

FILED: September 8, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JOON BUM KO,
Defendant-Appellant.

Washington County Circuit Court
C090146CR

A142884

Rick Knapp, Judge.

Submitted on June 17, 2011.

Garrett A. Richardson filed the brief for appellant.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Laura S. Anderson, Senior Assistant Attorney General, filed the brief for respondent.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Rosenblum, Senior Judge.

ORTEGA, P. J.

Conviction on Count 3 reversed; remanded for resentencing; otherwise affirmed.

1 ORTEGA, P. J.

2 Defendant appeals from a judgment of conviction of three counts of
3 violating a court's stalking protective order (SPO), ORS 163.750. Defendant assigns
4 error to the denial of his motion for a judgment of acquittal on Count 3 and the failure to
5 give a requested jury instruction on Counts 2 and 4. Because the statement at issue did
6 not constitute an unequivocal threat that would instill a fear of imminent, serious
7 violence, we reverse as to Count 3. We affirm as to Counts 2 and 4 because defendant
8 was not entitled to the requested instruction.

9 Defendant was charged in this case with four counts of violating an SPO.¹
10 The two SPOs at issue protected defendant's cousin, Chris Bae, and his uncle, Yoon Shin.
11 The charges arise from a single incident in which defendant, while on his way into a
12 courtroom for a second day of a trial for earlier violations of the same SPOs, contacted
13 Bae and Shin. Count 3 alleged that defendant "did unlawfully and recklessly engage in
14 conduct prohibited by the order by speaking with * * * Bae, the said conduct having
15 created reasonable apprehension regarding the personal safety of * * * Bae." Count 2
16 alleged that defendant "did unlawfully and recklessly engage in conduct prohibited by the
17 [SPO] by coming into the visual and physical presence of * * * Shin with the intent to
18 intimidate * * * Shin," and Count 4 alleged that defendant engaged in the same conduct
19 toward Bae.

20 We begin with defendant's challenge to the denial of his motion for a

¹ Defendant's motion for a judgment of acquittal was granted as to Count 1.

1 judgment of acquittal on Count 3. In reviewing the denial of a motion for a judgment of
2 acquittal, we view the evidence in the light most favorable to the state. [State v. Hall](#), 327
3 Or 568, 570, 966 P2d 208 (1998). In that light, the facts pertinent to Count 3 are these.
4 Shin, Bae, and Mintier, a Sheriff's deputy, were sitting in the hallway outside the
5 courtroom before the second day of defendant's trial on previous SPO violations when
6 defendant and his brother entered the hallway. Defendant, who was representing himself
7 at the trial, looked over and, from a distance of about 40 feet, said, "It's time for grill
8 session No. 2." He then walked past Shin, Bae, and Mintier. When defendant and his
9 brother were near the courtroom door, about five feet from Bae, defendant turned and
10 pointed at Bae. Using a harsh, angry tone and very stiff body language, defendant said,
11 "You're going down today," and said that he would prove that Bae and Shin were the real
12 criminals. Mintier was concerned that defendant was going to attack Bae and Shin, and
13 another police officer who happened to be present believed that a fight was imminent.
14 Bae also thought that defendant might engage in physical violence.

15 On appeal, defendant contends that his words did not amount to an
16 unequivocal threat that instilled a reasonable fear of imminent and serious personal
17 violence and that was objectively likely to be followed by unlawful acts. While
18 disagreeing with the decisions, the state acknowledges that, under [State v. Ryan](#), 237 Or
19 App 317, 239 P3d 1016 (2010), *rev allowed*, 350 Or 130 (2011), and [State v. Nguyen](#),
20 238 Or App 715, 243 P3d 820 (2010), statements that are alleged to constitute a violation
21 of an SPO must constitute unequivocal threats that instill a fear of imminent, serious
22 violence. The state argues that "defendant's communicative conduct here constituted an

1 'unequivocal threat.'"

2 The state's argument about defendant's "communicative conduct," however,
3 is inconsistent with the way that Count 3 was alleged. As noted above, defendant was
4 charged, based on a single incident, with violating the Bae SPO by "speaking with" Bae
5 (Count 3) and by coming into Bae's visual and physical presence with the intent to
6 intimidate Bae (Count 4). The relevant question as to Count 3, therefore, is whether
7 defendant violated the SPO "by speaking," not whether some other aspect of defendant's
8 conduct in conjunction with his speech, was sufficient to violate the SPO.

9 Here, the words spoken by defendant were not the sort of unequivocal
10 threat required to support a conviction for violating a SPO. We decline the state's
11 invitation to revisit our decisions in *Ryan* and *Nguyen*, and we conclude that, in this case,
12 defendant's statements did not constitute an "unequivocal threat of the sort that makes it
13 objectively reasonable for the victim to believe that he or she is being threatened with
14 imminent and serious physical harm." *Ryan*, 237 Or App at 325. Accordingly, the trial
15 court erred in denying defendant's motion for a judgment of acquittal on Count 3.

16 In defendant's second assignment of error, he argues that the trial court
17 erred in declining to give his requested "choice of evils" instruction as to Counts 2 and 4.²

² Defendant requested Uniform Criminal Jury Instruction 1103, which states:

"The defense of choice of evils has been raised.

"Conduct that would otherwise constitute an offense is justifiable
and not criminal when:

"(1) The defendant's conduct is necessary as an emergency measure

1 Defendant contends that he entered the visual and physical presence of Shin and Bae, as
2 alleged in Counts 2 and 4, because he had to do so to avoid committing the felony of
3 failure to appear in court. The state responds that, because Counts 2 and 4 charged that
4 defendant came into Bae's and Shin's physical presence "with the intent to intimidate" the
5 victims, proving the intent alleged in those counts effectively negated a choice-of-evils
6 defense. In the state's view, the jury found that defendant came into the victims' presence
7 with the purpose to intimidate and thus found that his conduct was not justified. We need
8 not reach the state's argument, because we conclude that the trial court correctly refused
9 to give the instruction.

10 We review the trial court's refusal to give the requested jury instruction for
11 legal error and review the evidence supporting the instruction in the light most favorable
12 to defendant, who requested the instruction. [State v. Marsh](#), 186 Or App 612, 614, 64
13 P3d 1141, *rev den*, 335 Or 655 (2003).

14 In the light most favorable to defendant, the incident occurred as follows.
15 When defendant arrived for the second day of his trial, Bae and Shin were sitting with
16 Deputy Mintier one foot away from the door to the courtroom. It was not possible for

to avoid an imminent injury; and

"(2) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of the defendant's avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the law that makes [*insert charged crime*] a crime.

"The burden of proof is on the state to prove beyond a reasonable doubt that this defense does not apply."

1 defendant to enter the courtroom without coming into the presence of Bae and Shin,
2 although it was possible to enter without stopping and communicating with them. In
3 defendant's version of events, as he and his brother were walking into the courtroom,
4 defendant stopped very briefly to speak to Shin and Bae, asserting, "You guys robbed
5 millions." Defendant's brother said, "Haven't you ruined our lives enough?" Defendant
6 had no intent to intimidate. He did not point at Bae, and he was not aggressive or rigid in
7 his stance. Defendant testified, "I admit I screwed up when I made that comment, when I
8 should have gone straight to court, but I didn't think it was a big deal because it was not a
9 threat and the deputy was sitting there and there were other officers."

10 Defendant excepted to the failure to give the choice-of-evils instruction.
11 The trial court had earlier explained, in the course of denying defendant's motion for a
12 judgment of acquittal on Counts 2 and 4 on the basis of a choice-of-evils defense, that
13 defendant had gone beyond the scope of conduct necessary to appear in court.

14 The choice-of evils instruction arises under ORS 161.200, which provides:

15 "(1) Unless inconsistent with other provisions of chapter 743,
16 Oregon Laws 1971, defining justifiable use of physical force, or with some
17 other provision of law, conduct which would otherwise constitute an
18 offense is justifiable and not criminal when:

19 "(a) That conduct is necessary as an emergency measure to avoid an
20 imminent public or private injury; and

21 "(b) The threatened injury is of such gravity that, according to
22 ordinary standards of intelligence and morality, the desirability and urgency
23 of avoiding the injury clearly outweigh the desirability of avoiding the
24 injury sought to be prevented by the statute defining the offense in issue.

25 "(2) The necessity and justifiability of conduct under subsection (1)
26 of this section shall not rest upon considerations pertaining only to the

1 morality and advisability of the statute, either in its general application or
2 with respect to its application to a particular class of cases arising
3 thereunder."

4 To assert that defense, a defendant must present evidence that "(1) [his] conduct was
5 necessary to avoid a threatened injury; (2) the threatened injury was imminent; and (3) it
6 was reasonable for the defendant to believe that the threatened injury was greater than the
7 potential injury of his illegal actions." [State v. Miles](#), 197 Or App 86, 92-93, 104 P3d
8 604, *rev den*, 338 Or 488 (2005) (quoting [State v. Seamons](#), 170 Or App 582, 586, 13 P3d
9 573 (2000); brackets in *Miles*). For conduct to be "necessary" to avoid a threatened
10 injury, the defendant must show that he did not have another available course of action.
11 *Miles*, 197 Or App at 93 (concluding that the defendant's act of possessing marijuana
12 without a medical marijuana card was not necessary where the defendant had the
13 alternative of obtaining a card); *see also Teague v. MVD*, 124 Or App 25, 860 P2d 905
14 (1993) (deciding that the choice-of-evils defense to suspension of driver's license for
15 driving while intoxicated was unavailable where it was possible to avoid the threatened
16 injury by walking away rather than driving).

17 Here, defendant's admission that he could have entered the courtroom
18 without stopping--thereby coming into the victims' presence for a more limited period of
19 time--precludes any finding that defendant lacked an alternative to the "evil" at issue.
20 Assuming without deciding that the other requirements for a choice-of-evils instruction
21 were met, defendant exceeded the scope of the conduct necessary to avoid a failure to
22 appear charge when he stopped to engage the victims. His conduct thus was not
23 necessary to avoid the evil of failure to appear, and the trial court's refusal to give a

1 choice of evils instruction was not error.

2 Conviction on Count 3 reversed; remanded for resentencing; otherwise

3 affirmed.