

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1471

September Term, 2015

LISA HUBBARD

v.

STATE OF MARYLAND

Graeff,
Friedman,
Thieme, Raymond, G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: May 27, 2016

*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.

In this case, we consider whether a defendant who acted to intimidate a witness can be convicted under the criminal statute prohibiting retaliating against a witness. In April of 2014, Kim Seymour, the victim, accused Lisa Hubbard, the appellant, of stealing her purse. The State charged Hubbard with theft and scheduled her trial for October 8, 2014. Eleven days before the scheduled trial, Hubbard and another woman approached Seymour outside her home. Hubbard brandished a knife, called Seymour names, and threatened to harm her if the charges were not dropped. Seymour ran inside her home and called 911. The State then charged Hubbard with second-degree assault, retaliating against Seymour for giving testimony in an official proceeding, and openly carrying a knife with the intent to cause injury to another. Seymour subsequently agreed to dismiss the underlying theft case and “let the money go” if Hubbard would leave her alone. The theft case was postponed on October 8 2014, and *nolle prossed* on October 28, 2014.

When Seymour and Hubbard arrived at the courthouse for Hubbard’s trial for the assault and retaliation charges, on July 30, 2015, Hubbard again called Seymour names and attempted to attack Seymour, but was stopped by two sheriffs. Hubbard was tried before a jury in the Circuit Court for Baltimore City. The jury found Hubbard guilty on the charge of retaliating against Seymour for giving testimony in an official proceeding, but acquitted her of the other charged offenses. The court ultimately sentenced Hubbard to serve three years incarceration, suspending all but time served and releasing her for appropriate treatment and monitoring.

In her timely filed appeal, Hubbard raises two questions for our consideration:

- I. Must this Court reverse Hubbard's conviction for retaliating against Seymour for giving testimony because there was no evidence that Seymour had already given testimony at the time of the alleged retaliation?
- II. Did the lower court err in allowing evidence of Hubbard's prior bad acts?

Because we conclude that Hubbard was tried and convicted under an inapplicable statute, we shall reverse her conviction for retaliating against Seymour for giving testimony in an official proceeding. In light of our decision on the first question, we need not address the second question raised by Hubbard in this appeal.

DISCUSSION

Hubbard was charged by statement of charges filed in the District Court for Baltimore City. In pertinent part, the state charged Hubbard with a misdemeanor violation of "CR 9 303" stating that:

On or About 09/27/2014
114 S CAREY ST
BALTIMORE, MARYLAND
...did intentionally threaten to harm with the intent of retaliating against Kim Seymour a victim or witness for giving testimony in an official proceeding.
Against the Peace, Government, and Dignity of the State.

Retaliating against an individual for giving testimony is prohibited by Md. Code (2002, 2012 Repl. Vol.) §9-303 of the Criminal Law Article ("CL"), which provides, in pertinent part:

- (a) A person may not intentionally harm another, threaten to harm another, or damage or destroy property with the intent of retaliating against a victim or witness for:

- (1) giving testimony in an official proceeding; or
- (2) reporting a crime or delinquent act.

The plain language of the charging document alleges that Hubbard threatened to harm Seymour “for giving testimony in an official proceeding,” rather than because Seymour had reported any crime to the police. Thus, the charging document alleges a violation of CL §9-303(a)(1), and not CL §9-303(a)(2). The evidence presented at Hubbard’s trial, however, indicates that Hubbard’s intent when she threatened Seymour on September 27, 2014, was not retaliation for testimony Hubbard had already given, but instead, to discourage or intimidate Seymour from giving testimony at the trial that was scheduled to begin on October 8, 2014. There is no indication in the record that Seymour had ever provided any testimony in any official proceeding for which Hubbard would have any motive to retaliate against her.

As the Court of Appeals clarified in *Tracy v. State*, 423 Md. 1 (2011):

The threat, “I will harm you because you reported a crime” is proscribed by CL §9–303(a)(2). The threat, “I will harm you because you testified” is proscribed by CL §9–303(a)(1). The threat, “I will harm you if you report the crime” is proscribed by CL §9–302(a)(2)(iii). The threat, “I will harm you if you testify” is proscribed by CL §9–302(a)(1).

Id. at 16. In this case, Hubbard was charged with a violation of CL §9-303(a)(1), but all the evidence indicates that she actually committed a violation of CL §9-302(a)(1).¹ “When

¹ CL §9-302 provides, in pertinent part:

- (a) Prohibited.—A person may not harm another, threaten to harm another, or damage or destroy property with the intent to:
(continued...)

a defendant has been charged and convicted under an inapplicable statute, the resulting sentence ‘is an illegal sentence’” and must be reversed.² *Tracy*, 423 Md. at 22 (citing *Moosavi v. State*, 355 Md. 651, 662 (1999)).

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY REVERSED.
COSTS TO BE PAID BY THE MAYOR AND
CITY COUNCIL OF BALTIMORE.**

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- (1) influence a victim or witness to testify falsely or withhold testimony; or
 - (2) induce a victim or witness:
 - (i) to avoid the service of a subpoena or summons to testify;
 - (ii) to be absent from an official proceeding to which the victim or witness has been subpoenaed or summoned; or
 - (iii) not to report the existence of facts relating to a crime or delinquent act.

² An illegal sentence may be challenged at any time. *Tracy*, 423 Md. at 22 (citing *Moosavi v. State*, 355 Md. 651, 662 (1999)). We find, therefore, that the State’s assertion that Hubbard failed to properly preserve any argument regarding the sufficiency of the evidence is not persuasive.