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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS MIGUEL ALVARADO,

Defendant and Appellant.

G050621

(Super. Ct. No. 13WF1462)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed in part, reversed in part.

Rex Adam Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Luis Alvarado challenges his convictions on two counts of criminal threats (Pen. Code, § 422¹) made on April 1, 2013, and April 4, 2013, against a housekeeper at a room and board home where his mother lived. His main focus is on the fact he did not make the threats directly to the housekeeper, but instead communicated them to his mother. That argument fails because there was substantial evidence (by way of previous shakedowns of the housekeeper) that Alvarado intended his mother to relay the threats on to the housekeeper. We also reject Alvarado's second argument that a modification of CALCRIM No. 1300 (the standard jury instruction embodying the elements of section 422) misled the jury. Any error was academic: The jury was informed *as regards the housekeeper* to consider whether Alvarado *intended* to have his mother pass on the threats; moreover the evidence would not allow for any other interpretation but that Alvarado intended his threats to be communicated to the intended victim. We are forced to reverse the conviction as to the April 4 criminal threats count (count 5), however, because there was evidence of *two* separate acts communicating threats against the housekeeper made that day, yet the prosecution did not elect which act to prosecute, and the trial court gave no unanimity instruction (as it was required to do *sua sponte*) in regard to that count.

II. FACTS

This case arises out of the prosecution of two separate sets of threats made by Alvarado against two different victims: (1) a man named Michael who lived at the same boarding house in Garden Grove as Alvarado's mother, and the housekeeper at that boarding house, named Elizabeth. The threats against Michael were made in December 2012, and the threats against Elizabeth were made in April 2013. Elizabeth and Alvarado's mother form the common links between the two sets of threats: For each of

¹ All further statutory references are to the Penal Code.

the first two threats with Michael as the intended victim, Elizabeth gave money to Alvarado's mother to give to Alvarado to keep him from harming Michael. Elizabeth was rewarded for her pains by becoming the intended victim of Alvarado's later threats to do physical harm conveyed via his mother about three months later.

The basic story of the two sets of threats was this: In December 2012, Alvarado had been living rent free by staying in his mother's room at the boarding house. That was not allowed. Elizabeth was saddled with the duty of telling him he had to leave and of (possibly) disposing of his leftover property as well. About two weeks later, Alvarado voiced his anger by telling Elizabeth he was going to "explode" Michael's car and "do a lot of physical damage" to Michael unless Elizabeth paid Alvarado \$5. Alvarado made the same threat to Michael directly. Elizabeth – not Michael – gave Alvarado's mother \$5 to prevent the harm.

Later that same December, Alvarado made a demand to Elizabeth for \$150 lest Alvarado "hit" Michael. This threat, unlike the \$5 threat, was not made to Michael directly. Again, Elizabeth gave the sum to Alvarado's mother to pass on to Alvarado.

A little more than three months later, on April 1, 2013, Alvarado called his mother to say that he wanted \$200 from Elizabeth or "something was going to happen to her." Elizabeth actually overheard that conversation because Alvarado's mother put her phone on "speaker." Elizabeth paid the \$200 "immediately" by giving it to Alvarado's mother, though she had to borrow the money to do so.

The April 4 communication was initially sent via a text message – again directly to Alvarado's mother as distinct from Elizabeth herself – in which Alvarado stated he was going to come over to the room and board home and kill Elizabeth – unless he got \$500. This time Alvarado's mother called the police. After the police arrived, Alvarado's mother received a voice call (as distinct from text message) from Alvarado who said he wanted \$500 or he was going to kill Elizabeth. Elizabeth overheard enough

of that conversation to remember him saying he wanted \$500 lest she be killed. The police advised her not to pay the \$500.

As a result of the foregoing, the district attorney's office filed a six-count information in November of 2013, asserting three counts based on Michael as victim (counts 1, 2, and 6), and three counts based on Elizabeth as victim (counts 3, 4, and 5). Count 2 was dismissed during trial,² and the jury returned not guilty verdicts on the remaining counts concerning Michael.³ Of the three counts based on threats against Elizabeth on which the jury did return guilty verdicts, count 4, attempted extortion based on events of April 1, is not challenged on appeal. That leaves for our analysis counts 3, based on events of April 1, 2013, and count 5, based on events of April 4, 2013.

III. DISCUSSION

A. *Substantial Evidence*

As to the two section 422 counts, Alvarado presents three arguments on appeal. The first is that there was a lack of substantial evidence to support those counts because in both cases the prosecution failed to establish that he intended his threats be communicated to Elizabeth.

It is established that threats conveyed to a third party to do harm to someone else do indeed fall within the ambit of section 422. (*In re David L.* (1991) 234 Cal.App.3d 1655, 1659 (*David L.*) ["The kind of threat contemplated by section 422 may as readily be conveyed by the threatener through a third party as personally to the intended victim."].) Here, the backstory to the two April threats provides substantial evidence of Alvarado's intent to have his mother convey his threats to Elizabeth. A reasonable jury could thus easily find – based on Alvarado's past successes in wringing

² Count 2 was for the completed crime of extortion (§ 518) but Michael testified he never paid anything to Alvarado, making that count nonviable since extortion requires an actual transfer of property. The count was dismissed during trial.

³ There was substantial evidence that Michael never felt in fear for his safety. Michael never paid anything to Alvarado and there was a police report in which Michael said he wasn't sure whether to believe Alvarado's threats.

money out of Elizabeth by making Michael his ostensible target and using his own mother *as a conduit* – that Alvarado expected his April threats to be relayed to Elizabeth. The jury had before it a textbook case of escalating extortion demands, in which, by April, Alvarado had decided he could obtain greater sums by threatening to harm Elizabeth herself rather than using Michael as a surrogate.

The jury's conclusion was strengthened by Elizabeth's testimony about what she heard from Alvarado's mother concerning Alvarado's willingness to engage in violence: Elizabeth testified that Alvarado's mother had told her that when Alvarado was young "he tried to kill his brother, and his whole life he had trouble with the police." Alvarado's mother herself testified that, based on her experience with her son, she feared for Elizabeth's safety if Alvarado actually did show up at the room and board home.

Of the three published opinions that have considered the quantum of evidence necessary to establish a defendant's intent that a threat communicated to a third party be conveyed to the victim, this case easily slots within the one which upheld the conviction. The three cases are *David L.*, *supra*, 234 Cal.App.3d 1655 [upholding conviction]; *People v. Felix* (2001) 92 Cal.App.4th 905 (*Felix*) [reversing] and *In re Ryan D.* (2002) 100 Cal.App.4th 854 (*Ryan D.*) [also reversing]. In the case of the affirmance, *David L.*, a school bully harassed the victim (pushing the victim against a locker), and the victim took a swing at the bully and knocked him to the ground. The next day the bully called the victim's friend on the phone, told the friend he was angry about the fight and told the friend he was going to shoot the victim. (*David L.*, *supra*, 234 Cal.App.3d at p. 1658.) Given the specificity of the threat and the ongoing "climate of hostility" between the bully and the victim, the jury could have inferred the bully intended the friend to "act as intermediary" in conveying the threat. (*Id.* at p. 1659.)

By contrast, the two reversals each involved situations where there was a substantial attenuation between the initial communication of the threat and little realistic possibility of any relay to the victim. Each of those communications were made in

contexts which a reasonable person would expect that the communication would in fact *not* be relayed to an ostensible victim. *Felix* involved a case where the communication was made during a therapy session to a jail psychologist. (*Felix, supra*, 92 Cal.App.4th at p. 909.) *Ryan D.* involved a painting for a high school art class turned into a person in authority and not the ostensible victim.⁴ (*Ryan D., supra*, 100 Cal.App.4th at p. 858.) These were clearly a long ways from our case.

B. *The Jury Instruction*

The next challenge Alvarado presents involves a modification to the standard language of CALCRIM No. 1300, which is a jury instruction intended to embody the elements of section 422. The standard CALCRIM tells the jury to find “The defendant intended that (his/her) statement be understood as a threat [*and* intended that it be communicated to <insert name of complaining witness>].” (Italics added.) However, in this case, the trial judge put an “or” between the intention the statement be understood as a threat, and the intention it be communicated to the complaining witness.⁵ On appeal Alvarado now argues that the disjunction allowed the jury to convict him without evidence he intended to have his mother convey his threats to Elizabeth which would (as the *Felix* and *Ryan L.* cases demonstrate) be incorrect.

The modification was the result of the fact, mentioned above, that the charges against Alvarado initially consisted of two sets of three counts, one set based on Michael being the victim. Michael testified he received the first, \$5 threat, directly, but received the \$150 threat only through the intermediary of a third party, Elizabeth. Discussing the problem of the third-party threat in the section 422 context, the trial judge

⁴ Much of *Ryan D.* involved the problem of free speech and art (see *Ryan D., supra*, 100 Cal.App.4th at pp. 857 [quotation from Roman poet Horace] and 861 [noting “section 422 cannot be applied to constitutionally protected speech”]), so we use the word “threat” in the sense that the prosecutor perceived the painting was intended.

⁵ In relevant part, the actual jury instruction provided:
“Either: [¶] A. The defendant intended that his statement be understood as a threat; [¶] OR [¶] B. The defendant intended that his statement be understood as a threat and intended it be communicated to Elizabeth [last name omitted] and Michael [last name omitted].”

proposed to “split it up” and say “the defendant intended that his statement be understood as a threat or the defendant intended that his statement be understood as a threat and intended that it be communicated to.” Alvarado’s trial counsel said “That’s acceptable and more accurate, your honor.” Moments later, when the judge again stated he would “give one element as a direct communication and two as an indirect communication,” Alvarado’s counsel’s response was again “That’s correct, your honor. I would agree with that.”

Though the Attorney General notes that any error was waived by trial counsel’s agreement, Alvarado now argues that the trial court should have sua sponte instructed the jury that an intention to communicate the threat to the victim is an *element* of section 422. In other words, the judge simply should have left out the “defendant intended that his statement be understood as a threat” alternative part of the instruction.

The alternative formulation was not, if considered wholly in a vacuum, a correct way to describe the elements of section 422 when there is no evidence of a direct threat to an intended victim. When a threat is against a victim who does not directly receive it because the threatening communication designates a third party as the object of the intended crime, the jury must find an intention to have the threat conveyed to the victim. That much is clear from *Ryan L.* and *Felix*. And since there was no evidence that Alvarado ever conveyed the April 1 and April 4 threats directly to Elizabeth, the jury should not have been given an instruction that, at least in theory, might have allowed them to find Alvarado guilty of those threats without an explicit finding of an intention to convey to Elizabeth.⁶

That said, any error was harmless even under the stricter “beyond a reasonable doubt” standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 835-836 [articulating less strict reasonable

⁶ As noted, the origin of the problem is that both the prosecutor and defense counsel did not quite realize that they were weighing down one jury instruction by trying to have it do the work of two.

probability of a different result standard].) There was simply no innocent explanation for any of Alvarado’s phone calls to his mother concerning Elizabeth. He had never sought help or counseling from her. There was no reason to provide him this information *except* for passing it on. No reasonable jury could conclude anything *but* he intended to have his mother convey to Elizabeth the threat. Each threat was intertwined with a specific demand for monetary payment. And there is the corroborating testimony of two text messages that Alvarado sent to his girlfriend in regard to the April 4 (\$500) threat, both of which explicitly said that Alvarado would refrain from harm to Elizabeth if he got a specific sum of money.⁷ The clincher is that *both counsel* told the jurors that they needed, as regards the April 1 and April 4 counts, to find an intent on Alvarado’s part to have his mother convey his threats to Elizabeth. Alvarado’s own trial counsel made it abundantly clear, as regards any indirect threats, that the jury had to find intent to pass those threats on. He stressed to the jury (he said it was “very important”) that the alternative formulation in the formal jury instruction (“The defendant intended that his statement be understood as a threat”) *only* applied to the \$5 threat made *directly* to Michael. He said that as regards any “third party” threat – and particularly threats concerning Elizabeth as victim – the jury had to “go” with the “full prong,” i.e., the prosecution had “to prove beyond a reasonable doubt that Luis Alvarado intended that his statement be understood as a threat *and* that he intended it be communicated to that third person.” (Italics added.) And in fact counsel repeated that gloss on the jury instruction a few moments later: “So let’s talk about the criminal threats that were made purported to Elizabeth [last name omitted]. [¶] . . . [¶] Number three is the most important one, okay? [¶] ‘Luis Alvarado intended that his statement be understood as a threat.’ And because

7

They were:

“(1) “Okay, *I’ll drop it*, but I want my money and I will get my money” and

“(2) It better be the 500 *or* that dyke will pay.” (Italics added.)

this is a third party, *you have to use this 'and intended that it be communicated to Elizabeth [last name omitted].'*” (Italics added.)

Likewise, the prosecutor recognized a need to find intent for conveyance to Elizabeth. In his reply to defense counsel’s argument, the prosecutor not only did not dispute defense counsel’s emphasis on the need for intent to convey the threat onward to Elizabeth, but the prosecutors also argued, at least twice, that the prosecution had shown such an intent. Moreover, each time the prosecutor made the obvious connection between Alvarado’s intent and a link to a monetary payday: (1) “And when this defendant is calling his mother when she’s living at the facility where [Elizabeth] works, where [Michael] also lives, *of course he intended* that information get to them. That is *the whole point* of communicating that. That’s how threats for money work.” (Italics added.) And (2) “Look at all the facts here. *It’s plainly obvious that he intended that information to be conveyed to the victims* because, otherwise, he’s not getting paid and – it’s plainly obvious that this isn’t just him being upset. This isn’t just him blowing off some steam. You don’t do that over the course of three days. You don’t do that by coupling that with ‘pay me money.’” (Italics added.)

We thus conclude, beyond a reasonable doubt, there was no danger the jury convicted Alvarado on either of the third party relay counts without finding an intent to have the threat relayed on to Elizabeth.

C. The Lack of Unanimity Instruction Involving the April 4 Count (Count 5)

Alvarado’s last argument involves just the April 4 count, and here we must conclude his argument is meritorious. His brief points out that there was evidence of two distinct acts that could come within section 422 on April 4 – the initial text message to his mother threatening to kill Elizabeth for \$500 and the subsequent phone call which Elizabeth (again) overheard. The prosecution did not elect which of the two acts

constituted the April 4 count,⁸ and the trial judge did not give a unanimity instruction as to the April 4 count, as was required to avoid the danger the jury might convict the defendant even though it was not in unanimous agreement as to the specific act constituting the offense. (See *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534 (*Melhado*) [“When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act.”]; *People v. Sutherland* (1993) 17 Cal.App.4th 602, 611-612 [“It is established that some assurance of unanimity is required where the evidence shows that the defendant has committed two or more similar acts, each of which is a separately chargeable offense, but the information charges fewer offenses than the evidence shows.”].)

The Attorney General correctly refrains from arguing that Alvarado’s counsel waived the issue by not asking for a unanimity instruction as to the April 4 count. Case law shows that the unanimity instruction, if required, cannot be waived by defense counsel’s not speaking up to request it (at least as to charged conduct). A unanimity instruction must be given as to charged conduct if the evidence shows more than one unlawful act on which the charge might be based. (*Melhado, supra*, 60 Cal.App.4th at p. 1534 [“the principle has emerged that if the prosecution shows several acts, each of

⁸ The information alleged: “Count 5: On or about April 04, 2103, in violation of Section 422[, subdivision] (a) of the Penal Code (criminal threats), a felony, Luis Miguel Alvarado did willfully and unlawfully threaten Elizabeth B to commit a crime which would result in death and great bodily injury to Elizabeth B, with the specific intent that the statement be taken as a threat, and the statement was 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, causing Elizabeth B to reasonably be in sustained fear for his/her safety and the safety of his/her immediate family.”

The jury verdict form likewise did not specify the particular act alleged: “We the jury in the above-entitled action find the Defendant, Luis Miguel Alvarado, guilty of the crime of criminal threats against Elizabeth T. on April 4th, 2013, a felony, in violation of Section 422(a) of the Penal Code of the State of California, as charged in count 5 of the information.”

Astute readers will notice the use of two different last initials for the victim Elizabeth. The explanation is that she married and changed her name by the trial.

which could constitute a separate offense, a unanimity instruction is required”]; 5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Trial, § 687, p. 1059 [“Where the evidence shows more than one unlawful act on which the charge might be based, the court is required to instruct, on its own motion, that the jurors, in order to convict, must unanimously agree as to the specific act committed.”].)

The Attorney General is incorrect, however, to assert that a unanimity instruction was not required because Alvarado’s acts on April 4 constituted a “continuous course of conduct.” The problem here is that because section 422 focuses on “an individual act – a threat,” it is not susceptible to continuous course of conduct analysis. (*People v. Salvato* (1991) 234 Cal.App.3d 872, 883-884 [prosecutorial election or unanimity instruction required where “numerous acts” could have been the basis for a section 422 count].)

Melhado, in fact, provides a good example of why, in the section 422 context, discrete threats require election or a unanimity instruction. (It also resembles this case because, like here, it involved a defendant who got mad because a business had failed to return his property.) In *Melhado*, the defendant brought his car into a repair shop for brake repairs, but could not pay the bill and was sent away without the car when he came to claim it. (*Melhado, supra*, 60 Cal.App.4th at p. 1532.) About two weeks later, when the defendant visited the shop, he noticed the car was missing. When told it was in storage, he said he was going to “blow [the manager] away” if he didn’t bring the car back. (*Id.* at p. 1533.) That particular threat was around 9 in the morning. The defendant returned to the repair shop at about 11 a.m. the same day, pulled an object resembling a hand grenade from his jacket pocket and said told the manager (and two mechanics) he was going to “blow you away” if he didn’t get his car back by the following Monday. (*Ibid.*) He even returned again, the same day, at about 4:30 p.m. This time the manager called the police who, arriving “within seconds” noticed a bulge in the defendant’s jacket (it turned out to be a fake grenade) and arrested him, (*Ibid.*) The

defendant was charged with one count of violation of section 422. In his argument to the jury, the prosecutor emphasized the events of 11 a.m. and treated the events of 9 a.m. and 4:30 p.m. as mere embellishments to “the retelling of the tale.” (*Id.* at pp. 1535-1536.) But the prosecutor never made an election to base the section 422 charge on the 11 a.m. events, and the court never told the jury “in so many words” of an election to base the crime on the 11 a.m. threat. (*Ibid.*) In reversing, the appellate court explained at some length that the 9 a.m. threat could have supplied its own basis for a section 422 conviction just as much as the 11 a.m. threat. (*Id.* at pp. 1536-1538.)

We see little difference between the two threats made on the same day in *Melhado* and the two threats made on the same day – April 4 – here. In each case, the second threat could be seen as substantially similar to the first one. In *Melhado*, it was two successive threats to blow up the victim, here it was two successive threats to come over to the boarding house and kill her. And in each case, the jury could, at least in theory, have divided over which specific threat constituted the crime of section 422.

While reversal is required, we cannot be too critical of either the trial judge or the prosecutor for the lack of a unanimity instruction (or an explicit election for that matter) given the peculiar record in this case. Not only was Elizabeth a reluctant witness, her testimony was a chronological jumble. Reading the reporter’s transcript of Elizabeth’s testimony, one can readily conclude that her statements concerning a *second* phone conversation involving overheard threats from Alvarado occurring on April 4 were simply the result of being wrong about the date, and in fact there was only *one* overheard threat, namely the one that took place on April 1. Moreover, as the Attorney General points out, there was evidence from Alvarado’s mother that she had moved out of the boarding house as of April 4, which undercuts the idea of a second overheard phone conversation on April 4.

But none of that can save the April 4 count. The fact is that the jury *did* hear from the victim herself that on *April 4* there was a text message from Alvarado

saying he would kill her lest he get \$500 *and* she also overheard a phone conversation in which he stated orally he would kill her unless he got \$500.⁹ We cannot, on appeal, retrospectively assume that the jury would have *necessarily* refused to convict on the overheard conversation on April 4.

IV. DISPOSITION

The judgment of conviction is affirmed as regards counts 3 (and of course the unchallenged) count 4. The judgment of conviction is reversed as regard count 5. Our disposition is without prejudice to the district attorney's office to retry Alvarado on count 5, though whether – given that his two-year sentence on that count was stayed under section 654 in any event – it will choose to do so is a matter for it to decide.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.

⁹ The Attorney General argues that “only one threat was communicated from Alicia to Elizabeth on April 4.” But that is not the issue. We are not concerned with when Elizabeth heard the threats, but when Michael made them.