

2018 WL 3468450

Unpublished Disposition

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NOTE: THIS OPINION WILL NOT APPEAR
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NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).
Appeals Court of Massachusetts.

COMMONWEALTH

v.

Alexander F. ROY, Jr.

17-P-1433

Entered: July 19, 2018.

By the Court (Blake, Sacks & Ditkoff, JJ. ¹)

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

*1 On appeal from his conviction of assault, the defendant argues, under the familiar standard of Commonwealth v. Latimore, 378 Mass. 671, 676-677

Footnotes

1 The panelists are listed in order of seniority.

2 We therefore need not address the defendant's challenge to his sentence.

(1979), that the evidence was **insufficient**. The parties agree that he was convicted on a threatened battery theory, which requires proof “that the defendant engaged in conduct that a reasonable person would recognize to be threatening, that the defendant intended to place the victim in fear of an imminent battery, and that the victim perceived the threat.” Commonwealth v. Porro, 458 Mass. 526, 530-531 (2010). This requires “objectively menacing conduct.” Commonwealth v. Chambers, 57 Mass. App. Ct. 47, 49 (2003). “[A]s a general rule words are not sufficient to constitute an assault.” Commonwealth v. Delgado, 367 Mass. 432, 436 (1975) (recognizing exception for words that convey information about defendant's immediate readiness and ability to carry out threat).

There was evidence that the defendant told the complaining witness, “Good, so I can kill you,” or, according to the defendant, “I could kick your ass.” But the defendant argues, and the Commonwealth concedes, that there was **insufficient** evidence that he engaged in any objectively menacing conduct, or that his words alone conveyed sufficient information about carrying out the threat. Having independently reviewed the record, we agree.² See Commonwealth v. Williams, 19 Mass. App. Ct. 915, 916 (1984) (confession of error does not relieve appellate court of the performance of its appellate functions). “[T]he prosecutor deserves commendation for not attempting to defend the indefensible.” Ibid.

Judgment reversed.

Verdict set aside.

Judgment for defendant.

All Citations

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