

CERTIFIED FOR PARTIAL PUBLICATION\*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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In re C. C., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

C. C.,

Defendant and Appellant.

C061230

(Super. Ct. No. J34381)

APPEAL from a judgment of the Superior Court of Butte  
County, Tamara L. Mosbarger, Judge. Reversed.

Washington & Heithecker, George E. Washington, Philip H.  
Heithecker, Tahj E. Gomes, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell,  
Senior Assistant Attorney General, Julie A. Hokans Supervising  
Deputy Attorney General, Jeffrey A. White, Deputy Attorney  
General, for Plaintiff and Respondent.

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\* Pursuant to California Rules of Court, rule 8.1110, this  
opinion is certified for publication with the exception of part  
I of the Discussion.

C. C. sent his former girlfriend two text messages expressing strong negative feelings about their breakup. A delinquency petition charged him with criminal threats and making a threatening or obscene telephone communication. (Pen. Code, §§ 422, 653m, subd. (a).)<sup>1</sup> The People dismissed the criminal threat count and the juvenile court sustained the petition, finding C. C. sent threatening or obscene texts.

The juvenile court placed C. C. on informal probation and ordered him to write a 500-word essay on the Columbine High School shootings. C. C. completed his essay and filed this timely appeal.

We conclude C. C.'s text messages were neither threatening nor obscene as those terms are used in section 653m. They did not threaten any *physical* harm, as required by statute. Nor, read in context, did the vulgar language he used qualify as obscene. Accordingly, we reverse for lack of substantial evidence. We need not reach C. C.'s alternative constitutional claims.

#### **FACTS**

C. C., aged 16, sent S. two text messages. We provide them in full, redacting the names:

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<sup>1</sup> Hereafter, undesignated statutory references are to the Penal Code.

"no [S.] im gonna come to school with one of [P's] gun and kill half the school ill load everyone with bullets and then shoot myself in the head right in front of u.

"just to show u how much u pushed me

"fuck u u stupid fuckin girl!

"fuck u!!

"god u stupid little fuckin cunt!

"god i waited to kiss u for a fuckin month its been two weeks ur kissing ppl [Sh.'s] friends try to cuddle with me and i push them off ur all i think about i do drugs now because of u because u r constantly hurting me i told u i cheating on u cause i didnt want to hide things from u i could have and i could have been happy but no . . . .

"u pushed me to cheat on u u would constantly tease me and fuck with me and put me thru things those were all bitch moves and i took them i cheated on u because of that u find a fuckin guy that will stay with u when u tease but dont put out and i waited all that time u will probably fuck [B.] right after he wins the [football game] i fuckin hate u i wanna kill myself cause u put me thru all this but only ppl c my bad side not ur shitty side cause ur a cheerleader and ill i did was b nice and i get picked on so fuck u [S.]

"god ur a lyer and a jerk.

"fuck."

S., aged 16, testified she had dated C. C. for a year and a half when she received these texts on October 6, 2008. She

testified the words in the texts are in common use at their high school. Another student testified the words were in common use at school, and it was stipulated a third student would so testify.

S. testified she was not annoyed by the texts or offended by the use of the swear words. C. C. sent her an apology for the language he had used and they are again friends. She understood that C. C. was upset about their breakup. S. did not report the texts to the police, but she told a friend, and word spread to other students, one of whom told the police.

A peace officer testified he spoke to C. C., who expressed regret for the texts, explaining that they were sent in response to "a heated argument."

The juvenile court found that the texts were sent with the intent to annoy, and that the first text constituted a threat and that both texts were obscene.

#### **DISCUSSION**

"When the sufficiency of the evidence is challenged on appeal, we apply the familiar substantial evidence rule. We review the whole record in a light most favorable to the judgment to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which a rational trier of fact could find beyond a reasonable doubt that the accused committed the offense." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 859 (*Ryan D.*); see *People v. Raley* (1992) 2 Cal.4th 870, 886, 891.)

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 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."

For purposes of this appeal we will assume substantial evidence shows "intent to annoy," although the point is debatable and C. C.'s claim that the intent to communicate painful feelings does not equate to an "intent to annoy" within the meaning of section 653m carries some force. We will separately consider the claims that the texts were threatening or were obscene under section 653m.

#### I.

##### **A Physical Threat is Required by Section 653m**

The juvenile court found the first text was a threat as defined by section 653m. That text states C. C. will shoot "half the school" and then shoot *himself* in front of S. It does not threaten harm to *her*.

The Attorney General defends the trial court's view that this text was a threat to harm S.'s *psyche* by forcing her to witness extreme violence.

The statute requires a threat "to inflict injury to the person or property of the person addressed or any member of his or her family." (§ 653m.) In our view the phrase "injury to the person" imports the notion of *physical* harm.

The Attorney General contends that if the Legislature meant to limit the statute to physical injury, it would have used the term "bodily injury," a term used in some statutes to convey that limitation. (See, e.g., §§ 245, subd. (a)(1) [application of "force likely to produce great bodily injury"], 422 [threat "to commit a crime which will result in death or great bodily injury to another person"].) The Attorney General contends that by not using the term "bodily injury" and instead using "injury to the person," the Legislature intended the statute to cover threats that make the recipient upset.

Putting aside the breadth of the proposed statutory scope, we are not persuaded. One does not "inflict" bad feelings, one inflicts *damage* to another. If the Legislature intended to protect the addressee's *psyche*, assuming it was permissible to do so, it would not have phrased the statute as a bar to criminalize the *infliction* of injury to the person or property of the victim. More to the point, if the Legislature had intended to criminalize damage to the psyche (by this statute), it would have expressly stated as such.

In fact, the Attorney General has provided an example that, examined more closely, points against his position. Section 245, cited as an example of the Legislature's use of "bodily

injury," provides in relevant part: "Any person who commits an assault upon the person of another with a deadly weapon . . . or by any means of force likely to produce great bodily injury shall be punished [as described]." (§ 245, subd. (a)(1), emphasis added.) The Legislature in this example uses the phrase "assault upon the person of another" to mean a *bodily* assault, not a *psychic* assault. Section 240 defines an assault as "an unlawful attempt, coupled with a present ability, to commit a violent *injury on the person of another.*" (Emphasis added.) This has long referred to *physical force*. (See *People v. Wright* (2002) 100 Cal.App.4th 703, 714-715.)

We see no semantic difference between "injury on the person" as used in section 240 and long construed to mean physical injury, and "injury to the person" as used in section 653m. Both refer to a physical injury to the person, not a psychic injury. Because C. C.'s first text did not threaten physical harm to S., the delinquency petition cannot be sustained based on the threat prong of section 653m.

## II.

### **Neither Text Was "Obscene" Under Section 653m**

The juvenile court found *both* texts were "obscene" as proscribed by the second prong of section 653m. We disagree, because it is inappropriate to extract isolated words from a private message and impose *criminal* liability based on their abstract offensiveness. Viewing C. C.'s texts in context, as we must, we find no basis for criminal liability.

In *People v. Hernandez* (1991) 231 Cal.App.3d 1376, at pages 1384-1386 (*Hernandez*), the term "obscene" as used in section 653m was interpreted to mean something different than the term is used in the context of erotic expression, such as in defining "'obscene matter'" or "'obscene live conduct.'" (§ 311, subds. (a) & (g); 2 Witkin & Epstein, Cal. Crim. Law (3d ed. 2000) Sex Offenses and Crimes against Decency, § 83; CALJIC No. 16.182; CALCRIM No. 1142.) In such contexts, referred to in *Hernandez, supra*, at pages 1385-1386 as "the *Miller* standard" (see *Miller v. California* (1973) 413 U.S. 15 [37 L.Ed.2d 419]), "'obscene matter'" generally refers to something "that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value." (§ 311, subd. (a)(1).)

*Hernandez* involved a traditional type of annoying telephone call, where Hernandez repeatedly called a woman over a two-week period, hurling abuse at her by using vile terms, such as calling her a "'fat bitch,' a 'whore,' and a 'c---.'" (*Hernandez, supra*, 231 Cal.App.3d at p. 1380 & fn. 4.)

In that factual context, *Hernandez* approved an instruction defining "'obscene'" as used in section 653m as "'offensive to one's feelings, or to prevailing notions of modesty or decency; lewd.'" (*Hernandez, supra*, 231 Cal.App.3d at p. 1384.)

*Hernandez* explained that because the purpose of the statute "was

to protect an individual's right to privacy from annoying intrusions[,]” section 653m was not limited to “‘obscene’ language dealing with sex and appealing to the prurient interest under the *Miller* standard, while exempting equally annoying telephone calls containing language that would be considered ‘obscene’ under a common or dictionary definition.” (*Hernandez, supra*, at p. 1384.) *Hernandez* in part noted that sister-state statutes had been construed to include a similarly broad definition of “obscene” in order to deter harassing telephone calls and thereby protect the peace and solitude of telephone owners. (*Id.* at p. 1386; see generally Annot., Use of Telephone to Annoy or Harass (1979 & 2008 supp.) 95 A.L.R.3d 411; Comment, Constitutionally Regulating Telephone Harassment: An Exercise in Statutory Precision (1989) 56 U.Chi.L.Rev. 1403.)

Because C. C. does not challenge the *Hernandez* definition of “obscene” as the word is used in section 653m, for the purposes of this appeal we accept it as accurate. That definition has three discrete parts, “‘offensive to one’s feelings, or to prevailing notions of modesty or decency; lewd.’” (*Hernandez, supra*, 231 Cal.App.3d at p. 1384.) C. C.’s texts do not fit within any of those parts.

We need not consider whether the texts were objectively of the kind that would offend someone’s feelings sufficiently for criminal liability, because S. testified without contradiction that she was not subjectively offended.

The texts were not "lewd." The first text has nothing arguably lewd in it. Although the second text used vulgarities derived from sexually-related terms such as "fuck" and "cunt," those words were not used lewdly. They were expletives used as verbs and adjectives to emphasize the depth of his feelings, and in a couple of places as insults to describe how he felt about S. as a result of her conduct. For example, calling her a "cunt" did not import any lewd thoughts about her; it conveyed anger and insult towards her. There was one explicit sexual usage, when C. C. posited that S. would "fuck" another boy after a football game, but the term "fuck" was merely a synonym for sexual congress, it conveyed no more salacious meaning than a more refined term for that activity.

Neither text was offensive to prevailing notions of modesty or decency. As for the second text, the words "fuck" and "bitch" and "cunt" are generally eschewed in polite settings, which is why in court the parties and witnesses generally referred to the "F word" or "B word" or "C word." But each has acquired secondary meanings through modern usage. In particular, the evidence was uncontradicted that these words are in common use at the high school, the venue in which the relationship existed, and in which C. C.'s pointed communications about his feelings were sent. For this reason we reject the Attorney General's view that the use of "C word" and the like at trial proves the words are necessarily indecent.

The meaning of words is always contextual. As provided in the erotic obscenity arena, matter must be judged in its entirety, including the context in which it is presented. (§ 311, subd. (a) [matter must be "taken as a whole"]; see *People v. Goulet* (1971) 21 Cal.App.3d Supp. 1, 3-4.)

The importance of context is highlighted by *In re Price* (1970) 4 Cal.App.3d 941 (*Price*). *Price* upheld a charge of using obscene language in public (former § 311.6; Stats. 1961, ch. 2147, § 5, p. 4428), when a minor called police officers, inter alia, "'mother fuckers,'" because the majority interpreted it to mean "a vulgar description of sexual intercourse with one's mother." (*Price, supra*, at pp. 944, 946.) A dissenting opinion pointed out that the majority's reading of the words was wrong:

"The term 'f g pigs' in the context in which it was used referred not to copulation of porcine animals but was rather a highly insulting epithet directed to the police officers. The term 'f g law' referred not to the law of sexual intercourse but a derogatory reference to the law in general. The average person would not have construed the phrase 'f k them' uttered by appellant in reference to the police officers as an invitation to engage in sexual activities with them. Appellant's use of the vulgarism describing the filial partner in an oedipal relationship is fairly to be viewed as an epithet rather than as a phrase appealing to a shameful or morbid

interest in intra-family sex." (*Price, supra*, 4 Cal.App.3d at p. 948 (dis. opn. of Thompson, J.).)

Although we are not applying the same definition of obscenity at issue in *Price*, the point is that the dictionary definitions of words such as "fuck" or "cunt" may not reflect the meaning conveyed by those words as used in contemporary society. Meaning generally hinges on the circumstances in which words are used.

As we explained in a case involving an alleged criminal threat (§ 422), "The circumstances surrounding a communication include such things as the prior relationship of the parties and the manner in which the communication was made." (*Ryan D., supra*, 100 Cal.App.4th at p. 860.) In this case, the words were used by an agitated, frustrated high school boy to his former high school girlfriend, and both parties to the communication attended a high school where such language is in common parlance. The messages concern intimate matters between the parties, and were not spoken aloud in a group, but texted privately *inter sese*.

To extract isolated words like "fuck" and "cunt" from such a communication and predicate *criminal* liability on them because they are "offensive" in the abstract is to stretch the *Hernandez* definition far beyond its utility, which was to broaden the meaning of obscene beyond its usage in reference to erotic material, in order to deter unwanted, *harassing*, communications

that intrude on a person's peace and solitude. (*Hernandez, supra*, 231 Cal.App.3d at pp. 1384, 1386.)

Similarly, while the violence described in the first text is arguably *upsetting*, it is not *obscene*—that is, offensive to prevailing notions of modesty or decency—particularly when read in the context in which the text was sent.

In short, whatever may be said about the manner in which C. C. expressed himself, it was not criminal.

**DISPOSITION**

The judgment is reversed for lack of evidence.

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CANTIL-SAKAUYE, J.

We concur:

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BLEASE, Acting P. J.

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ROBIE, J.