Circuit Court for Dorchester County
Case No. C-09-CR-19-000238

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1875

September Term, 2019

CHARLES RANDALL FREEMAN

v.

STATE OF MARYLAND

Reed,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: February 8, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

After leaving a voicemail message at a psychiatric hospital where he had been a patient, appellant Charles Randall Freeman was charged with one count of making a threat of arson in violation of Md. Code (2002, 2012 Repl. Vol., 2018 Cum. Supp.), § 6-107 of the Criminal Law Article ("Crim."), and one count of making a threat of mass violence in violation of Crim. § 3-1001. In a bench trial, the Circuit Court for Dorchester County convicted Freeman on both counts.

Freeman challenges those convictions, arguing that the evidence is insufficient to establish that he threatened to blow up a structure or harm more than five people and that his recorded message is protected by the First Amendment because it did not rise to the level of a "true threat." For reasons that follow, we disagree and affirm the convictions.

BACKGROUND

At trial, the State presented the audio recording of a three-minute voicemail message that Freeman left at 7:36 a.m. on Saturday, September 28, 2018. The message was discovered days later, on a phone line in the Quality Improvement office at the Eastern Shore Hospital Center. The caller identified himself as former patient Chuck Freeman, who had been discharged from the facility on March 12, 2010.

In the voicemail, Freeman complained about two staff members, identifying both by their first names and making racial epithets. In the course of his message, Freeman stated, "I'm going to blow you up like the USS Arizona at Pearl Harbor."

Hospital security was called in. Perceiving threats, the investigating officer contacted the Cambridge Police Department. "The front doors of the facility were secured" and the entire hospital was put "on sort of a heightened alert . . . for everybody's safety."

The charge nurse who was mentioned by Freeman testified that she and her husband worked at the hospital when Freeman was treated, that she spent 40 hours a week as a charge nurse interacting with Freeman while he was there, and that both she and her husband, who is African American, were still working at the facility. She did not listen to the voicemail recording until just before trial, because she had been "told that it would be emotionally upsetting . . . to listen to it" because of "racial slurs and negative comments[,]" as well as threats.

Defense counsel did not dispute that Freeman left the message, arguing instead that it was merely an incoherent rant by a disturbed person. Counsel moved for a judgment of acquittal on the grounds that Freeman "didn't say that he would do anything in particular," that "the voice mail is a political at times deranged rant[,]" and that Freeman referred to an "ambiguous 'they' will do something[,]" "[b]ut it's never explicit who or what." Counsel parsed the voicemail in the following manner:

> There's a mention of the East Coast being swallowed up like in the 2011 earthquake. He references that at the start. Goes on to saying that he warned Washington D.C. back in 2013 and various other political complaints and epithets.
>
> At about 1:43, which is . . . the start of the most relevant passage here, at some point it's kind of hard to say this is – after listening many times, this is as good as what I can say that I believe is said. He starts saying, "One girl said to me the other day, she said, 'When this happens you're, you're talking about you ain't going to be around talking about it. That's right. I'm going to beat that too, but that's worth dying for. See you all sons of bitches go up like a ball of fire. Going to blow you up like the USS Arizona in Pearl Harbor. You're going to – they're going to have to drop bombs from the sky.'"
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> That – I will concede that the words immediately [preceding] to "drop bombs from the sky" I think are very difficult to hear and I'm not – I can't

> represent that I'm certain that's what he says. It goes on to certain other passages. I'll start at about 2:13. He says, "You ain't gonna get away with this. The ground's going to swallow you up. Your country is big, but you think it can't happen. It's already planned. I've seen the technology. That's why I didn't say much when I was down there. They're going to fuck you people up."
>
> And the end, the conclusion starts about, "Your government says they're going to bust up China and all the rest of them overseas too, because this is a world thing," that word is not clear to me, "I found out about." And the last part, "Fuck you, Americans; you and your fucking phony allies."

Defense counsel argued that the evidence was insufficient to convict because Freeman's words did not satisfy the statutory requirements for each offense and, in any event, were protected by the First Amendment:

> I would submit just on the statutory basis I don't think what he said in there was an explicit threat against the building or a threat that he would actually do anything himself, except perhaps enjoy watching whatever was going to happen.
>
> There's also, regardless of the statutory interpretation, I think as a First Amendment constitutional basis there's very interesting issues here. I think . . . under the Constitution speech can't be prohibited just for being speech. There has to meet some sort of existing exception to the First Amendment and the only applicable one here would be a true threat; and a true threat I would argue has an objective and subjective component.
>
> The objective component is that a reasonable person . . . familiar with the context would interpret it as a threat of violent conduct by the defendant or speaker. And a subjective component; that the defendant subjectively intended for his words to be perceived as a threat of violence conducted by the defendant.

In support, defense counsel cited *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001 (2015), and extra-jurisdictional cases decided by federal and state appellate courts. Ultimately, counsel argued, these cases make "pretty clear, you can't take that statement out of context" and "it needs to be pretty explicit[.]" Although the hospital may have been

justified in being concerned and notifying the police, counsel maintained that the voicemail contained "a lot of political rantings and, frankly, just deranged rantings that I think err on the side of a reasonable person couldn't take it seriously."

The prosecutor countered that it was clear that Freeman was "reaching out to" individuals in "the building" because he "called the Quality Assurance line at the hospital that he was a previous patient of; referenced who he was and that he was a previous patient[,]" then "name[d] two employees that were employees there when he was a patient that were still employees[.]" With respect to whether the message was a "true threat," the prosecutor "concede[d] that if the call ended after Mr. Freeman says, 'Be prepared for what's coming to you,' that I wouldn't have . . . met the burden of a true threat." Instead, the State argued,

> "True threats encompass those statements through which the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat; rather, a prohibition on true threat protects individuals from the fear of violence and from the disruption that fear endangers, in addition to protecting people from the possibility that a threat and violence would occur."
>
> Objectively, there's no question the hospital went on lockdown after they heard this call. They were certainly concerned. They didn't allow Ms. Murray to listen to that phone call because of the offensive nature of its contents. And subjectively, when you look at the phone call in its totality; the fact that he's identifying two specific employees who were in an interracial relationship as he's continuing to make these racial slurs, that he continually tells them to be prepared for what's coming for them.
>
> And then the true threat itself when he says at, again, 1 minute and 52 seconds in, "I'm going to see you sons of bitches go up like a ball of fire. I'm going to blow you up like the USS Arizona in Pearl Harbor." It's not, "You're going to get blown up." It's "I'm going to blow you up like the USS

> Arizona in Pearl Harbor," and that he wants to see them go up like a ball of fire.
>
> I think that . . . certainly meets the elements of arson threat . . . .
>
> And then moving through to the threat of mass violence, seeing them go up like a ball of fire and dropping bombs on them would certainly be enough to meet the elements of arson in the first degree and it does place the hospital staff in fear of physical harm.

After noting for the record that he had "listened to State's Exhibit 1 multiple times, literally with my ear down to the speaker, to determine what exactly was said[,]" the trial judge agreed "with [defense counsel] that most of this was a rant" and that it was not clear "what precipitated it coming some eight or nine years after Mr. Freeman was there, but as we know, folks suffering . . . from mental diseases can be triggered by certain events." Nevertheless, the court pointed out that Freeman

> called the right place. He called the Quality Assurance, because he had a complaint to make.
>
> And much of what he talked about related to what was going on in the world. He referenced the earthquake that we experienced here and things such as that. There were a couple of things that stood out. Early on in the recording he indicated "be prepared for what's coming" and that could be another earthquake that could swallow us up. We . . . don't know.
>
> But there was one part where he said, "I am going to blow you up like the USS Arizona at Pearl Harbor." Clear as day; that's what he said. And that unfortunately is a threat of – it's an arson threat under the statute, which includes explosives. And it is a threat of mass violence. Although in sentencing they may certainly merge under . . . lenity.
>
> So the court does believe that those few words were enough of a rant to constitute the crimes charged. So I find him guilty of Counts One and Two.

After being sentenced to ten years, with all but 410 days of time served suspended, plus three years of supervised probation, Freeman noted this timely appeal.

DISCUSSION

Freeman contends that he "did not threaten to blow up a structure," as required to convict him under Crim. § 6-107(a), which prohibits threats to "set fire to or burn a structure" or to "explode a destructive device . . . in, on, or under a structure." Nor did he threaten harm to multiple people, as required to convict him under Crim. § 3-1001, prohibiting "[t]hreats of crimes of violence that would place five or more people at risk of death or serious physical injury . . . if the threat were carried out." In Freeman's view, the evidence is insufficient to convict him of violating either statute "because it is not at all clear who, or what, he was referring to when he said, 'I am going to blow you up like the USS Arizona at Pearl Harbor.'" A contrary view, he argues, would criminalize "a form of pure speech" in violation of his First Amendment right, by penalizing language that was not a "true threat" under the jurisprudence protecting speech that is "disturbing" but not "a serious expression of intent to commit arson or harm more than five people[.]"

The State counters that the trial court's finding that Freeman's threat was directed at the hospital and its employees was not clearly erroneous. Moreover, the evidence and case law supports the court's determination that Freeman's statement was a "true threat" that was not protected by the First Amendment.

When, as in this case, the challenged convictions result from a bench trial, "we 'review the case on both the law and the evidence.'" *See State v. Neger*, 427 Md. 582, 595 (2012) (quoting Md. Rule 8-131(c)). "We 'will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses[,]'" weigh the evidence, and resolve

conflicts in it. *Id.* (quoting Md. Rule 8-131(c)); *see Pinkney v. State*, 151 Md. App. 311, 329 (2003).

When considering the legal sufficiency of the evidence in a non-jury trial, therefore, our task is to "determine whether 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Stephens v. State*, 198 Md. App. 551, 558 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *State v. Albrecht*, 336 Md. 475, 479 (1994)). "The test is 'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Painter v. State*, 157 Md. App. 1, 11 (2004) (quotation marks and citation omitted) (emphasis in original). Circumstantial evidence supporting rational inferences from which the trial judge may be convinced of the accused's guilt beyond a reasonable doubt is sufficient to convict. *See Anderson v. State*, 227 Md. App. 329, 346 (2016).

In addition to prohibiting threats of arson, Crim. § 6-107 is "aimed at persons who threaten to blow up buildings." *Moosavi v. State*, 355 Md. 651, 664 (1999). The Court of Appeals has explained that a statement "that 'I'm going to blow up the [building]' . . . . falls within the purview of [this statutory] prohibition of threats to '[e]xplode a destructive explosive device.'" *Id.*

Here, the evidence is sufficient to support conviction under this statute because it was undisputed that after calling the hospital and identifying two specific employees, Freeman stated, "I'm going to blow you up like the USS Arizona at Pearl Harbor." The

trial court did not commit either factual or legal error in ruling that this statement, which targeted the hospital and/or employees against whom Freeman was registering his grievances, was sufficient to convict him under Crim. § 6-107.

Similarly, Crim. § 3-1001 prohibits threats of mass violence "made by oral . . . communication[,]" defining such conduct as "knowingly threaten[ing] to commit or cause to be committed" a crime of violence that, if carried out, would place five or more people "at substantial risk of death or serious physical injury[.]" *See* Crim. § 3-1001(a)-(c). The evidence presented to the trial court was sufficient to establish that Freeman's recorded statement, "I'm going to blow you up like the USS Arizona[,]" constituted a threat to commit first degree arson in a manner that inflicted "serious physical injury" (*i.e.*, "physical injury that . . . creates a substantial risk of death; or causes permanent or protracted serious physical injury," as that term is defined in Crim. § 3-201(d)) on any and all hospital employees who were present when he blew up the building. That was sufficient to convict under Crim. § 3-1001.

We are not persuaded by Freeman's corollary contention that these two misdemeanor convictions violate his First Amendment right to free speech because his message was not a "true threat." To be sure, statutes like Crim. § 3-1001 and 6-107, which "make[] criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind[,]" so that "[w]hat is a threat must be distinguished from what is constitutionally protected speech." *See Watts v. United States*, 394 U.S. 705, 707 (1969). In *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2004 (2015), for example, the Supreme Court construed a federal statute criminalizing the transmission in

interstate commerce of "'any communication containing any threat . . . to injure the person of another[.]" (quoting 18 U.S.C. § 875(c)). The Court held that the district court erred in permitting the jury to determine that the defendant's statements in numerous Facebook posts were "true threats" because a reasonable person would understand them as such, rather than requiring the State to prove the defendant intended the statements to be a threat or knew that they would be viewed as such. 135 S. Ct. at 2012. Pointing out that even though the statute did not expressly establish any required mental state, the Court reasoned that proof of scienter, *i.e.*, that a defendant must intend the challenged communication to be a threat, is necessary to convict because premising a conviction solely on how such a communication would be understood by a reasonable person "is inconsistent with 'the conventional requirement for criminal conduct – *awareness* of some wrongdoing." 135 S. Ct. at 2011 (quotation marks and citation omitted).

This Court held in *Abbott v. State*, 190 Md. App. 595, 619 (2010), that the question of whether a particular statement constitutes a true threat is for a factfinder to decide. Interpreting Crim. § 3-708(b), an analogous statute prohibiting threats against State and local officials, we recognized that an allegedly threatening statement must be viewed in context and in light of protections in the First Amendment to the Constitution and Article 40 of the Maryland Declaration of Rights:

> The word "threat" has been defined as an expression of "a determination or intent to injure presently or in the future."
>
> As indicated, [Crim.] § 3-708(b) prohibits a knowing and willful threat. "A threat is knowingly made if the maker comprehends the meaning of the words uttered; it is willfully made if the maker voluntarily and

> intelligently utters the words in an apparent determination to carry out the threat."
>
> Notably, in order to convict, the State "must prove a true threat," which is distinct from "'words as mere political argument, talk or jest.'" A "true threat" is not constitutionally protected speech. Ordinarily, it is for the trier of fact to determine whether a statement constitutes a true threat.
>
> Whether a particular communication constitutes a true threat depends on both its language and its context. As the . . . Fourth Circuit explained . . . , "the context in which the words were [communicated], the specificity of the threat, and the reaction of a reasonable recipient familiar with the context in which the words were [communicated] are factors which must be considered" in determining whether a [communication] is a 'true threat.'"
>
> Of import here, "[a] threat may be considered a 'true threat' even if it is premised on a contingency." Nor is the government required to prove the present ability or intent to carry out the threat. Moreover, the statement may be a threat even if it was never communicated to the intended recipient.

Id. at 620-21 (citations omitted).

The statement at issue in *Abbott* was made in an email to the sitting governor, whom the defendant blamed for his mounting personal and business losses. *See id.* at 604-05. Abbott wrote that if he "ever g[o]t close enough[,]" he would wrap his hands around the governor's throat and "strangle the life from" him. *Id.* at 605. Calling himself a "true" American and the governor a "sell out," Abbott told that the governor that he "can send [his] MEXICAN army after" him, then expressed his hope that the governor would "drop dead" before Abbott got to him, because Abbott would hate to lose his "life because of a piece of shit like you." *Id.* at 605 (capitalization omitted). After examining other cases, this Court held that the statement was a true threat because a factfinder could "readily conclude" that it was not a political statement, but a "serious expression of an intent to harm the Governor." *See id.* at 603, 629-30. *Cf. United States v. Callahan*, 702 F.2d 964

(11th Cir. 1983) (affirming threat conviction based on letter threatening lives of president-elect and vice-president-elect).

In *Moosavi v. State*, 355 Md. at 654-55, the Court of Appeals affirmed a conviction under the predecessor to Crim. § 6-107, holding that a statement made on the phone by an "irate" bank customer that he was "going to blow up the bank[,]" "probably on a Sunday[,]" was a threat within the scope of Crim. § 6-107.

More recently, in *Hammonds v. State*, 436 Md. 22, 30 (2013), the Court of Appeals affirmed a conviction based on a criminal defendant's verbal statement, made immediately after he was sentenced in another matter, that the judge "don't know it, but she just signed her death warrant" and that "she's going to be one sorry bitch in a year and a half." The Court held that Crim. § 9-303(a), prohibiting retaliatory threats against Maryland judges, "does not require that a threat be communicated to the witness or victim" if those statements "constituted a 'communicated intent to inflict harm,'" and that given the context, the defendant had the requisite intent to retaliate. *Id.* at 39, 50-51. *Cf. Pendergast v. State*, 99 Md. App. 141, 148-49 (1994) (holding that evidence was sufficient to support jury finding that defendant's letter was a "true threat" of physical harm to two sentencing judges, in response to "what he perceived as injustice."). *See also United States v. Roberts*, 915 F.2d 889, 890 (4th Cir. 1990) (holding that evidence was sufficient to support conviction based on letter from anti-abortion activist, notifying a Supreme Court Justice that "either Brennan, Stevens or Kennedy is to die") (quotation marks and footnotes omitted).

Applying this First Amendment jurisprudence to the record before us, we are satisfied that the evidence supports the trial court's finding that Freeman's statement was a true threat, rather than protected speech. As articulated by the trial court, the evidence established that Freeman's threats were made to the hospital and targeted two employees. Accompanied by epithets based on race and nationality, Freeman threatened to blow "you" up – referring to the hospital on whose phone line he was leaving the voicemail, and/or to the two employees against whom he harbored grievances. The evidence also supports a finding that, like the threat against the sentencing judge in *Hammonds*, Freeman's threat was made in retaliation against the hospital and its employees for their treatment of him. As in *Moosavi*, Freeman's statement that he would "blow you up like the USS Arizona in Pearl Harbor" left no ambiguity that his threat to detonate explosives was intended to project death or serious physical injury, which put at risk more than five people who were likely to be at the hospital at any given time. This threat hit its mark, inflicting fear of imminent harm, to the point that police were called in, the facility doors were locked, and a nurse he identified was shielded from the distress of hearing the message.

In our view, Freeman's statement is easily distinguished from statements that other courts have determined were not true threats. For example, in contrast to the politically motivated statement made by draft-resister Watts about pointing any military weapon he might be issued toward the President, Freeman tied this threat against the hospital and its employees to his personal grievances stemming from his medical treatment. *Cf. Watts*, 394 U.S. at 708 ("We agree with petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.'"). Likewise, we find

no support in other cases cited by Freeman for the proposition that his statement was made in circumstances that could not be a criminal threat. *Cf. Kansas v. Anderson*, 192 P.3d 673, 678 (Kan. Ct. App. 2008) (characterizing jury's decision as a choice between whether defendant "was merely blowing off steam" or "whether his conduct satisfied all the elements of the crime of criminal threat"); *Berry v. Indiana*, 704 N.E.2d 462, 464 (Ind. 1998) (recognizing that defendant's prior threats against murder victim were admissible to provide relevant context).

JUDGMENT OF THE CIRCUIT COURT FOR DORCHESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.