SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3342-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ZHARIA Z. YOUNG,

Defendant-Appellant.

Argued October 24, 2022 – Decided November 14, 2022

Before Judges Whipple, Mawla and Smith.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 21-02-0214.

Taylor L. Napolitano, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Taylor L. Napolitano, of counsel and on the brief).

Kim L. Barfield, Assistant Prosecutor, argued the cause for respondent (Jennifer Webb-McRae, Cumberland County Prosecutor, attorney; Kim L. Barfield, of counsel and on the brief).

PER CURIAM

We granted defendant Zharia Z. Young leave to appeal from a May 10, 2022 order, denying her motion to dismiss an indictment charging her with third-degree terroristic threats, N.J.S.A. 2C:12-3(a). We affirm.

On April 7, 2020, nearly one month after the President of the United States declared COVID-19 a national emergency, New Jersey State Troopers responded to a motor vehicle accident in Cumberland County. Officers observed two disabled vehicles lodged in trees and emergency medical services members attempting to treat defendant, who was uncooperative and refused treatment. When officers attempted to take defendant's statement, they noticed she had an odor of alcohol on her breath and bloodshot, watery eyes. They asked defendant if she had consumed alcohol and she replied "no." Defendant failed a field sobriety test.

After officers advised defendant that she was under arrest, she resisted being handcuffed and began screaming profanities at the officers. As she was being placed into a police vehicle, she kicked an officer in the chest. According to the complaint summons, "following the arrest[,] . . . defendant . . . repeatedly coughed and verbally threaten[ed] . . . troopers with being exposed and infected with the COVID-19 virus." The arresting trooper's affidavit of probable cause

stated: "While being transport[ed] . . . to the . . . [s]tation and while processing . . . defendant, she forcefully coughed and repeatedly [told t]roopers that she would give them the COVID-19 virus."

A second trooper filed an investigation report stating:

> While inside the [t]roop car, [defendant] purposely coughed and stated she had . . . [COVID]-19 and gave it to [t]roopers.
>
> While at . . . [the s]tation, [defendant] purposely coughed on [t]roopers and stated the [t]roopers should get tested because she had [COVID]-19. [Defendant] refused to give breath samples. She was placed in [a] cell . . . where she yelled profanities and continuously kicked the cell door violently. [She] requested to use the restroom and while doing so again purposely coughed in my face. [Defendant] was placed back in the cell where she continued to yell profanities and stated she was happy to infect [t]roopers with [COVID-19].

Defendant was processed and released the same day.

According to a supplemental investigation report filed by a State Police detective, the station commander advised "he was concerned . . . the squad of [t]roopers who were working during this time period may have to be quarantined due to exposure if [defendant] does have the [COVID-19] virus." The commander asked the detective "to contact [defendant] to see if she would

disclose her [COVID]-19 status . . . ." When the detective reached defendant and advised her of the purpose of his call,

> she immediately stated[:] "They should be concerned." I asked her to explain why they should be concerned and she advised that she is a public health care worker and had been displaying [COVID-19] symptoms for the past few days. I asked her if she had taken a [COVID-19] test and she advised that she had not but was planning on taking the test. I asked . . . if she would be willing to share those results, so we could take . . . proper steps to ensure the [t]roopers were not exposed and she stated that she probably would not. She then . . . complain[ed] about how the [t]roopers had no right to arrest her and that she didn't care if they got infected. She also stated that she hoped they "get infected[.]"

Following the call, the detective contacted the prosecutor's office, which authorized charges for terroristic threats and violating Executive Order No. 107[1] "[d]ue to the fact . . . we did not know the [COVID-19] status of [defendant] and concerns over possible [COVID-19] exposure to others . . . ." The detective's report further noted "approximately seven [t]roopers were sent into a two[-] week quarantine due to the statements and actions of [defendant]."

The grand jury indictment charged defendant with violating N.J.S.A. 2C:12-3(a), which states:

> A person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the

[1] The violation of the Executive Order is not an issue before us.

> purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.

Ten months after the indictment, we decided State v. Fair, which declared the "reckless disregard of the risk of causing such terror or inconvenience" portion of N.J.S.A. 2C:12-3(a) was unconstitutionally overbroad in violation of the First Amendment to the United States Constitution, U.S. Const. amend. I. 469 N.J. Super. 538, 558 (App. Div. 2021). As a result, defendant moved to dismiss the indictment, arguing it was impossible to know whether the grand jury indicted for "purpose to terrorize another" or under the reckless disregard portion of the statute. At oral argument before the motion judge, defense counsel asserted Fair struck down the entire statute.

The judge correctly noted the statute was written in the disjunctive "or[,]" and pursuant to "R[ule] 3:7-3[,] . . . surplusage in the indictment . . . may be stricken by the [c]ourt . . . ." Accordingly, he entered an order stating: "The phrase 'reckless disregard of the risk of causing terror' will be stricken from the indictment. However, the State can seek to convict . . . defendant of making terroristic threats by proving . . . defendant acted with the purpose of causing terror."

Defendant raises the following arguments on appeal:

> POINT [I:] THE TRIAL COURT SHOULD HAVE DISMISSED THE INDICTMENT BECAUSE N.J.S.A. 2C:12-3(A) IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE. IN THE ALTERNATIVE, THE "RECKLESS DISREGARD" PROVISION OF THE INDICTMENT IS NOT SURPLUSAGE BECAUSE IT IS NOT CLEAR WHETHER AT LEAST [TWELVE] OF THE GRAND JURORS INDICTED ON THE "PURPOSE TO TERRORIZE" PROVISION, AND THE INDICTMENT IS OTHERWISE DEFECTIVE FOR FAILING TO ALLEGE A "CRIME OF VIOLENCE[,]" IDENTIFY THE COMPLAINANTS, OR ALLEGE A TRUE THREAT.
>
> > A. [N.J.S.A.] 2C:12-3(a) is Entirely Unconstitutional And None of Its Unconstitutionally Overbroad Aspects Are Severable.
> >
> > B. Even If The Unconstitutional Aspects of [N.J.S.A.] 2C:12-3(a) Were Severable, There Is No Way To Tell Whether A Majority of The Grand Jurors Indicted Young on The Remainder of The Charge.
> >
> > C. The Indictment Is Deficient For Failing to Specify All of The Elements of The Charge or To Allege A True Threat.

I.

"An indictment should be disturbed only on the 'clearest and plainest ground[s],' . . . and 'only when the indictment is manifestly deficient or palpably

defective . . . .'" State v. Shaw, 241 N.J. 223, 239 (2020) (second alteration in original) (first quoting State v. Perry, 124 N.J. 128, 168 (1991); then quoting State v. Hogan, 144 N.J. 216, 229 (1996)). We "review a trial court's decision [on a motion] to dismiss an indictment under the deferential abuse of discretion standard." State v. Twiggs, 233 N.J. 513, 532 (2018) (citing Hogan, 144 N.J. at 229). However, when a decision to dismiss hinges on a purely legal question, the review is de novo and we need not defer to the motion court's interpretations. State v. S.B., 230 N.J. 62, 67 (2017).

II.

In Points I.A. and B., defendant urges us to strike down N.J.S.A. 2C:12-3(a) in its entirety because, pursuant to Fair, it is unconstitutionally vague and fails to define "crime of violence."[2] She argues the statute is not severable, and "[n]othing in the language or legislative history . . . indicates . . . the Legislature would have passed the statute without the 'reckless disregard' provision, or even that the Legislature contemplated a reasonable listener requirement for [N.J.S.A. 2C:12-3(a)]."

[2] We discuss the "crime of violence" issue in Section III of this opinion.

A.

Pursuant to the New Jersey Constitution, persons "may freely speak, write and publish [their] sentiments on all subjects, being responsible for the abuse of that right." N.J. Const. art. I, ¶ 6. Our constitution's free speech clause has been co-extensively interpreted with the First Amendment of the United States Constitution. Pennsauken v. Schad, 160 N.J. 156, 176 (1999). "The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." Fair, 469 N.J. Super. at 549 (quoting R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992)).

"The Supreme Court, however, has recognized 'a few limited' categories of speech which may be restricted based on their content, including . . . true threats." Ibid. (citing Virginia v. Black, 538 U.S. 343, 358-59 (2003)). In State v. Carroll, we stated:

> A "true threat" includes "statements where 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 First Amendment does not cover true threats so as "to protect[] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." By contrast, mere hyperbole, even "vehement, caustic, . . . unpleasantly

> sharp attacks" and "vituperative, abusive, and inexact" speech are protected.
>
> [456 N.J. Super. 520, 538 (App. Div. 2018) (alterations in original) (citations omitted).]

In Fair, we noted a "true threat" requires a speaker "to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 469 N.J. Super. at 550 (quoting Black, 538 U.S. at 359). We struck down the reckless disregard portion of N.J.S.A. 2C:12-3(a) because "it unconstitutionally encompasses speech and expression that do not constitute a 'true threat' and, therefore, prohibits the right of free speech guaranteed by the First Amendment." Id. at 554.

Defendant misreads Fair because we clearly did not invalidate the entire statute. Rather, we remanded for a new trial regarding "those parts of N.J.S.A. 2C:12-3 that are not constitutionally overbroad . . . ." Id. at 558.

B.

Where a provision of a statute is declared unconstitutional, the remaining "provision shall, to the extent . . . it is not unconstitutional . . . be enforced and effectuated . . . ." N.J.S.A. 1:1-10. Whether the court performs such "judicial surgery[,]" depends on whether the Legislature would have wanted the statute to survive. N.J. Chamber of Com. v. N.J. Election Law Enf't Comm'n, 82 N.J.

57, 75 (1980). The Legislature's "intent must be determined on the basis of whether the objectionable feature of the statute can be [excised] without substantial impairment of the principal object of the statute." Affiliated Distillers Brands Corp. v. Sills, 60 N.J. 342, 345 (1972). In other words, we may sever a statutory provision "where the invalid portion is independent and the remaining portion forms a complete act within itself." Inganamort v. Borough of Fort Lee, 72 N.J. 412, 423 (1977). Whether a statute contains a severability clause is not determinative. See id. at 422; see also State by McLean v. Lanza, 27 N.J. 516, 527 (1958).

Clearly, post-Fair, the remainder of N.J.S.A. 2C:12-3(a), proscribes a complete act within itself, namely, "threaten[ing] to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience . . . ." N.J.S.A. 2C:12-3(a). We discern no legislative intent that the reckless disregard and purposeful sections of the statute were meant to be one unit. As the motion judge noted, the statute is written in the disjunctive. The legislative intent is further evidenced by differing forms of culpability proscribing purposeful acts and the now-invalidated recklessness standard.

III.

In Point I.C., defendant contends the indictment should be dismissed because it fails to allege a "crime of violence," identify the multiple complainants, or show defendant's actions constituted "a prosecutable true threat." We also address defendant's argument raised in Point I.A. asserting "crime of violence" is unconstitutionally vague.

"It is axiomatic that an indictment 'must charge the defendant with the commission of a crime in reasonably understandable language setting forth all . . . critical facts and . . . essential elements' of the alleged offenses so as to enable defendant to prepare a defense." State v. Salter, 425 N.J. Super. 504, 514 (App. Div. 2012) (quoting State v. Wein, 80 N.J. 491, 497 (1979)). "Thus, 'the State must present proof of every element of an offense to the grand jury and specify those elements in the indictment.'" State v. Dorn, 233 N.J. 81, 93-94 (2018) (quoting State v. Fortin, 178 N.J. 540, 633 (2004)). The sufficiency of an indictment depends on "whether [it] substantially misleads or misinforms the accused as to the crime charged. The key is intelligibility." Wein, 80 N.J. at 497. "In making that determination, the court looks to whether the indictment is sufficiently specific 'to preclude the substitution by a trial jury of an offense

which the grand jury did not in fact consider or charge.'" Dorn, 233 N.J. at 94 (quoting State v. LeFurge, 101 N.J. 404, 415 (1986)).

"A statute is void if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." State v. Lenihan, 219 N.J. 251, 267 (2014) (quoting Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 279-80 (1998) (internal quotations omitted)). A vague statute may deny due process by failing to provide fair notice of prohibited conduct. Ibid.; see also U.S. Const. amend. XIV, § 1. Statutes can also be unconstitutionally vague if they authorize or allow arbitrary and selective enforcement. Hill v. Colorado, 530 U.S. 703, 732 (2000). An offense must be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983).

"A statute [can] be challenged as being either facially vague or vague 'as applied.'" Lenihan, 219 N.J. at 267 (quoting State v. Maldonado, 137 N.J. 536, 563 (1994)). "A law is facially vague if it is vague in all applications." Ibid. Accordingly, a facial due-process challenge is particularly difficult to present and establish. United States v. Salerno, 481 U.S. 739, 745 (1987).

"A statute that 'is challenged as vague as applied must lack sufficient clarity respecting the conduct against which it is sought to be enforced.'" Lenihan, 219 N.J. at 267 (quoting Visiting Homemaker Serv. of Hudson Cnty. v. Bd. of Chosen Freeholders, 380 N.J. Super. 596, 612 (App. Div. 2005)). "[I]f a statute is not vague as applied to a particular party, it may be enforced even though it might be too vague as applied to others." Ibid. (quoting State v. Cameron, 100 N.J. 586, 593 (1985)). Accordingly, a person challenging a statute must normally show it is vague as applied to them. See Holder v. Humanitarian L. Project, 561 U.S. 1, 19-20 (2010); Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 495 (1982); State v. Dalal, 467 N.J. Super. 261, 281 (App. Div. 2021).

The indictment, as modified by the motion judge, reads as follows:

> [O]n or about the [seventh] day of April, 2020, in the Township of Commercial, County of Cumberland, . . . [defendant] did threaten to commit a crime of violence upon members of the New Jersey State Police, with purpose to terrorize the said victim . . . contrary to the provisions of N.J.S.A. 2C:12-3[(a)] . . . .

The indictment is not deficient because it contained the relevant provision of the statute and the alleged victims of the crime.

Further, the indictment is not deficient for not defining the crime of violence because this is a matter of the State's proofs and a jury issue. Indeed, the model jury instruction for N.J.S.A. 2C:12-3(a), states:

> The first element that the State must prove beyond a reasonable doubt is that defendant threatened to commit any crime of violence. The State alleges that defendant threatened to commit the violent crime of _____. The elements of the crime(s) of _____ are as follows: _____ . . . .
>
> The words or actions of the defendant must be of such a nature as to convey menace or fear of a crime of violence to the ordinary person. It is not a violation of this statute if the threat expresses fleeting anger or was made merely to alarm.[]
>
> The second element that the State must prove beyond a reasonable doubt is that the threat was made with the purpose to
>
> . . . .
>
> terrorize another . . . . In this case, the State alleges that defendant intended to terrorize (name of victim). The State need not prove that the victim actually was terrorized.
>
> [Model Jury Charges (Criminal), "Terroristic Threats (N.J.S.A. 2C:12-3[(a)])" (rev. Sept. 12, 2016).]

While we cannot speculate what crime of violence the State will present to the jury to prove terroristic threats, it is readily apparent from the record defendant's conduct suggests assaultive behavior, in that by coughing she

intended to transmit a deadly virus. In State v. Smith, the defendant was an HIV-infected jail inmate who threatened to kill corrections officers by biting or spitting at them. 262 N.J. Super. 487, 492 (App. Div. 1993). He then bit an officer's hand causing a puncture and was subsequently convicted of several offenses, including terroristic threats pursuant to N.J.S.A. 2C:12-3(b). Ibid. On appeal, the defendant argued the verdict was against the weight of the evidence because it was medically impossible to transmit the virus through a bite. Id. at 517. We found no reversible error, noting the

> defendant's theory depends on his premise that a bite cannot spread HIV, a premise by no means established by the evidence. Moreover, [the] defendant assumes that all rational persons know that a bite is ineffective in transmitting the virus. Throughout his brief, he laments society's ignorance about AIDS. But that very ignorance, perhaps better characterized as uncertainty, if he is correct, would tend to support an inference that a reasonable person would take seriously a threat by a hostile, HIV-infected person, under the circumstances of this case, to kill by biting. As noted by the prosecutor, even if the likelihood of transmission is remote, the test under N.J.S.A. 2C:12-3(b) is the reasonableness of the victim's fear. Given the medical evidence that there seems at least some possibility of transmission, and that even the defense's expert would test a bite victim for HIV infection, the jury reasonably could have found that [the] defendant's words and conduct threatened death.
>
> [Id. at 517-18 (emphasis in original).]

Some have noted charging terroristic threats in the context of COVID-19 is misguided, as "intuitively, it does not seem plausible that the act of coughing on another—without more—falls under the class of a crime of violence." Charles Flanders et al., "Terroristic Threats" and COVID-19: A Guide for the Perplexed, 169 U. Penn. L. Rev. Online 63, 77 (2020) (emphasis added). Further, the act of coughing on another does not fit the historically intended purpose of terroristic threat statutes, e.g., "calling in a bomb threat that forces the evacuation of a nursing home." Ibid.

However, defendant's alleged actions here were not limited to the act of coughing, but rather coughing accompanied by a statement indicating a purpose to infect troopers. The evidence in the record reveals an intent to terrorize, defined elsewhere as "to convey the menace or fear of death or serious bodily injury by words or actions." N.J.S.A. 2C:38-2(d).

Therefore, pursuant to the facts presented here, defendant's actions were not mere hyperbole because she worked in healthcare and claimed to be experiencing COVID-19 symptoms. Unlike Smith, where the risk of HIV transmission was limited, the risk of transmitting COVID-19 has proven the

opposite.[3] And considering defendant's offense occurred at the outset of a national emergency, which would claim over one million American lives,[4] including over 31,000 New Jerseyans,[5] we cannot conclude the indictment punishes defendant merely for causing alarm, was unintelligible, arbitrary, or vague as applied to her.

IV.

Finally, to the extent we have not addressed an argument raised on the appeal, it is because it lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

[3] How COVID-19 Spreads, CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last updated Aug. 11, 2022).

[4] COVID Data Tracker, CDC, https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last updated Oct. 27, 2022).

[5] COVID-19 Case and Mortality Summaries, NJ Dep't of Health, https://www.nj.gov/health/cd/topics/covid2019_dashboard.shtml (last updated Oct. 27, 2022).