Filed 10/24/16 P. v. Granados CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ARAN GRANADOS, Defendant and Appellant.	B268917 (Los Angeles County Super. Ct. No. GA096325)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jared D. Moses, Judge. Modified and affirmed with directions.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

Aran Granados appeals from the judgment entered following a jury trial in which he was convicted of one count of criminal threats (Pen. Code,[1] § 422, subd. (a)), one count of attempting to dissuade a witness (§ 136.1, subd. (a)(2)), and one count of misdemeanor assault (§ 240). The court sentenced appellant to two years in state prison.[2]

Appellant contends his conviction for attempting to dissuade a witness under section 136.1, subdivision (a)(2) lacks substantial evidentiary support. We agree and modify the judgment to strike appellant's conviction for violating section 136.1, subdivision (a)(2). In all other respects, we affirm.

FACTUAL BACKGROUND

Juana Loya Campos (Loya) shared an apartment with her 18-year-old son Christian and her daughter M.G., age 16. Appellant lived next door with his mother, brother, and two sisters. The two families did not get along.

The April 27 incident

On April 27, 2015, about 5:00 in the afternoon, Loya found appellant arguing with M.G. outside their apartment. Appellant was shouting obscenities at M.G., who was crying. Loya sent her daughter inside, while she remained outside with appellant. Appellant appeared to be drunk and proceeded to call Loya names and make obscene gestures and movements toward her.

Appellant then picked up an unopened 16-ounce can of beer and threw it at Loya. Loya ducked, and the beer can narrowly missed her head. Loya picked up the can and tossed it into some bushes. She then made a move to go inside her apartment, but appellant blocked her way.

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[1] Undesignated statutory references are to the Penal Code.

[2] The sentence consisted of the mid-term of two years as the base term for count 4, criminal threats, and 30 days in county jail with 30 days credit for time served on count 6, misdemeanor assault. The court also imposed and stayed a two-year sentence on count 5 for attempting to dissuade a witness.

Loya called the police on her cell phone; officers arrived shortly thereafter. As Loya reported the incident, she appeared "shaken up" and "distraught," while appellant was laughing and making jokes with a friend. One officer found a 16-ounce beer can in the bushes nearby. The top of the can had lifted slightly, allowing beer to foam out of the small opening, but the can was still nearly full. Police arrested appellant.

The May 5 incident

On May 5, 2015, Christian called Loya to pick him up immediately from work at Party City because appellant was in the store. Christian sounded "terrorized." He thought appellant had come to the store looking for him, and he did not feel safe. When Loya arrived at Party City, Christian appeared "very frightened."

Loya drove Christian home. As she parked her truck on the street, she saw a red SUV approaching from the opposite direction, driving very slowly. Loya exited her vehicle, and Christian reclined the passenger seat back to avoid being seen. The vehicle stopped slightly past Loya's truck, and appellant got out. Appellant maintained continuous eye contact with Loya as he passed by her going toward his apartment, and his left hand was under his shirt.

Suddenly appellant turned around and walked back toward Loya. From his reclined position in the front passenger seat, Christian could see the handle of a gun tucked into appellant's waistband when he adjusted his shirt. Stopping in front of Loya's vehicle, appellant raised his right hand and said to Loya, "If you call the police or you call them again, look, I'm going to shoot your son."[3] As he said this, appellant made a gesture with his finger as if to shoot through the window of Loya's vehicle three times.

Appellant returned to his vehicle and drove away. Afterward, Loya and Christian went to the police station to report the incident. Appellant was arrested that evening.

For his part, appellant testified that he noticed Loya staring at him with her phone in her hand as he was walking to his apartment. He thought she might be taking pictures

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[3] Christian told police appellant said in Spanish, "I'll blast your son if you call the cops."

or recording him, and at first took it as a joke, smiling for the camera and flexing. Then he started to feel harassed and said, "Ma'am, why are you always messing with me . . . . Instead of paying attention to all the neighbors, you should pay more attention to your kids." Loya responded by saying she would put appellant in jail. Appellant denied threatening to shoot Christian or pretending to fire a gun into Loya's vehicle. He also denied owning a gun or ever touching one.

DISCUSSION

On the basis of his threat that he would shoot Christian if Loya called the police again, appellant was charged and convicted under section 136.1, subdivision (a)(2) of attempting to prevent or dissuade a witness or a victim "from attending [or] giving testimony at [any] trial, proceeding, [or] inquiry authorized by law." Appellant asserts his threat constituted an unambiguous attempt to prevent Loya from reporting a crime to authorities, not to prevent her from testifying. He contends his conduct should have been charged as a violation of section 136.1, subdivision (b) rather than subdivision (a)(2). He concludes that, because the evidence is insufficient to support a conviction under section 136.1, subdivision (a)(2) insofar as his conduct plainly falls outside of the prohibition of that section, his conviction on the charge of dissuading a witness must be reversed. We agree.

The offenses under section 136.1, subdivision (a)(2) and subdivision (b) are distinct crimes. Subdivision (a)(2) prohibits a person from "[k]nowingly and maliciously attempt[ing] to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law." On the other hand, "subdivision (b) target[s] pre-arrest efforts to prevent a crime from being reported to the authorities, rather than courtroom testimony." (*People v. Fernandez* (2003) 106 Cal.App.4th 943, 950 (*Fernandez*); *People v. Hallock* (1989) 208 Cal.App.3d 595, 606–607 (*Hallock*).)

The crime of intimidating a witness, as proscribed by section 136.1, subdivision (a), "requires proof that the defendant specifically intended to dissuade a witness from testifying." (*People v. Young* (2005) 34 Cal.4th 1149, 1210; *People v.*

Lyons (1991) 235 Cal.App.3d 1456, 1461.) "A specific intent is an intent to accomplish some additional consequence by commission of the proscribed act." (*Lyons*, at p. 1458.) Thus, "[u]nless the actions or statements are meant to achieve the consequence of affecting a potential witness' testimony, no crime has been committed." (*People v. Ford* (1983) 145 Cal.App.3d 985, 989; *People v. McDaniel* (1994) 22 Cal.App.4th 278, 284 ["Unless the defendant's acts or statements are intended to affect or influence a potential witness's or victim's testimony or acts, no crime has been committed under this section"].) As when a defendant challenges a conviction for criminal threats, we consider the totality of the circumstances under which a threat was made in determining whether the statement constituted an attempt to prevent a witness from testifying. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340–1341, 1343; see also *People v. Smith* (2009) 178 Cal.App.4th 475, 480.)

In *Hallock,* the defendant tried to rape a 77-year-old woman. As she ran away, the defendant threatened, "if you tell anybody anything that happened tonight here . . . I'll blow your house up." (*Hallock, supra*, 208 Cal.App.3d at p. 598.) The information charged defendant under section 136.1, subdivision (c)(1),[4] based on a violation of subdivision (b) (preventing a witness or victim from reporting a crime), but the trial court instructed the jury pursuant to subdivision (a) (preventing a witness or victim from testifying at an authorized proceeding). (*Hallock, supra,* at pp. 605–607.) The appellate court reversed the resulting conviction for intimidating a witness, concluding the threat "could only reasonably have been believed to have been directed at reporting the crime to the police, defendant's mother or others in authority that might lead to defendant's arrest." (*Id.* at p. 607.) The court added, "It is also unreasonable to conclude that defendant was concerned with testimony at a future trial for a crime for which he had not yet been arrested." (*Ibid.*)

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[4] Section 136.1, subdivision (c)(1) makes witness intimidation under either subdivision (a) or (b) of that section a felony where, among other things, the defendant's act "is accompanied by force or by an express or implied threat of force or violence."

The court's observations in *Hallock* suggest that had there been evidence showing that at the time the defendant made the threat he was concerned the victim might testify at a future trial, such evidence would have been sufficient to support the conviction under subdivision (a) of section 136.1. The absence of any such evidence required reversal. So it is in the present case. Although the threat to shoot Christian was made after appellant had been arrested, there is no evidence that any proceedings were pending at that time, much less that appellant had the specific intent to dissuade Loya from testifying at any future trial. Given the plain meaning of appellant's statement—if you call the police again, I will shoot your son—it is simply not reasonable to construe the threat as anything other than an attempt to prevent Loya from doing what she had done before—call the police and get appellant arrested.

Respondent asserts that "[c]ourts have broadly interpreted the pending legal proceedings in which the defendant intends to prevent the witness's participation," and urges us to do so here. Respondent thus argues that because appellant had been arrested when Loya called the police the week before, "the jury could have reasonably found his threats were intended to dissuade [Loya] from providing further testimony in the pending investigation against him."[5] But the strained interpretation to which respondent subjects section 136.1, subdivision (a)(2) renders subdivision (b) redundant and ignores the fact that the Legislature has carefully delineated the various offenses that constitute interference with the administration of justice by bribing, influencing, intimidating, or threatening witnesses. (Pen. Code, pt. 1, tit. 7, ch. 6, §§ 136–140.) The interpretation of

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[5] In this regard, respondent cites *People v. Thomas* (1978) 83 Cal.App.3d 511, 513, as "finding that the jury properly found the defendant guilty of threatening the witness not to testify in the future even though the witness had already testified one day prior to the threat; the temporal nature of the threat does not compel the conclusion that the witness would not be called as a witness or that she had been excused as a witness." Contrary to respondent's characterization of the case, *Thomas* did not involve a jury conviction, nor does it support respondent's claim that courts have interpreted the phrase "giving testimony at any trial, proceeding, or inquiry authorized by law" to include calling police or seeking the arrest of a person.

section 136.1 urged by respondent effectively merges the separate prohibitions under subdivisions (a)(2) and (b), making some of the statutory language " 'mere surplusage,' " a construction that "would be repugnant to all rules of statutory construction." (*People v. Womack* (1995) 40 Cal.App.4th 926, 930, 931 (*Womack*).)

The court's reasoning in *Fernandez, supra*, 106 Cal.App.4th 943, also compels us to reject respondent's contention. In *Fernandez*, a jury convicted the defendant of attempting to prevent a victim from reporting a crime to the authorities under section 136.1, subdivision (b)(1), based on his efforts to convince the victim to testify untruthfully at the preliminary hearing. The Court of Appeal reversed the conviction, holding that the defendant's attempt to prevent or influence the victim's testimony "simply is not substantial evidence of conduct proscribed by section 136.1, subdivision (b)(1)," although the conduct would have been punishable under a different statute had it been so charged. (*Fernandez, supra*, 106 Cal.App.4th at p. 950.)

The court focused on the term "report" as used in section 136.1, subdivision (b)(1): "Starting with the 'plain and commonsense meaning' of section 136.1, subdivision (b)(1), a 'report' may be generally defined as 'an account presented.' (American Heritage Dict. (3d college ed.) p. 1158.) In the context of reporting a crime, it generally means notifying the authorities that the crime has occurred and providing information about the offense. 'Testimony,' on the other hand, is more specifically defined as a 'declaration by a witness under oath, as that given before a court.' (*Id*., at p. 1401.)" (*Fernandez, supra*, 106 Cal.App.4th at p. 948.)

The court noted that a broad interpretation of the phrase " 'report . . . to any judge' " to encompass preliminary hearing testimony would be contrary to legislative intent in light of the statutory scheme of which section 136.1 is a part. (*Fernandez, supra*, 106 Cal.App.4th at p. 948.) In this regard, the court cited with approval the *Womack* court's refusal "to stretch the language of the statute at issue to cover the defendant's conduct when another statute within the same chapter of the Penal Code clearly applied." (*Fernandez*, at p. 949; *Womack, supra*, 40 Cal.App.4th at p. 931.) "A review of the entire statutory scheme convinces us that when the Legislature intends to

penalize an effort to influence or prevent *testimony*, or an effort to prevent the defendant from appearing in court, it does so explicitly. Section 136.1, subdivision (b)(1) makes no reference to testimony or courtroom appearances." (Fernandez, at p. 949.) In accordance with *Fernandez*, we conclude that just as "[s]ection 136.1, subdivision (b)(1) is not a catchall provision designed to punish efforts to improperly influence a witness," neither is it interchangeable with other provisions aimed at penalizing conduct ranging from "the falsification of evidence [to] efforts to bribe, influence, intimidate or threaten witnesses," including a violation of subdivision (a)(2). (*Id*. at p. 948.)

Respondent seeks to distinguish *Fernandez* by characterizing appellant's threat as falling within both subdivisions (a)(2) and (b)(1). But as discussed above, there was no ambiguity in appellant's statement, the clear objective of which was to prevent Loya from contacting the authorities to report appellant and have him arrested. In the absence of any evidence of a pending proceeding or any reference to testimony, the threat fell squarely under the prohibition of section 136.1, subdivision (b) only, not subdivision (a)(2).[6]

Although not addressed by the parties, we note that the trial court's instruction on the charge of dissuading a witness erroneously allowed the jury to convict appellant of a subdivision (a)(2) offense even though his conduct violated only subdivision (b). The court instructed the jury with CALJIC No. 7.14, including most of the bracketed language from the pattern instruction: "Defendant is accused in Count 2 of having violated section 136.1, subdivision (a)(2) . . . . [¶] Every person who knowingly and maliciously attempts to prevent or dissuade any witness or victim from: [¶] A. Attending or giving testimony at any trial, proceeding, or inquiry authorized by law, or [¶] B. Making any report of such victimization to any peace officer, state or local law enforcement officer, or any prosecution agency, or [¶] C. Arresting or causing or seeking the arrest of any

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6 Even the prosecutor took this view of appellant's statement, explaining to the jury in closing argument that "when the defendant acted, he intended to dissuade [Loya]. He intended to *prevent her from calling the police* with the serious threat of threatening to kill her son. And that's why the defendant is guilty of the dissuading a witness." (Italics added.)

person in connection with such victimization, is guilty of a violation of Penal Code section 136.1, subdivision (a)(2), a crime."

The court's instruction thus drew no distinction between a threat to dissuade a witness from testifying and a threat to prevent a witness from making a report to authorities. The Bench Notes to CALCRIM No. 2622 (the primary authority for CALJIC No. 7.14) refer to the bracketed material as alternatives to be given, depending on whether the crime is charged under subdivision (a) or subdivision (b); paragraph A applies to charges under subdivision (a), while paragraphs B and C apply to charges under subdivision (b). Because we have concluded the evidence does not support a conviction under subdivision (a)(2) in this case, the court's instructional error is moot.

DISPOSITION

The judgment is modified to strike the conviction for violation of Penal Code section 136.1, subdivision (a)(2), and the trial court is directed to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.