Filed 12/19/11 Opinion on remand

**CERTIFIED FOR PUBLICATION**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>EDDIE JASON LOWERY,<br>Defendant and Appellant. | E047614<br>(Super.Ct.No. INF062558)<br>OPINION ON REMAND |

APPEAL from the Superior Court of Riverside County. John G. Evans, Judge. Affirmed.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Gil Gonzalez, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Eddie Jason Lowery was convicted by a jury of a single count of threatening a victim or witness who provided assistance to law enforcement in a

criminal court proceeding. (Pen. Code, § 140, subd. (a).)[1] In a published opinion in this case, *People v. Lowery* (2011) 52 Cal.4th 419 (*Lowery*), our Supreme Court recently determined subdivision (a) of section 140 must be construed to include an objective test for determining whether a statement qualifies as a "true threat" and therefore falls outside the protections of the First Amendment. As a result of this decision, the case has been remanded for us to determine whether the Supreme Court's determination affects the judgment of conviction.

FACTUAL AND PROCEDURAL BACKGROUND

As described in our prior opinion, the relevant background is as follows: In a prior case (case No. INF059263), defendant and his wife were accused of stealing $250,000 in cash from 88-year-old Joseph Gorman. Gorman hired defendant and his wife to do housecleaning and some other work in and around his mobilehome on June 26, 2007. Gorman left defendant and his wife alone in the home for several hours. After they left, Gorman discovered he was missing $250,000 in cash he kept hidden in his home. Defendant and his wife were separately prosecuted for the theft. They were tried separately, and Gorman testified against them. Defendant was acquitted, but his wife was convicted of the theft and ordered to repay $250,000 to Gorman in restitution.

While attempting to locate the money taken from Gorman, an investigator obtained access to numerous tape recorded conversations between defendant and his wife while the wife was in jail during the period of August 2007 through January 2008. In the

[1] All further statutory references are to the Penal Code unless otherwise stated.

course of these conversations, defendant made a number of statements that served as the basis for the charge in this case. For example, defendant said, "Well, guess what I'm gonna do? I'm gonna kill the bastard. And I'm gonna go down to Mr. Gorman's house, maybe this week, and I'm gonna blow his fucken' head away." During trial, the jury heard a portion of the taped conversations and was also given a transcript. A registration records check revealed defendant owned a handgun as of January 28, 1993.

Defendant testified in his own defense and said he no longer owned a gun, did not intend to carry out the threats, and did not mean any of his statements about killing or blowing people up to be taken seriously. He indicated he made the statements because he was angry and because he believed he had been falsely accused by Gorman. During cross-examination, defendant was impeached with a prior conviction for cashing a stolen check with a forged signature in 1994.

The jury found defendant guilty as charged. The trial court granted defendant formal probation for a period of three years subject to various terms and conditions, including spending 365 days in jail.

## DISCUSSION

In his direct appeal, defendant argued his conviction for threatening a victim should be reversed because section 140, subdivision (a), as written and as applied to the facts of his case, was constitutionally overbroad in violation of the First Amendment of the United States Constitution. More specifically, defendant claimed section 140, subdivision (a), was constitutionally overbroad because it lacked the following two elements. First, the defendant must specifically intend the statement be taken as a threat.

Second, the defendant must have the apparent ability to carry out the threat. As a result, defendant claimed the prosecution did not bear the burden of proving these elements and the jury was not properly instructed on the elements of the charge.

In a published opinion, *People v. Lowery* (2009) 180 Cal.App.4th 630, reversed on other grounds in *Lowery*, *supra*, 52 Cal.4th 419, we rejected defendant's overbreadth challenge to section 140, subdivision (a), and affirmed the judgment. Our Supreme Court granted review and agreed with our conclusion that section 140, subdivision (a), does not violate the First Amendment because it lacks the elements of specific intent and immediacy or ability to carry out the threat. (*Lowery*, at p. 428.) However, to avoid difficult constitutional questions and to ensure the constitutionality of section 140, subdivision (a), our Supreme Court construed this section "as applying only to those threatening statements that a reasonable listener would understand, in light of the context and surrounding circumstances, to constitute a true threat, namely, 'a serious expression of an intent to commit an act of unlawful violence' [citation], rather than an expression of jest or frustration. The latter category carries First Amendment protection; the former does not. [Citation.]" (*Lowery*, at p. 472.) Because our Supreme Court's analysis concluded section 140, subdivision (a), is constitutional on a different ground, it reversed our opinion and remanded the case for us to consider whether its holding affects the judgment of conviction. (*Lowery*, at p. 428.)

In reaching its conclusion, our Supreme Court relied on *Virginia v. Black* (2003) 538 U.S. 343, which said the First Amendment allows states "to ban a 'true threat.' " (*Id.* at p. 359.) " 'True threats' encompass those 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. [Citations.] The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protects 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.' [Citation.]" (*Id*. at pp. 359-360.)

In sum, our Supreme Court adopted an objective test for determining whether a statement charged under section 140, subdivision (a), qualifies as a "true threat," which falls outside the protections of the First Amendment. Therefore, on remand, we must determine whether the jury was adequately instructed and, if not, whether the jury's conviction can be upheld based on a harmless error analysis.

The jury was in part instructed as follows:

"The crimes or other allegations charged in this case require proof of the union or joint operation of act and wrongful intent. For you to find a person guilty of the crime in this case of threatening a witness after testimony or information given, a violation of Penal Code Section 140[, subdivision] (a) as charged in Count 1, that person must not only commit the prohibited act or fail to do the required act, but must do so with wrongful intent.

"A person with wrongful—a person acts with wrongful intent when he or she intentionally does a prohibited act; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for the crime or allegation. [¶] . . . [¶]

"The defendant is charged with threatening to use force against a witness, in violation of Penal Code Section 140, sub[division] (a). To prove that the defendant is guilty of this crime, the People must prove that:

"Number 1. [The victim] gave assistance or information to a law enforcement officer or public prosecutor in a criminal case; and,

"2. The defendant willfully threatened to use force or violence against [the victim], or threatened to take, damage, or destroy the property of [the victim] because he had given assistance or information.

"Someone commits an act willfully when he . . . does it willingly or on purpose."

From a review of all of the jury instructions, including those quoted above, it is apparent the jury was not specifically advised to apply an objective standard to determine whether the defendant's statements were "true threats" meant to be taken seriously rather than mere expressions of jest or frustration. Therefore, the instructions to the jury were incomplete under *People v. Lowery*, *supra*, 52 Cal.4th at page 472. Nevertheless, we conclude the conviction must stand.

In *Pope v. Illinois* (1987) 481 U.S. 497, the defendants were charged with selling obscene magazines. (*Id*. at p. 499.) The jury was instructed to apply "community standards" to determine whether the magazines fit the definition of "obscene." (*Id*. at pp. 498-499.) The United States Supreme Court concluded the instructions given were unconstitutional and that the jury should have been instructed to apply "a reasonable person" standard to determine whether the magazines were unprotected by the First Amendment as obscene materials. (*Id*. at pp. 500-501.) However, the Supreme Court

said, "Under these circumstances, we see no reason to require a retrial if it can be said beyond a reasonable doubt that the jury's verdict in this case was not affected by the erroneous instruction." (*Id*. at p. 502.) As a result, the Supreme Court remanded the case for a determination as to whether the error was harmless under *Chapman v. California* (1967) 386 U.S. 18.

Under the *Chapman* standard, reversal is required unless we conclude beyond a reasonable doubt the error was harmless. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) In this regard, the appropriate inquiry is whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." (*Neder v. United States* (1999) 527 U.S. 1, 18.)

Based on our review of the instructions as a whole, it is our view the jurors would have understood defendant could not be found guilty under section 140, subdivision (a), if the statements he made were simply expressions of jest or frustration. The instructions advised the jury it must find beyond a reasonable doubt defendant made threatening statements with "wrongful intent." The jury was further advised it must find beyond a reasonable doubt defendant made threatening statements "willfully." Threats made "willfully" or with "wrongful intent" are inconsistent with statements made simply as expressions of jest or frustration, which should not be taken seriously.

In his own defense, defendant testified he only made the statements out of frustration because he thought he and his family had been treated unfairly by "the system." He also testified he did not intend the statement to be taken seriously. However, it is our view the guilty verdict shows the jury did not find defendant's

testimony to be credible. Thus, the jury's verdict is consistent with a finding defendant made statements that a reasonable listener would understand as "true threats," because the jury decided this key factual issue against defendant based on credibility.

Other strong evidence in the record demonstrates a reasonable listener would have taken defendant's threatening statements seriously. As noted above, defendant made the threatening statements to his wife while she was in jail, and he knew their conversations were being monitored or recorded. The evidence shows the jail's telephone system played a prerecorded warning to individuals at the beginning of each call, and the warning was repeated periodically during telephone conversations to remind the individuals their conversation could not be considered private. During trial, the jury heard a portion of defendant's taped conversations that included the threatening statements directed at the victim. The jury was also given a transcript of the tape recording. The transcript shows defendant continued his threats even after the reminder warning interrupted his conversation. This evidence strongly indicates defendant intended his threatening statements to be taken seriously. From the evidence as a whole, a jury could easily and reasonably conclude defendant's wrongful intent was to cause authorities and the victim to fear he would actually retaliate violently against the victim. Although he denied owning a gun, there was also evidence a handgun was registered in defendant's name as of January 28, 1993.

In light of the record as a whole and the surrounding circumstances in which the threatening statements were made, we can only conclude a reasonable listener would have understood the statements as "true threats" and not merely a display of jest or

frustration. We therefore conclude the lack of instruction requiring the jury to apply an objective standard was harmless under *Chapman*.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

KING
J.