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People v. Bayan

Court of Appeal of California, First Appellate District, Division Four

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A111491

Reporter
2006 Cal. App. Unpub. LEXIS 9485 *; 2006 WL 3012925

THE PEOPLE, Plaintiff and Respondent, v. BRADLEY DEAN BAYAN, Defendant and Appellant.

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Prior History: San Mateo County Super. Ct. No. SC057395.

Core Terms

good faith, telephone, annoy, kill, telephone call, methamphetamine, criminal threat, trial court, hurt, circumstances, conversation, threatening, obscene, Bail, fat

Judges: RIVERA, J.; REARDON, Acting P.J., SEPULVEDA, J. concurred.

Opinion by: RIVERA

Opinion

Defendant Bradley Dean Bayan appeals a judgment entered upon a jury verdict finding him guilty of making a criminal threat on June 28, 2004, a felony (*Pen. Code, § 422*)[1]; making an annoying phone call on the same date, a misdemeanor (§ 653m, subd. (a)); and contempt of court for violating a court order, a misdemeanor (§ 166, subd. (a)(4)). He contends the evidence does not support the criminal threat conviction; the trial court improperly admitted evidence of his drug use; and the trial court had a duty to instruct the jury on the defense of good faith in connection with the annoying phone call charge. We affirm in part and reverse in part.

[*2] I. BACKGROUND [2]

Terry Finn, a licensed private investigator and bail bondsman, ran a business known as Madonna's Bail Bonds. He first met defendant in 2002 when defendant, an attorney, came unexpectedly into Finn's office one day seeking assistance in preparing a subpoena. Defendant was "literally bouncing like a jelly bean" and talking rapidly as if he was "hopped up on something." He had dilated pupils, spoke rapidly, jumped from subject to subject, and showed agitation. Finn had worked as a police officer in the past, and thought defendant's appearance and behavior were consistent with being under the influence of an illegal stimulant.

In the latter part of 2002 and early 2003, defendant came into Finn's office unannounced on several occasions. His demeanor was the same on these occasions as it had been the first time he visited Finn's office, **[*3]** giving Finn the impression defendant was under the influence of drugs or mentally disturbed. [3] He would telephone and harass the people at Finn's office. In one instance, defendant brought his bicycle to Finn's office on a weekend and asked to leave it there while he went to the law library across the street. When Finn refused, telling him he would be in the office only for a few moments, defendant became angry, "ranting and

[1] All undesignated statutory references are to the Penal Code.

[2] Because defendant does not raise any issues in connection with his conviction for contempt of court, we will not recite the facts pertinent to that crime.

[3] Finn testified that based on his experience, he believed people on stimulants might commit criminal acts and be physically dangerous.

raving and screaming." On another occasion, after law enforcement officers had searched the office of another bail agency, Aladdin Bail Bonds, in February 2003, defendant told Finn he had used the telephones in Finn's company's office to warn the employees of Aladdin of the search. Finn thought defendant should not have gone into his office and used the telephone without permission, and was concerned that if the police found out his telephone had been used to warn Aladdin employees, they might think he had been involved in a conspiracy with Aladdin. After that incident, defendant on at least eight occasions made "hang-up" calls to Finn's office.

[*4] On one occasion, someone asked Finn his opinion of defendant as an attorney. Finn replied that his mother had told him if he could not say anything nice about someone, he should not say anything at all. On the evening of December 31, 2003, Bayan called Finn, "yelling and screaming and ranting and raving and threatening to sue [him] and take [him] down and hurt [him] and sue [him] for slander, the usual run of the mill things he would say on the phone." Finn told him to "bring it on," because he was tired of defendant threatening him in that way whenever they saw or spoke with each other.

Defendant and Finn did not speak again until June 28, 2004, when defendant again telephoned Finn. [4] He was "out of control, angry, ranting and raving and swearing," and called Finn a "fat fuck." Finn described defendant's conversation as "[t]he usual routine, I'm going to sue you. I'm going to take you down. I'm going to hurt you this time." He threatened to "take [Finn] down, hurt [him], sue [him], put [him] out of business," and told Finn, "I should have killed you when I had the chance."

[*5] Finn was not worried after receiving defendant's call, since it was much like other calls defendant had made. However, he became concerned after a former client named Kimberly Karkov telephoned him later that day. She told him she had been in court with defendant; that defendant had seen Karkov's key chain, which had the name Madonna's Bail Bonds on it; that when defendant saw the key chain, he screamed that he was "going to kill that fat fuck, Terry Finn"; and that he threatened to kill Karkov as well. [5] Finn also reviewed a memorandum by a mediator at the small claims court, Ana Navarro, who had seen defendant's interaction with Karkov and noticed that defendant had appeared to be upset or excited and was raising his voice.

[*6] Finn became concerned that defendant had "flipped out completely" and was a threat to him and his staff. He directed the staff to take extra security precautions in and around the building, including exercising care when walking to their vehicles or to the jail and ensuring that their firearms were accessible. He also increased video surveillance at his business.

Finn contacted Officer Dan Smith of the Redwood City Police Department to seek a restraining order. Smith left defendant a telephone message, and defendant called him back on July 7, 2004. In the conversation, defendant was "pretty much yelling and screaming" at Smith, and Smith had to hang up after five or ten minutes. In the next few days, defendant left Smith approximately five telephone messages. Smith described defendant's manner in those messages as "aggressive and upset and very demanding."

The jury also heard evidence of defendant's prior methamphetamine use. Officer Victor Artiga of the Redwood City Police Department testified that he saw defendant on May 27, 2004. Defendant was talking very rapidly, almost nonstop, in a raspy voice, and was unable to stay focused on any one topic. Artiga believed defendant was **[*7]** under the influence of a stimulant, and checked his pulse rate and pupils. Defendant's pulse was high and his pupils dilated and contracted in a manner that indicated he was under the influence of a controlled substance. Defendant told Artiga he had been smoking methamphetamine and that although he had slept 10 hours the night before, he had been up for 36 hours before that. Defendant also told Artiga he had been using methamphetamines for nine years.

Detective Jeff Price of the Redwood City Police Department testified as an expert that chronic methamphetamine users can have dilated or constricted pupils, rapid speech, rapid, jerky body movement,

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[4] Finn and defendant did not see each other in person between March 2003 and July 2004, approximately a month after the events leading to defendant's conviction for criminal threats and making an annoying telephone call.

[5] The information originally contained several causes of action alleging defendant had threatened Karkov and made obscene or threatening communications to her. Those counts, as well as an additional count alleging threats to Finn, were dismissed at the outset of trial. Karkov did not testify at trial, and the evidence of defendant's conversation with her came from Finn's testimony. Defendant objected to the testimony on the ground that it was hearsay. The trial court admitted the evidence not for the truth of anything Karkov had said, but only for limited purpose of the effect the conversation had on Finn.

elevated pulse rates, and elevated blood pressure. They tend to be irrational and unstable, and can become violent and unpredictable.

Defendant was arrested and taken to jail. While in jail, he made telephone calls, which were recorded. [6] In at least two of those calls, defendant stated that he had telephoned Finn, complained about Finn making negative comments about him, and threatened to sue him.

[*8] In his own defense, defendant testified that on June 28, 2004, he and Karkov appeared in small claims court to litigate a case in which he had sued Karkov to collect a bill. She told him that Finn had told her how much defendant should have charged for his services. When defendant returned to his office, he called Finn and told him that if Finn continued making derogatory comments, defendant would sue him. He denied having told Finn that he should have killed him when he had the chance. Questioned about his methamphetamine use, defendant indicated he had used methamphetamine only once or twice during 2004 and not at all during 2003. He denied having been under the influence of methamphetamine at the time of his conversation with Artiga. He acknowledged he had used obscenity in the June 28, 2004, telephone call to Finn, admitting to having called him a "fat fuck" and saying that he may have called Finn a "piece of shit." He agreed that the recipient of such language would find it annoying, but testified that his intent in using it was not to annoy Finn but to add force to his threat to sue him.

II. DISCUSSION

A. Sufficiency of Evidence of Criminal Threat

Defendant **[*9]** argues the evidence does not support the conclusion that he made a criminal threat, and that his statements to Finn were protected by the First Amendment. In reviewing a claim challenging the sufficiency of the evidence to support a criminal threat conviction where the defendant has raised a "plausible First Amendment defense," we make an independent examination of the record in order to ensure that the speaker's free speech rights have not been infringed. (*In re George T. (2004) 33 Cal.4th 620, 632* (*George T.*).) However, credibility determinations and findings of fact that are not relevant to the First Amendment issue are not subject to independent review. (*Id. at p. 634*.) Thus, we defer to the lower court's credibility determinations, but make an independent examination of the whole record to determine whether the facts establish a criminal threat. (*Ibid*.)

As noted in *George T., supra, 33 Cal.4th at page 630*, not all threats are criminal. Our Supreme Court has ruled that in order to prove a violation of *section 422*, the prosecution must establish the following: "(1) that the defendant 'willfully threaten[ed] to commit **[*10]** a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat . . . was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo (2001) 26 Cal.4th 221, 227-228*.) [7]

[*11] A threat is judged not solely by the words spoken, but also by their context. (*In re Ricky T. (2001) 87 Cal.App.4th 1132, 1137* (*Ricky T.*); *People v. Butler (2000) 85 Cal.App.4th 745, 753* (*Butler*).) Depending on the circumstances, even an ambiguous statement may qualify as a threat under *section 422*. (*Butler, supra, 85 Cal.App.4th at p. 753*.) Thus, the court in *Butler* considered whether the evidence was sufficient to support a finding that the defendant had violated *section*

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[6] A placard on the telephone notified inmates that their calls could be recorded, and a computerized voice warned the inmate and the party being called that the call was monitored and recorded.

[7] *Section 422* provides in pertinent part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

422 where he had confronted the victim, grabbed her arm, called her a "fucking bitch," and told her that she needed to mind her own business or she "was going to get hurt." At the time, the victim was with a neighbor whom she knew defendant-a gang member-and his friends had been terrorizing. (Butler, at pp. 749, 753-755.) The Court of Appeal concluded these circumstances standing alone established a violation of section 422. (Butler, at p. 755.) However, an ambiguous statement such as, " 'I'm going to get you' " that is "no more than a vague threat of retaliation without prospect of execution," and that is unaccompanied by a show of physical **[*12]** violence, has been found insufficient to establish a violation of section 422. (Ricky T., supra, 87 Cal.App.4th at p. 1138.)

Courts may also look to conduct after the threat to determine whether the defendant intended his statement to be interpreted as a threat. Thus, the court in *Butler* noted that the seriousness of the defendant's threat was shown by the fact that he and his gang followed the victim to her apartment, threatened to get a gun and kill everyone inside, invaded her home and knocked down her young daughter, and physically assaulted two men. (Butler, supra, 85 Cal.App.4th at p. 755.) Similarly, the defendant in People v. Martinez (1997) 53 Cal.App.4th 1212, 1218, (*Martinez*) told the victim, " 'I'm going to get you,' 'I'll get back to you,' 'I'll get you.' " Although those words might not, standing alone, convey a threat to commit a crime that would result in death or great bodily injury, they were held to support a violation of section 422 when viewed in the context of the surrounding circumstances, including the facts that the defendant approached the victim, came into close proximity to his face, yelled **[*13]** and cursed at him, and displayed angry behavior; that afterwards, defendant told his girlfriend he would blow up the victim's workplace; and that he later set a fire at defendant's workplace and attempted to set two other fires there. (Martinez, at pp. 1214-1216, 1218, 1220-1221; see also People v. Solis (2001) 90 Cal.App.4th 1002, 1014 [jury can consider later action taken by defendant in evaluating whether terrorist threat has been made].)

In this case, the words defendant used to Finn did not constitute an unequivocal threat of physical harm. Defendant told Finn in the June 28, 2004, telephone call at issue that he would "take [him] down, hurt [him], sue [him], put [him] out of business." Thus, the threat to hurt Finn was made in the context of a threat to sue him or put him out of business, not a threat to kill him or commit great bodily injury. Finn understood the threat at the time to be merely defendant's "usual routine." That "routine" included the "run of the mill things" defendant had said in his December 31, 2003, telephone call, in which he threatened to "sue [Finn] and take [him] down and hurt [him] and sue [him] for slander."

[*14] Although there was a history of antagonism between defendant and Finn, there was no history of defendant threatening bodily harm, making any show of force, or attacking Finn's property. Indeed, defendant had not seen Finn in person for over a year at the time he made the June 28, 2004, telephone call, and had had no conversations at all with him for nearly six months. Thus, while defendant's previous statements and behavior-including his history of methamphetamine use-might well have indicated anger, instability, and a desire to sue, they did not indicate he was likely to kill or physically injure Finn.

Finally, defendant's statement that he "should have killed [Finn] when he had the chance" did not convey "a gravity of purpose and an immediate prospect of execution of the threat." (§ 422.) Rather than threatening future action, it expressed regret at action not taken in the past.

The Attorney General argues, however, that defendant's later action in telling Karkov he would kill Finn indicate his words to Finn conveyed a serious, unequivocal threat. As noted above, Karkov did not testify at trial. Defendant's statements to her were introduced through Finn's testimony, and were **[*15]** admitted not for the truth of anything Karkov had told Finn but only for the limited purpose of the effect the conversation had on him. Thus, while we might consider Karkov's conversation with Finn as evidence that Finn received information that put him in fear of his safety, we *cannot* consider it as evidence that defendant in fact told Karkov he would kill Finn.

In the circumstances, we conclude the evidence does not support the conclusion that defendant made a criminal threat for purposes of section 422. That conviction must be reversed. In light of this conclusion, we need not consider defendant's additional contention that the criminal threats conviction should be reversed because the trial court erroneously admitted evidence of the effects of defendant's methamphetamine use.

B. Instruction on Section 653m

Defendant contends the trial court erred in failing to

instruct the jury sua sponte that a telephone call made in good faith does not violate section 653m. Section 653m, subdivision (a) provides: "Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other **[*16]** person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith."

The trial court instructed the jury as follows: "Every person who with intent to annoy, telephones or makes contact with by [*sic*] means of electronic communication with another, and addresses [to] or about the other person any obscene language or expresses to the other person any threat to inflict injury to the person or property of the person [addressed] or any member of his or her family is guilty of a misdemeanor. [P] In order to prove this crime each of the following elements must be proved. One, a person willfully and with the intent to annoy, two, telephone is [*sic*] another, and three, addresses to the other person any obscene language or addresses to the other person a threat to inflict injury to the personal property of the person addressed." The instruction did not inform the jury that section 653m was not applicable to calls made in good faith.

Defendant **[*17]** argues that lack of good faith is an element of a violation of section 653m, or alternatively that good faith is an affirmative defense on which he relied, and that accordingly the trial court had a duty to instruct the jury on the topic. In criminal cases, even in the absence of a request, the trial court must instruct the jury on the principles of law relevant to the issues raised by the evidence, including instructions on all of the elements of the charged offense, recognized defenses, and the relationship of those defenses to the element of the offense. (*People v. Rubalcava (2000) 23 Cal.4th 322, 333-334*; *People v. Whitehurst (1992) 9 Cal.App.4th 1045, 1049*.) The obligation to instruct sua sponte on a defense arises "if it appears the defendant is relying on the defense or if there is substantial evidence to support the defense and it is not inconsistent with defendant's theory of the case." (*Ibid.*)

We first reject defendant's contention that lack of good faith is an element of the charged offense. "When a statute first defines an offense in unconditional terms and then specifies an exception to its applicability, the exception is generally **[*18]** an affirmative defense to be raised and proved by the defendant." (*People v. Lam (2004) 122 Cal.App.4th 1297, 1301*; accord, *People v. Miller (1999) 69 Cal.App.4th 190, 211*.) Section 653m, subdivision (a) defines the elements of the offense and then specifies that the prohibition does not apply to calls made in good faith. Therefore, good faith is a defense to be raised and proved by defendant.

Defendant contends, however, that even if lack of good faith is not an element of the offense, the evidence offered at trial supports the theory that he made the June 28, 2004, telephone call to Finn in good faith. In support of his position, he points to his testimony on cross-examination, when the following exchange occurred: "[Q.] So you do admit calling him on the phone and using obscenity toward Mr. Finn, Mr. Bayan? [A.] Yes, I do. [Q.] And did you do that with the intent to annoy Mr. Finn? [A.] No, sir, I did not. [Q.] Did you think it might be a little annoying when you called him a fat fuck and a piece of shit? [A.] I had not thought about it at the time. It was just simply a response to his antagonistic statement that he made after I informed **[*19]** him that I would sue him, you know, the first time of: 'Are you threatening me?' I thought, you know, I became, you know, you know, just thinking of the opinion that why would he say anything like that, unless he is trying to instigate some kind of response, and so the fact that I had to repeat myself a second time, I did include the statements: 'You piece of shit,' and 'you, fat fuck.' [Q.] Well, you would admit that if a person heard that, they would think that was, at least, annoying, Mr. Bayan? [A.] Yes, I would have to conclude that, sir. [Q.] Certainly not an endearing comment? [A.] No, sir. [Q.] Would you say your intent was then to annoy Mr. Finn when you made those comments? [A.] No, sir. [Q.] What was your intent exactly when you used this profanity toward Mr. Finn? [A.] Just to strengthen the force of my statement in regard to having, you know, the intent to sue him if I continued to hear him making statements like that in the local community. It's just profanity that came out of my thought. That wasn't really the thought about as far as an intent. Just trash language, unfortunately, on my part." [8]

[*20] The evidence does not support a theory that although defendant's telephone call to Finn satisfied the elements of section 653m-which include the intent to

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[8] In closing argument, defense counsel argued that defendant had not called Finn to harass him or call him names, but because he was upset that Finn was defaming him, and that his intent in making the call was legitimate.

annoy-he made the call in good faith. Instead, it indicates that defendant's position was that he did not intend to annoy Finn at all. The trial court had no sua sponte duty to instruct the jury on the defense of good faith.

III. DISPOSITION

The judgment as to count one, violation of *section 422*, is reversed. In all other respects, the judgment is affirmed. The matter is remanded for resentencing.

RIVERA, J.

We concur:

REARDON, Acting P.J.

SEPULVEDA, J.
