1

STATE OF MAINE
KNOX, SS.

UNIFIED CRIMINAL DOCKET
ROCKLAND
Docket No. CR-21-659

State of Maine

v.

Hasahn Carter

ED 1147

Order

Rep. Sinclair

This order addresses several pending motions, which were heard during one or both proceedings held on November 29 and 30, 2023. On both occasions, the defendant appeared remotely, and all counsel were present either in person or remotely.

A. Motion to Continue

The defendant moved to continue the trial scheduled for the December term. After further consultation between the defendant and his attorneys, defense counsel advised the clerk that the motion was being withdrawn, and a jury has now been impaneled. Consequently, the trial will proceed as presently scheduled.

B. Motion to amend count 1

During the hearing on the defendant's motion to dismiss counts 1 and 8, discussed below, the State orally moved to amend count 1, which alleges robbery as defined in a portion 17-A M.R.S. § 651(1)(B)(1) and (2). (That count 1 does not include another portion of section 651(1)(B) bears directly on the defendant's motion to dismiss that count.). The defendant has objected to the motion.

In relevant part, count 1 alleges that the defendant

did commit or attempt to commit theft from Seth A. Haskins and at that time did threaten to use force against Seth A. Haskins, who was present, with the intent to prevent or overcome resistance to the taking of the property, or the retention of the property immediately after the taking, or to compel the person in control of the property to give it up or to engage in other conduct which aided in the taking or carrying away of the property.

The State now seeks to amend count 1 to include additional language, which is also part of section 651(1)(B), that would allege that the defendant also "otherwise intentionally or knowingly placed another person present in fear of the imminent use of force with the intent" to create the results already described in the charge as presently framed. This new set of proposed allegations would create an entirely separate basis for a jury to find the defendant guilty of the charge in count 1.

The court is authorized to allow an amendment to an indictment that, like the one here, alleges a crime greater than a Class D crime if the proposed amendment "does not change the substance of the charge." M.R. U. Crim. P 7(d). A substantive change to a charge in an indictment without having the case resubmitted to a grand jury would violate the defendant's right, created in Article I, Section 7 of the Maine Constitution, to grand jury process. *State v. Hathorne*, 387 A.2d 9, 11 (Me. 1978). A substantive amendment is one that "changes the nature or grade of the offense charged." *State v. Corliss*, 706 A.2d 593, 594 (Me. 1998). A formal change, in contrast, is one that does not result in a difference between the substance of the original charge and the amended one. *State v. Johnson*, 870 A.2d 561, 564-65 (Me. 2005).

The amendment to count 1 sought by the State is clearly substantive and not merely formal. Count 1 would remain a robbery charge, and the sentencing

classification would be unchanged, but count 1 as amended would introduce an entirely different definition of robbery, and one that would form an alternative, independent basis for the defendant to be found guilty. Setting aside the clear prejudice that would result from such an amendment on the eve of trial, it is precluded by Maine case law, the rules of court, and likely even the Maine Constitution. Accordingly, the court denies the motion.

C. Motion to dismiss

The defendant has moved to dismiss counts 1, discussed above, and count 8, alleging terrorizing with a dangerous weapon, on the ground that the statutes defining those offenses are constitutionally overbroad. His motion, therefore, constitutes a challenge to the statutes on their face—meaning that the issue is one of law and is not a function of the facts or evidence that would be presented at trial. The State does not oppose the relief sought as to count 8, so that charge will be dismissed. The remaining issue is whether count 1 is constitutionally infirm.

The basis for the defendant's motion is found in the Supreme Court's decision in *Counterman v. Colorado*, --- U.S. ---, 143 S.Ct. 2106 (2023). There, the Court considered a challenge to the constitutionality of a statute that criminalized repeated communications with another person that "would cause a reasonable person to suffer serious emotional distress and does cause that person to suffer severe emotional distress." *Id.* at 2112. The defendant in that case asserted that the statute was overbroad because it prohibited some communications that were protected by the First Amendment. *Id.* The Court agreed. *Id.* at 2119. The Court reasoned that the conduct addressed by the statute was a "true threat", in contrast to threats that, in context, would not be taken seriously. *Id.* at 2114. While some "true threats" are not protected by the

First Amendment, others are protected by that constitutional right. In order to avoid a chilling effect that would inhibit the person from making the communication because the person would be exposed to prosecution based only on the way the communication is perceived by others, the prosecution is required to prove that the defendant acted with a culpable state of mind, specifically—at a minimum—recklessly, which means that, when he made the communication, he was aware that there was a practical certainty "that others would take his words as threats." *Id.* at 2116-17. Because the Colorado statute did not contain a *mens rea* element, it criminalized some communications that are protected by the First Amendment, and consequently the Court held that the statute was unconstitutionally overbroad. *Id.* at 2119.

Section 651(1)(B), which is the statutory basis for the robbery charge in count 1, does not explicitly include a culpable state of mind. In its entirety, the statute provides:

> (1) A person is guilty of robbery if the person commits or attempts to commit theft and at the time of the person's actions:
>
> ....
>
> (B) The actor threatens to use force against any person present or otherwise intentionally or knowingly places any person in fear of the imminent use of force with the intent:
>
> (1) To prevent or overcome resistance to the taking of the property, or to the retention of the property immediately after the taking; or
>
> (2) To compel the person in control of the property to give it up or to engage in other conduct that aids in the taking or carrying away of the property.

Thus, the Legislature *has* included the culpable states of mind of intentional or knowing conduct for robbery that is based on placing the alleged victim in fear of the imminent use of force—the type of robbery described in the second part

of the sentence in subsection (1)(B). As is discussed above, however, that is *not* the formulation set out in count 1. Count 1 charges the defendant with the other kind of robbery defined in section 651(1)(B) found in the first part of section (1)(B), namely, threatening the "use of force against any person present."

The State argues, at least in part, that the mens rea that is an element of the other definition of robbery in section 651(1)(B) (i.e., placing a person in fear of the imminent use of force) also applies to the formulation that *is* set out in count 1—in other words, that the phrase "intentionally or knowingly" modifies both types of robbery as defined in this provision of the statute. If so, this would likely render the charge in count 1 consistent with the requirements established in *Counterman*. The State's argument, however, fails, for at least two reasons.

First, count 1 does not allege any culpable state of mind. If the statutory definition of robbery contained in count 1 actually includes a culpable state of mind as the State now asserts, then the allegation is fatally deficient for failing to include an essential element. As a constitutional principle, a charge must include each element of the alleged offense. *State v. Weese*, 662 A.2d 213, 214 (Me. 1995); *see State v. Elliot*, 2010 ME 3, ¶ 29, 987 A.2d 513; *see also Haller v. State*, 241 A.2d 607, 609 (Me. 1968) (stating that inclusion of all elements of a crime is a "cardinal rule" of pleading). The omission of even a single element renders the charge "void[]." *State v. Day*, 2000 ME 192, ¶ 4,760 A.2d 1069. One of the elements of a crime is the culpable state of mind that is included in the definition of the charge. 17-A M.R.S. § 32. By virtue of the State's own contention that the robbery charge as alleged in count 1 includes a mens rea

element, the charge fails because the allegations do not include a definitionally essential element. On this basis, count 1 must be dismissed.[1]

Second, and alternatively, the court is not persuaded as a matter of statutory construction that the element of intentional or knowing conduct that appears in the second part of section 651(1)(B) applies to the version of robbery set out in count 1, which is set out in the first part of the statute. In several decisions that predated *Counterman* by many years, the Law Court examined the constitutionality of the crimes of terrorizing or threatening communications and the nature of the proof needed for a person to be found guilty of those types of offenses. *See State v. Porter*, 384 A.2d 429, 431-34 (Me. 1978); *State v. Sondergaard*, 316 A.2d 367, 369-70 (Me. 1974) (considering the pre-Code crime of "threatening communications", 17 M.R.S. § 3701); *State v. Hotham*, 307 A.2d 185, 307 A.2d 185, 186-87 (Me. 1973) (same).[2] Count 1 includes, as an element, an allegation that the defendant "threatened to use force" against another person. The Law Court's pre-*Counterman* decisions concluded that the State is *not* required to prove that the actor had any particular culpable state of mind when making the threatening communications and that the absence of any mens rea does not make the statute unconstitutional as overbroad. As the Court stated in *Porter*,

> [W]hether a communication constitutes a "threat" within the plain meaning of that work does not depend upon the subjective motivation

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[1] The State complains that the defendant did not seek relief pursuant to *Counterman* sooner after the Supreme Court issued its opinion in that case, in June of 2023. But the State has had the identical amount of time to seek a superseding indictment or other relief that would have either expanded the allegations in count 1 to include the definition of robbery that does not presently appear in that charge, so that a culpable state of mind would be included in at least that alternative aspect of the charge, or to have included a mens rea element in the definition that does appear in the indictment if, as the State argues here, the statute should be construed to include such an element.

[2] The Court's analysis of the pre-Code statutes was held to be fully applicable to analogous statutes later enacted as part of the Criminal Code. *State v. Daley*, 411 A.2d 410, 413 n.8 (Me. 1980).

(or intention) of the communicator. A communication is a threat if it carries the promise of evil under such circumstances that a reasonable person receiving the communication would believe that such was to ensue at the hands of the communicator, or his allies.

384 A.2d at 434. In those decisions, the Court concluded that the statutes did not violate First Amendment rights because, by itself, the content of the criminalized communications removed them from being constitutionally protected. *See id.; Sondergaard*, 316 A.2d at 369; *Hotham*, 307 A.2d at 186. In other words, the statutes were deemed constitutional because of the objective impact the communications would have on another person, without regard to the defendant's state of mind. Given that conclusion, the Court also held that the Legislature's omission of a mens-rea element from the statutes was not inadvertent. *Porter*, 384 A.2d at 434. *Counterman* has since undermined that analysis because constitutional principles *require* proof of the actor's mens rea.

Given that the Law Court had endorsed the constitutionality of statutes criminalizing threatening conduct without regard to the actor's mens rea, there is no reason to conclude that the Legislature intended to incorporate such an element into the definition of robbery as alleged in count 1. *See Finks v. Me. State Highway Comm'n*, 328 A.2d 791, 797 (Me. 1974) (stating that courts will presume that the Legislature bears "in mind" judicial decisions when it enacts statutes); *see also Gen. Motors Acceptance Corp. v. Anacone*, 160 Me. 53, 78, 197 A.2d 506, 521 (1964) (explaining that "a statute enacted after a judicial construction is presumed to take that construction"). While statutes are to be construed to preserve their constitutionality, when section 651 was enacted it *was* constitutional based on the then-current understanding of the First

Amendment. To the extent that the statute does not contain a culpable state of mind as an element, it has *become* unconstitutional pursuant to *Counterman*.

If it can be done reasonably, statutes are to be construed in a way that would make them constitutional. *MacImage of Maine, LLC v. Androscoggin County*, 2012 ME 44, ¶ 26, 40 A.3d 975. The statutory language at issue here, however, cannot be reasonably construed to make it comport with *Counterman*. The plain language of that part of section 651(1)(B) does not include a mens-rea element, and the State's reading to try to achieve that result—bringing over language that appears later in the statute to modify a disjunctive phrase that appears earlier—is a grammatical contortion.

To interpret the statute as the State urges here would be to change the meaning of the statute through reverse engineering. This would be the result whether the court were to attach the element of intentional or knowing conduct to the definition of robbery contained in count 1, or whether the court were to adopt the lesser mens rea of recklessness, which the *Counterman* Court held to be constitutionally sufficient. --- U.S. at ---, 143 S.Ct. at 2112. With either approach, the court would be improperly re-writing the statute and engaging in legislative conduct by adding an element to the crime as defined by the Legislature in order make it comport, post hoc, with *Counterman*. *See Elliot*, 2010 ME 3, ¶ 29, 987 A.2d 513 (stating, "A court may not add elements to a crime because [n]o conduct constitutes a crime unless it is prohibited ... [b]y this code [the Maine Criminal Code]; or ... [b]y any statute or private act outside this code, including any rule, regulation or ordinance authorized by and lawfully adopted under a statute.") (internal citations omitted). More specifically, this would be in disregard of the Court's conclusion that the Legislature had designed statutes criminalizing threatening conduct to exclude

any consideration or proof of the defendant's state of mind. *See Porter*, 384 A.2d at 434.

The reach of the portion of section 651(1)(B) at issue here extends to protected speech and conduct. It is therefore constitutionally overbroad.

Because count 1 does not include an allegation of a constitutionally-required mens-rea element, or because the statute forming the basis for count 1 is unconstitutionally overbroad, or because of both reasons, count 1 of the indictment will be dismissed.

The entry shall be:

For the foregoing reasons, the defendant's motion to continue is withdrawn. The State's motion to amend count 1 of the indictment is denied. The defendant's motion to dismiss counts 1 and 8 of the indictment is granted, and those charges are dismissed.

Dated: December 11, 2023

/s/ Jeffrey L. Hjelm
Active Retired Justice, Maine SJC