COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

BOSTON MUNICIPAL COURT
CHELSEA DIVISION
DOCKET NO. ****CR****

COMMONWEALTH

V.

JEREMY WASHINGTON

MOTION TO DISMISS

Jeremy Washington, the accused in this matter, moves this Honorable Court to dismiss the charge of willful and malicious destruction of property valuing more than $250 (M.G.L. 266, § 127) and witness intimidation (M.G.L. c. 268, § 13B) of the above-numbered complaint.

As grounds therefore, the defendant states that the evidence presented in the materials giving rise to the complaint is not sufficient to establish probable cause for the issuance of a complaint against him. *Commonwealth v. DiBennadetto*, 436 Mass. 310, 313 (2002), *Commonwealth v. McCarthy*, 385 Mass. 160, 163 (1982). *DiBennadetto* affirms that after the issuance of a complaint, a motion to dismiss will lie for a failure to present sufficient evidence to the judicial officer. *DiBennadetto*, 436 Mass. 310 at 313.

Respectfully submitted,
JEREMY WASHINGTON
By his attorney,

_____

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DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The defendant respectfully moves, pursuant to Massachusetts Rule of Criminal Procedure 3(g) and *Commonwealth v. DiBennadetto*, 436 Mass. 310, 313 (2002), that this Honorable Court dismiss the charges of witness intimidation and of willful and malicious destruction of property because the factual allegations constituting the basis for the complaint do not make out probable cause to believe that Mr. Washington committed these offenses. See Criminal Complaint, Application for Criminal Complaint, Chelsea Police Department narratives **REV-*****-AR, attached; *DiBennadetto*, 436 Mass. 310, 313 (holding that "[a] motion to dismiss will lie for failure to present sufficient evidence [to establish probable cause] to the clerk-magistrate"); Mass. R. Crim. P. 3(g) (prescribing process for the issuance of criminal complaints and instructing that "the appropriate judicial officer shall not authorize a complaint unless the information presented by the complainant establishes probable cause to believe that the person against whom the complaint is sought committed an offense"). "The standard of probable cause to authorize a complaint is the same as the standard that governs the grand jury's decision to issue an indictment." Mass. R. Crim. P. 3(g)(2) Reporter's Notes.

Under Rule 3(g), the complainant must present the factual basis for the complaint in writing or, in the alternative, any oral presentation to the magistrate must be recorded. Here, the factual allegations reflected in the Application for Criminal Complaint and the Chelsea Police Department reports do not support a finding of probable cause to believe that Mr. Washington committed the crimes charged.

FACTS

On July 25, 2015, Mr. Washington was arrested after an altercation with a police officer on Main Street, Chelsea. The police reports allege that Mr. Washington struck an officer with his fist. Mr. Washington then allegedly struggled with officers on the street and resisted transport to the police station. After Mr. Washington was booked, officers ordered him to go to a cell block area, at which point another struggle ensued. This struggle involved at least four, and possibly as many as seven, officers. During this struggle, "[t]he computerized fingerprinting station in booking was knocked over and damaged." Eventually, Mr. Washington was moved into a cell, where he pounded his head against the cell door's window and "challenged the officers to fight." While locked in the cell, "[i]n an attempt to intimidate officers, Washington was swinging his fists and yelling that he wanted to fight." The police report describes Mr. Washington's behavior at the station as "clearly erratic." The report also alleges that he "was sometimes cooperative but was also very agitated," that he stated that he is a lawyer[1], and that "he was not making logical sense, he was acing erratically, and we [police officers] thought he might be on drugs."

Mr. Washington faces nine charges stemming from these events, including willful and malicious destruction of property worth more than $250 (the computerized fingerprinting station) (M.G.L. c. 266, § 127) and witness intimidation (M.G.L. c. 268, § 13B).

[1] Mr. Washington is not a lawyer.

ARGUMENT

Courts generally do not inquire into the competency or sufficiency of the evidence in support of a criminal complaint. *See Commonwealth v. Coonan*, 428 Mass. 823, 825 (1999). However, despite this general rule, a court may properly review the evidence presented to determine whether there was sufficient evidence to find probable cause for the defendant's arrest, or to determine whether the acts which the defendant is alleged to have done constitute a crime. *See e.g.*, *Commonwealth v. O'Dell*, 392 Mass. 445 (1984); *Commonwealth v. McCarthy*, 385 Mass. 160 (1982). In the District Court, the charging document is the complaint, rather than the grand jury indictment, but the standard of probable cause is the same. *See Commonwealth v. Valchuis*, 40 Mass. App. Ct. 556, 560 (1996). Under the probable cause requirement, a complaint should not issue "unless the information presented by the complainant establishes probable cause to believe that the person against whom the complaint is sought committed an offense." Mass. R. Crim. P. 3(g)(2). Probable cause is defined as "reasonably trustworthy information sufficient to warrant a prudent person in believing that a crime has been committed and that the accused is the perpetrator." Massachusetts District Court Standards of Judicial Practice (2008).

1. The evidence presented to the Clerk Magistrate is insufficient to establish probable cause to believe that Mr. Washington maliciously destroyed or injured the computerized fingerprinting station.

After Mr. Washington's arrest, four separate police reports were written by members of the Chelsea Police Department. Nine officers, two sergeants, and four lieutenants authored the first report. A second report was authored by a lieutenant. The third and fourth reports came from two officers. In the approximately eight pages of detailed reports written by numerous law enforcement officials, there is *exactly one sentence* referencing the basis for the malicious destruction of property charge:

> "The computerized fingerprinting station in booking was knocked over and damaged."

There are absolutely no facts in the police reports to support a claim that this damage was inflicted willfully and maliciously. Rather, based on the police reports, it is just as likely that the fingerprinting station was knocked over accidentally during the course of a struggle between Mr. Washington and officers. Likewise, there is no evidence that the fingerprinting station was knocked over by Mr. Washington, as opposed to one of the officers involved. As such, the charge must be dismissed for lack of probable cause.

Willful and malicious destruction of property is a specific intent crime. *Commonwealth v. McDowell*, 62 Mass. App. Ct. 15, 22 (2004). "Willfulness" requires a showing that the defendant intended both the conduct *and* the harmful consequences of his conduct. *Commonwealth v. Redmond*, 53 Mass. App. Ct. 1, 4 (2001). "Malice" requires a showing that the defendant's conduct was motivated by cruelty, hostility, or revenge. *Id.* "While, in most crimes, the willful doing of an unlawful act suffices to prove malice, under G.L. c. 266, § 127, it does not." *Id.*, citing *Commonwealth v. Peruzzi*, 15 Mass. App. Ct. 437, 443 (1983).

The terms "willful" and "malicious" are not redundant. "The word 'willful' means intentional and by design in contrast to that which is thoughtless or accidental. Malice, on the other hand, refers to a state of mind of cruelty, hostility or revenge. Both elements are required for the crime of destruction of property." *Peruzzi*, 15 Mass. App. Ct. at 443. "[S]omething more than a deliberate intent to do a wrong' must be shown to establish malice." *Id.*, quoting *Commonwealth v. Hosman*, 257 Mass. 379, 385 (1926). To establish probable cause for this charge, the Commonwealth must show not only that the conduct which led to the destruction was intentional, but also that the destruction of the property was *both* intentional and malicious.

Commonwealth v. Armand, 411 Mass. 167, 171 (1991) ("the charge of willful and malicious destruction requires proof of specific intent in terms of both willful and malicious action"). Because the police report states nothing more than that the fingerprinting station "was knocked over and damaged," there can be no probable cause to believe that the destruction was caused by Mr. Washington, let alone that he acted willfully and with malice toward the property.

It is well established that the fact that property is damaged during the commission of a crime does not suffice to show the requisite malice. *See Redmond*, 53 Mass. App. Ct. 1, 4-5 (2001) (damage to a door, window, and security system was not willful and malicious destruction of property when done in the course of a burglary); *Commonwealth v. Doyle*, 83 Mass. App. Ct. 384, 388 (2013) (defendant did not damage an ATM with "a state of mind infused with cruelty, hostility, or revenge," but rather in order to access the cash within); *Commonwealth v. Armand*, 411 Mass. 167, 170-71 (1991) (damage to car door and steering column merely ancillary to principal goal of pulling victims out of car in order to beat them).

Accepting, for the sake of argument, that the fingerprinting station was knocked over by Mr. Washington as he struggled with the officers, the damage to the station was merely incidental to the alleged behavior leading to the assault and battery charges stemming from that course of action. Thus, as in *Redmond*, "such property damage was nothing more than the adventitious by-product of a wholly discrete criminal enterprise [struggling with the officers] and was not gratuitous, excessive violence purposefully designed to intimidate and overpower, or destructive acts that were by design and hostile to the owner of the property." 53 Mass. App. Ct. at 5 (quotations and citations removed). Even if Mr. Washington intended to commit the other crimes with which he is accused, there is nothing in the application for the complaint to suggest that he possessed the requisite intent to damage the station, as required by statute.

2. The evidence presented to the Clerk Magistrate is insufficient to establish probable cause to believe that any damage to the computerized fingerprinting station was greater than $250.

The value of the property, specifically whether it is greater than $250, is an element of the crime charged. Therefore, there must be probable cause that the damages were greater than $250. *Commonwealth v. Beale*, 434 Mass. 1024, 1025 (2001) ("In view of the significantly increased sentencing range triggered by a finding that the value of the destroyed property exceeds $250, we conclude that the value of the property must be treated as an element of the felony of malicious destruction of property").

The reports provided by the Chelsea Police do not describe the damage to the station in the least. For all the clerk magistrate would have known, the station could have sustained a superficial scratch, or it could have been completely shattered.[2] The police report merely states that the station was "knocked over and damaged," without any insight into the severity of the damage. Without more information, there is no probable cause to believe the damage was greater than $250. Therefore count nine of the complaint must be dismissed, insofar as it charges malicious destruction of property over $250, as opposed to $250 or under.

3. The evidence presented to the Clerk Magistrate is insufficient to establish probable cause to believe that Mr. Washington committed the offense of witness intimidation.

M.G.L. c. 268, § 13B reads, in pertinent part:

> "Whoever, directly or indirectly, willfully (a) threatens, or attempts or causes physical injury to … or (c) misleads, intimidates or harasses another person who is: (i) a witness or potential witness at any stage of a criminal investigation … or other criminal proceeding of any type … (iii) [or who is] a … police officer … (v) … with the intent to impede, obstruct, delay, harm, punish or otherwise interfere

[2] It is worth noting that the Commonwealth provided defense counsel with an invoice related to inspection of the computerized fingerprinting station done after the incident. No repair work was necessary and the invoice explicitly states, "The machine is in working order."

> thereby, or do so with reckless disregard, with such a proceeding shall be punished …"

To charge Mr. Washington with the crime of witness intimidation there must be probable cause for the following elements: (1) that the defendant threated or intimidated (2) a police officer; (3) that the defendant did so willfully, with the specific intent to impede, obstruct, delay, or interfere with a criminal investigation, *or* that the defendant did so recklesslessly, disregarding the impact his conduct would have in impeding, obstructing, delaying, or interfering with that proceeding. Mass. Jury Instruction Criminal No. 7.360.

In the present case, there is nothing to support that Mr. Washington acted with the requisite intent. "Intimidation, according to the cases, is putting a person in fear *for the purpose of influencing his or her conduct*." *Commonwealth v. McCreary*, 45 Mass. App. Ct. 797, 799 (1998) (emphasis added). Mr. Washington may have acted out erratically, but there is no indication that he had any intent to influence the conduct of the officers as it related to an investigation or criminal proceeding. His behavior was such that officers suspected he was under the influence of drugs. His statements were illogical and contradictory. He was unpredictably cooperative, combative, and remorseful, and he did not seem to understand the serious nature of his alleged behavior. (When ordered to the cell block area, the report alleges that Mr. Washington stated, "What the hell are you talking about? I'm walking out the door and going home! I've got work in the morning!") Whatever his mental state, he was obviously not attempting to interfere with a proceeding, as comprehended in the statute. In fact, given his alleged behavior and statements, it is doubtful whether Mr. Washington thought that this incident would lead to any investigation or proceeding at all.

The place, time, and circumstances of the alleged behavior also cut against a finding of probable cause for witness intimidation. *See Commonwealth v. McCreary*, 45 Mass. App. Ct. 797, 800-01 (1998). This behavior took place in the police station, after booking, while Mr. Washington was locked in a cell, in contrast to the time, place, and circumstances of numerous witness intimidation cases. *See Commonwealth v. Potter*, 39 Mass. App. Ct. 924, 925-26 (1995) (defendant made threatening phone calls the day after victim had appeared in court to testify against him); *Commonwealth v. Conley*, 34 Mass. App. Ct. 50, 52 (1993) (defendant threatened victim the day she was to testify against him); *Commonwealth v. Perez*, 47 Mass. App. Ct. 605 (1999) (defendant gang members attacked victim, who had witnessed a crime, given a statement to police, and was scheduled to testify); *Commonwealth v. Gordon*, 44 Mass. App. Ct. 233, 234 (1998) (defendant approached victim, a juror in his son's case, in a threatening manner just outside the courthouse after a day of testimony); *Hrycenko v. Commonwealth*, 459 Mass. 503, 511 (2011) (defendant, serving a sentence imposed by the victim judge, sent a letter to the victim referencing retaliation and weapons, pressing her to reconsider his sentence).

The court in *McCreary* found the evidence sufficient for witness intimidation despite the fact that the language of the threat did not explicitly mention the judicial proceedings. 45 Mass. App. Ct. at 800. While Mr. Washington is not alleged to have made any reference to judicial proceedings either, his situation is distinguishable from *McCreary* due to the "place, time, and circumstances" of the behavior in question. In *McCreary*, the defendant approached the officer victim right outside the courtroom where the trial was to take place, just before trial was to start; "at the very brink, both in terms of time and place, of the witness function." *Id*. at 800-01. These circumstances are not present in the allegations against Mr. Washington.

Potter, *Conley*, *Perez*, *Gordon*, *Hyrcenko* and *McReary* all involved defendants who clearly attempted to intimidate, to put the victim in fear, and thereby influence the behavior of the victim. The attempt to influence can be overt (as in *Conley*, *Hyrcenko*, *Gordon*, and *McReary*) or inferred (as in *Potter* and *Perez*), but there is a connection between the behavior and the "criminal investigation … or other criminal proceeding of any type." M.G.L. c. 268, § 13B.

This connection is crucial to the probable cause calculus, and it is completely lacking from the police report. Mr. Washington's behavior may indeed have been erratic, disruptive, and even aggressive, but it was clearly not directed towards interfering with an investigation or proceeding; it was simply a continuation of the behavior that resulted in his arrest. Not only is there simply nothing in the report to support a finding of probable cause that Mr. Washington was attempting to interfere with an investigation, but the report, taken as a whole, paints a picture of an agitated man, speaking and acting unpredictably and without reason, who clearly did not understand the gravity of his situation. If every suspect arrested for crimes of violence who continued their violent behavior during arrest, booking, and confinement was charged with witness intimidation, the statute would be rendered largely meaningless. Those whom Mr. Washington is alleged to have intimidated are the police themselves, who were there witnessing his actions. It cannot be conceived that the criminal investigators, the police, would not give the information to themselves or include it in their police reports, or testify at a hearing or trial, based on the behavior of a suspect upset about his arrest.

Additionally, there is no evidence that his behavior was directed toward any specific goal at all, let alone to prevent communication of information. There is simply nothing to suggest that Mr. Washington's behavior and language was directed toward influencing the officers not to

testify against him, to interfere with an investigation, or even to convince the officers not to complete the booking process. The police report clearly states that Mr. Washington was already under arrest, locked in a cell when he "attempt[ed] to intimidate officers." While his challenges to the officers could be interpreted as a threat, they certainly do not rise to the level of *intimidation*; "putting a person in fear *for the purpose of influencing his or her conduct*." *McCreary,* 45 Mass. App. Ct. at 799 (emphasis added).

On their face, his challenges to the officers have nothing to do with any pending proceeding or investigation, but were rather a continuation of the erratic behavior for which he was initially arrested. Mr. Washington's interactions with the police did not take place at the court house or even at a time close to when a trial for this matter would occur; it happened while Mr. Washington was being arrested, and immediately after. *Contrast with Commonwealth v. Cruz*, 82 Mass. App. Ct. 1113 (Sep. 24, 2012) (unpublished) (where defendant arrested for carjacking "maintained a steady stream of invective [including threats of violence] against one of the officers who was involved in his arrest" during arrest, transportation, and booking, could have concluded that the intent of the defendant was to dissuade the officer from completing the arrest and booking).

Additionally, under Rule 3(g), the complainant must present the *factual basis* for the charge. Here, the police report and application for complaint contain no *actual facts* demonstrating probable cause to believe the defendant committed witness intimidation. An application for a complaint which fails to articulate specific facts that provide probable cause to believe that the defendant committed the charges sought in the application is insufficient; if a complaint issues based on such an application, that complaint must then be dismissed. *Cf. Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("official intrusions upon constitutionally protected interests of

the private citizen" must be premised on "specific and articulable facts which, taken together with rational inferences therefore, reasonably warrant that intrusion"). Instead of laying out facts, the police report baldly states, "In an attempt to intimidate officers, Washington was swinging his fists and yelling that he wanted to fight." Once again, his behavior here is quite clearly a continuation of the agitated state that he had been displaying throughout the course of his arrest and booking; no "rational inferences" allow any other conclusion. *Id.* Rather than presenting a factual basis for probable cause to believe that Mr. Washington was engaging in witness intimidation with all that entails – willfulness; threatening or attempting to cause injury; misleading, intimidating, or harassing; intending to impede, obstruct, delay, harm, punish, or interfere with an investigation or proceeding – the police report simply states that he attempted to intimidate officers. *See Commonwealth v. DiBennadetto*, 436 Mass. 310 (2002); *Commonwealth v. McCarthy*, 385 Mass. 160, 162-63 (1982); Mass. R. Crim. P. 3(g)(1); M.G.L. c. 268, § 13B.

Finally, allowing this charge under the facts alleged would contradict the purpose of the legislation. Despite the broad language, there is a clear purpose: "The purpose of the statute, rather obviously, is to protect witnesses from being bullied or harried so that they do not become reluctant to testify or to give truthful evidence in investigatory or judicial proceedings." *McCreary*, 45 Mass. App. Ct. at 799. The statute is "concerned primarily with countering the effect of witness intimidation on the successful prosecution of criminals." *Commonwealth v. Morse*, 468 Mass. 360, 367 (2014). The amendments that led to the current iteration of the statute were a response to a "'new wave' of gang violence and witness intimidation" in gang cases. *Commonwealth v. Rivera*, 76 Mass. App. Ct. 530, 534 (2010). "The over-all purpose and effect of the amendment was … to expand the scope of the statute to address heightened concerns with witness intimidation and its interference with the successful

prosecution of gang members and other street violence." 76 Mass. App. Ct. at 534 (*see also*, n. 6). There is no evidence that Mr. Washington's alleged behavior had anything do with impeding truthful testimony, and it strains credibility to believe that the statute was meant to prosecute those arrested for crimes of violence who continue their violence once in custody. Additionally, there is no allegation that Mr. Washington is involved with a gang.

There is no evidence in the application for complaint or police reports to provide probable cause that Mr. Washington committed witness intimidation. Given that Mr. Washington did not use or threaten force in an attempt to impede a criminal investigation, the Commonwealth will be unable to present sufficient evidence at trial to prove witness intimidation in violation of M.G.L. c. 268, §13B. Mr. Washington therefore requests that this charge be dismissed.

CONCLUSION

For all of the above reasons, the facts presented to the clerk magistrate do not support a finding of probable cause that Mr. Washington committed witness intimidation or malicious destruction of property valuing more than $250. These charges should therefore be dismissed.

Respectfully submitted,
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