "wishing" cancer on her family, and that he

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[2]The Court notes that there is no bar to taking judicial notice of a publicly known fact on a motion for facial sufficiency (*e.g. People v Suarez,* 51 Misc3d 620 [Crim Ct New York County 2016] (judicial notice of court's own records to establish element for bail jumping charge). *See also People v Reip,* 32 Misc3d 491 [Crim Ct New York County 2011] (taking judicial notice on motion for facial insufficiency that NY Transit Police Department was previously disbanded)). The Court may not, however, consider any other factual allegations that are not contained within the four corners of the accusatory instrument on a motion to dismiss for facial insufficiency (*see People v Thomas*, 4 NY3d 143, 146 [2005]; *People v Antonovsky*, 41 Misc3d 44 [App Term 2d Dept 2013]). The Court has therefore ignored the many "facts" strewn within the People's responsive papers that were not in the superseding information (*e.g.* People's Response at 3-10, i.e. that the second informant is an assistant to the Clerk of the Court; that the phone number is a personal office extension; that the defendant called from a blocked number; that the complainant notified court officers who called 911).

will "chop off her head" because she is not doing a good job.

In some instances, allegations of the sheer number of calls and/or the specific content of the calls supports the inference that the calls were not for a legitimate purpose (*see Shack,* 86 NY2d 529 (over 175 calls from mentally ill defendant to family member/psychiatrist, including up to seven in one day, that continued after being told to desist and included threats of harm, constituted aggravated harassment); *People v Lewis,* 52 Misc3d 134(A) [App Term 2d Dept 2nd, 11th and 13th Jud Dist 2016] (22 messages within 24 hours, some containing threats of physical violence and death, sufficient); *People v Williams,* 45 Misc3d 1202(A) [Crim Ct New York County 2014] (single call threatening to come over with a gun to kill recipient sufficient). Under the relevant case law, a "true threat" is "a statement meant to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, and which an ordinary, reasonable recipient familiar with the context of the communications would interpret as a true threat of violence" (*see Lewis*, 52 Misc3d 134(A) *citing/Virginia v Black*, 538 US 343, 359 [2003]).

Here, the calls are not so voluminous, nor so explicitly or immediately threatening to warrant an inference that the calls had no legitimate purpose. While highly inappropriate and rude, using obscenities and wishing misfortune or disease on a public official during a call to a clerk's office in the context of complaining about how the clerk is performing their duties, is not sufficient for the Court to infer that these calls were not initiated for a valid reason (*see People v Mangano*, 100 NY2d 569 [2003] (multiple crude and offensive messages complaining about parking tickets left on answering machine at town's parking violation bureau set up to receive such complaints, insufficient for aggravated harassment)). The content of the calls that are detailed in the superseding information - "I hope someone kicks the shit out of you and I wish cancer on your

family," are certainly unpleasant but do not rise to the level of serious and imminent threat of violence on the Clerk of the Court. Significantly, there are no allegations that the defendant was instructed *not* to call the clerk's office at the Appellate Division but still persisted, a factor that can be informative where the communication in question is made to an entity that is required to field calls from the public (*e.g. People v Smith*, 89 Misc2d 789 [App Term 2d Dept 1977] (defendant called police department 27 times over three hours after being told his complaint was civil in nature, and despite orders to desist; initially legitimate call became aggravated harassment with intent to harass and annoy)).

Therefore, for the reasons stated above, the Court finds that the superseding information does not give reasonable cause to believe that the defendant's telephone calls were made with no legitimate purpose of communication, and the defendant's motion to dismiss the charge of Aggravated Harassment in the Second Degree for facial insufficiency is GRANTED.

D. Penal Law § 240.26(1)

"A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person" he "strikes, shoves, kicks or otherwise subjects such other person to physical contact or threatens to do the same" (PL § 240.26(1)). "The crux of section 240.26 (1) is the element of physical contact: actual, attempted or threatened" (*People v Bartkow*, 96 NY2d 770, 772 [2001]). As discussed *supra*, the only threat alleged here is the defendant threatening to "chop April's head off." Given the context of this communication, the Court does not construe this threat as a "genuine and immediate threat of physical contact to the complainant" (*People v Hargrove*, 47 Misc3d 136(A) [App Term 2d Dept 2nd, 11th and 13th Jud Dist 2015]. *See also People v Shehabeldin*, 39 Misc3d 149(A) [App Term 2d Dept 2nd, 11th and 13th Jud Dist 2013] (irate passenger's statement to bus driver that she "should shoot" the driver and "should come back and

shoot" him because the bus was late facially insufficient). Accordingly, defendant's motion to dismiss the charge of Harassment in the Second Degree is GRANTED.

The foregoing constitutes the opinion, decision and order of the Court.

Dated: April 9, 2019
Brooklyn, New York

ENTER:

Elizabeth N. Warin, J.C.C.