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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MERLIN CODY GRIFFITHS,

Defendant and Appellant.

F063624

(Super. Ct. No. 1430176)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Stanislaus County. John D. Freeland, Judge.

Christian Koster, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Cornell, J., and Franson, J.

A jury convicted appellant, Merlin Cody Griffiths, of making a criminal threat, in violation of Penal Code section 422 (section 422). The court placed appellant on three years' probation, ordered that he serve 162 days in county jail as a condition of probation, and awarded him credit for time served.

On appeal, appellant contends (1) the evidence was insufficient to support his conviction of the instant offense, and (2) the court erred in failing to instruct the jury on the offense of attempt to make a criminal threat. We find merit in the first of these contentions, and reverse.

## **FACTS**

### ***Prosecution Case***

On March 28, 2011,<sup>1</sup> Kayla Braaten, a student at Modesto Junior College (MJC), walked up to a group of people that included appellant and “a couple of [Braaten’s] friends” on the MJC campus.<sup>2</sup> As she approached, she heard appellant, whom she had never seen before, say something, but she did not know if appellant was speaking to her and she did not hear what he said. She asked “another person who was there” what appellant said. This person told Braaten “[appellant] said, “‘Look at this nasty bitch walk up.’”

The next time Braaten saw appellant was March 30. She was sitting at a picnic table on campus with four other people when a woman she knew only by her first name, Megan, walked up, with appellant “following closely behind.” Megan and appellant sat down at the table, and appellant began talking to “another girl.”

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<sup>1</sup> All references to dates of events are to dates in 2011.

<sup>2</sup> The “Prosecution Case” portion of our factual summary is taken from Braaten’s testimony.

At some point thereafter, four persons left, leaving Megan, Braaten and appellant sitting at the table. Appellant asked Braaten, ““Have I seen you before?”” Braaten responded, ““Yeah. You’re the one that called me a nasty bitch the other day.”” At that point, Braaten testified, “[Appellant] told me that if he was in the same state of mind as he was the other day, he would still call me the same things, take me on the grass, rape me, strangle me with his backpack and stab me with whatever he had.” In response, Braaten asked appellant if he was “on any drugs.” Appellant mumbled a response that Braaten could not understand.

There followed a period of time during which appellant “mumbled” to himself and Braaten and Megan talked to each other. After approximately five minutes, appellant, who, Braaten thought, “could tell [the two women] wanted to leave,” said, ““You guys can come to my house if you want. I promise I won’t hurt you.”” Braaten did not respond. She asked Megan if she wanted to walk with her to her (Braaten’s) car, and the two women got up and walked away. Appellant got up and walked off in the opposite direction. As soon as Braaten and Megan were “out of earshot,” Braaten told Megan she “wasn’t going to let [her] stay there with that guy,” and asked her if she needed a ride anywhere.

Braaten drove Megan to the “bus station,” dropped her off and returned to campus. She “found the people [she] was with” and “told them what had happened,” at which point she and one of her male friends “went and contacted campus security[.]” Campus security personnel contacted the police, and four days later Braaten spoke with a police officer.

When appellant spoke of raping, strangling and stabbing her, Braaten became “[v]ery scared.” She remained scared “[f]or a couple days after that, until [appellant] was finally in custody.”

## *Defense Case*

Appellant testified that on March 28, he approached Braaten and a friend of his who was standing near Braaten and, in an attempt to introduce himself to Braaten, said to his friend, ““Who is this nasty bitch?””<sup>3</sup> Braaten appeared to be “a little uneasy ....” Appellant said to her, ““Don’t worry about it. You look fine. You’re very fine looking.”” He then said, ““I’m Merlin. And what is your name?”” Braaten said nothing, and appellant “turned and walked away.”

On March 30, he sat down at a table where Braaten and another woman were sitting. He introduced himself and the two women did likewise. Appellant “flirted” with them and invited them to his house “or maybe go out to lunch.” Both women “said no,” and appellant said, ““It’s not like I’m going to hurt you.”” Shortly thereafter, Braaten said, ““Aren’t you the one that called me a nasty bitch the other day?”” Appellant “apologize[d] for that.” Appellant spoke to the women for a while longer, until they “spontaneously, ... without saying anything, left ....” At no time did he make the threatening statement that Braaten testified he made.

## **DISCUSSION**

Subdivision (a) of section 422 (section 422(a)) provides, in relevant 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

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<sup>3</sup> The “Defense Case” portion of our factual summary is taken from appellant’s testimony.

reasonably to be in sustained fear for his or her own safety ... , shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.” (Italics added.)

Appellant contends the prosecution failed to prove his threatening statements were “so unequivocal, unconditional, [and] immediate as to convey a gravity of purpose and immediate prospect of execution of the threat,” within the meaning of section 422(a).

### ***Standard of Review***

“In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury’s duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.] “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]” [Citation.]”<sup>4</sup> (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) However, “while substantial evidence may consist of inferences, such inferences must be “a

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<sup>4</sup> Insertions added by this court are placed in brackets and italicized to distinguish them from the single bracketed insertion appearing in the original material.

product of logic and reason” and “must rest on the evidence” [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations].” (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393-1394, italics omitted.)

### ***Applicable Legal Principles***

“A threat which may appear conditional on its face can be unconditional under the circumstances.” (*People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1158 (*Stanfield*).

Thus, “To constitute a criminal threat, a communication need not be absolutely unequivocal, unconditional, immediate, and specific. The statute includes the qualifier ‘so’ unequivocal, etc., which establishes that the test is whether, in light of the surrounding circumstances, the communication was sufficiently unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution.” (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861 (*Ryan D.*), citing *People v. Bolin* (1998) 18 Cal.4th 297, 340.) For example, “A seemingly conditional threat contingent on an act highly likely to occur may convey to the victim a gravity of purpose and immediate prospect of execution.” (*Stanfield*, at p. 1158.)

“[T]he statutory definition of the crime proscribed by section 422 is not subject to a simple checklist approach to determining the sufficiency of the evidence. Rather, it is necessary first to determine the facts and then balance the facts against each other to determine whether, viewed in their totality, the circumstances are sufficient to meet the requirement that the communication ‘convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat.’” (*Ryan D.*, *supra*, 100 Cal.App.4th at p. 862; accord, *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137 (*Ricky T.*) [“The surrounding circumstances must be examined to determine if the threat is real and genuine, a true threat,” and such threats must be “judged in their context”].) Relevant

circumstances include “[t]he parties’ history ...” (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340.)

“[Section 422] ‘was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others.’ [Citation.] In other words, section 422 does not punish such things as ‘... ranting soliloquies, however violent.’ [Citation.]” (*Ryan D.*, *supra*, 100 Cal.App.4th at p. 861.)

### ***Analysis***

As the parties do not dispute, the jury reasonably could credit Braaten’s testimony that appellant said to her “that if he was in the same state of mind as he was the other day, he would still call [Braaten] the same things, take [her] on the grass, rape [her], strangle [her] with his backpack and stab [her] with whatever he had.”

This statement, on its face, was not an unconditional threat to commit a crime. Rather, it was conditional. Moreover, the condition was a past state of mind which, appellant implied, did not exist at the time he made the statement. In effect, he stated he would commit a crime *if* a condition which did not exist—his state of mind on March 28—in fact, existed.

The People acknowledge that appellant’s statement was conditional, but, they argue, the “surrounding circumstances” demonstrate that it was sufficiently unequivocal to qualify as a criminal threat under section 422. Specifically, the People point out, two days earlier appellant, who had never met Braaten, “without any form of provocation” had called her a “nasty bitch.” The People assert that “A history of animosity or conflict between the parties is relevant to supply ... context and make the victim’s perception that an immediate threat was contemplated appear reasonable.” However, the cases the People cite in support of this proposition are far different than the instant case, and do not support the People’s claim.

Those cases include *People v. Gaut* (2002) 95 Cal.App.4th 1425 (*Gaut*) and *People v. Martinez* (1997) 53 Cal.App.4th 1212 (*Martinez*). In *Gaut*, the court upheld the section 422 conviction of a defendant who, while incarcerated, telephoned the victim, a woman with whom he had a dating relationship, and made a number of unconditional threats, which the victim recorded on her voicemail. The defendant told the victim, for example, “‘I’m gone [*sic*] do some real ugly shit to you,’” and “‘I’m gone [*sic*] cross your ass out of the game.’” (*Gaut*, at p. 1429.) In addition, “[the] defendant had a lengthy history of not only threatening but also physically assaulting [the victim],” and “[he] said he had pistol-whipped his former girlfriend and intended to shoot her.” (*Id.* at p. 1431.) Based on these factors, the court stated, “It was reasonable for [the victim] to fear that defendant would also follow through on the threats he made from jail based on the totality of the circumstances.” (*Ibid.*)

The instant case is distinguishable from *Gaut* in several respects, including the absence of evidence that appellant had engaged in any past acts of violence, toward Braaten or anybody else.

*Martinez* is similar. In that case, the defendant was speaking with his girlfriend, Ramona Garcia, at her place of employment, Kern Medical Center (KMC), when Garcia’s supervisor, Robert Iorio, told him to leave. (*Martinez, supra*, 53 Cal.App.4th at pp. 1214-1215.) Thereafter, the defendant rode his bicycle “‘quickly” in Iorio’s direction, dismounted, got “‘right in Iorio’s face,”” “‘started yelling and cussing” at Iorio, and threatened to “‘get” him. (*Id.* at p. 1215.) He then got on his bicycle and as he rode off he told Iorio, “‘I’ll get back to you, I’ll get you.”” (*Ibid.*) Later that day, the defendant told Garcia he was going to “‘blow up” her car and KMC. (*Ibid.*) The next day there were two fires at KMC and a piece of charred paper was found protruding from the gas tank of Garcia’s car. (*Id.* at pp. 1215-1216.) An arson investigator testified all three fires were intentionally set and found physical evidence linking the defendant to the fires. (*Id.* at

p. 1216.) In upholding the defendant's conviction of violating section 422, the court relied in part on the "surrounding circumstances," including the following: the defendant was "extremely angry" at Iorio, and one of the fires he set at KMC was in a place where the defendant had reason to believe Iorio would be. (*Martinez*, at p. 1221.)

Thus, in *Martinez*, unlike the instant case, there was evidence the defendant took action to actually carry out his threats, and as the *Martinez* court noted, "Although section 422 does not require an intent to actually carry out the threatened crime, if the defendant does carry out his threat, his actions might demonstrate what he meant when he made the threat, thereby giving meaning to the words spoken." (*Martinez, supra*, 53 Cal.App.4th at pp. 1220-1221; accord, *People v. Solis* (2001) 90 Cal.App.4th 1002, 1013 [in determining whether conditional, vague, or ambiguous language constitutes a violation of § 422, the trier of fact may consider "subsequent actions taken by the defendant"].) The conduct of the defendant in *Martinez* distinguishes that case.

Finally, the People cite *Ricky T., supra*, 87 Cal.App.4th 1132, where the appellate court reversed a minor's adjudication of violating section 422. Specifically, the People cite the portion of the following statement that we have italicized: "In contrast to other cases upholding section 422 findings, there was no evidence in this case to suggest that appellant and [the victim] *had any prior history of disagreements, or that either had previously quarreled, or addressed contentious, hostile, or offensive remarks to the other.*" (*Ricky T.*, at p. 1138, italics added.) However, none of the "other cases" cited suggest that a remark such as appellant's "nasty bitch" epithet would be sufficient, by itself, to establish that an ambiguous or conditional threat constituted a violation of section 422. For example, the court cited *Martinez*, discussed above, and *People v. McCray* (1997) 58 Cal.App.4th 159, 172, where, like *Gaut*, "[the] defendant's past violence toward the victim was relevant to the determination of whether [the] defendant made a terrorist threat." (*Ricky T.*, at p. 1138.)

Here, appellant's reference to Braaten as a "nasty bitch" was crude and offensive. But unlike the acts of violence in *Gaut* and *McCray* and the acts of arson in *Martinez*, this remark is not the sort of surrounding circumstance that gives rise to a reasonable inference that appellant intended to actually carry out the acts of violence he referred to on March 30. As indicated earlier, his March 30 remarks were (1) conditional and (2) declarative of a past state of mind. They can be fairly characterized, at the very least, as bizarre, disturbing, offensive and boorish in the extreme. However, in our view, even when considered in the context of appellant's crude and offensive remark two days prior, these remarks were not so unconditional and immediate as to indicate a gravity of purpose and an immediate prospect of execution of the violent acts appellant described. Accordingly, appellant's conviction cannot stand.<sup>5</sup>

#### **DISPOSITION**

The judgment is reversed.

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<sup>5</sup> Appellant also contends the evidence was insufficient to establish the sustained fear element of section 422. Because we reverse on the ground discussed above, we need not address this contention, nor do we need to address appellant's claim of instructional error.