Filed 5/16/17 In re A.F. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re A.F., a Person Coming Under the Juvenile Court Law.	B270864 (Los Angeles County Super. Ct. No. PJ51488)
THE PEOPLE, Plaintiff and Respondent, v. A.F., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Morton Rochman, Judge. Affirmed.

Holly Jackson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Deputy Attorney General, for Plaintiff and Respondent.

A two count petition was filed on March 24, 2015, alleging A.F. (appellant) made criminal threats against Jan Hayes-Rennels (Hayes-Rennels) and Jose Malave (Malave).[1] (Pen. Code, § 422, subd. (a)).[2] The juvenile court sustained the count regarding Hayes-Rennels and dismissed the count regarding Malave. It then denied appellant's request to reduce the felony charges to misdemeanors. The juvenile court ordered appellant be suitably placed and set the maximum term of confinement at three years.

On appeal, appellant argues that his alleged criminal threats, which were made on Facebook, are protected by the First Amendment.

We find no error and affirm.

FACTS

In March 2015, appellant was registered as a student at Placerita Junior High School (Placerita), but he was not attending classes because he was on home study pending an expulsion hearing. The principal of Placerita, Hayes-Rennels, was involved in placing appellant on home study. Malave, an assistant principal for the Hart School District, was also involved.

Appellant was friends with Javier S. (Javier). They exchanged Facebook instant messages (IM's) about a movie titled The Purge: Anarchy (Universal Pictures 2014) (The Purge:

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[1] A subsequent petition filed on January 11, 2016, alleged that appellant made a criminal threat against Rachel C. (§ 422, subd. (a)). The subsequent petition is not at issue in this appeal.

[2] All statutory references are to the Penal Code unless otherwise indicated.

Anarchy), which is a sequel to a movie titled The Purge (Universal Pictures 2013) (The Purge).

The Wikipedia synopsis for the 2014 film states: "In the 2010s of an alternate reality of the United States of America, the New Founding Fathers of America . . . , which took over following an economic collapse, instituted totalitarian rule. . . . Using the 28th Amendment to The United States Constitution, they established one night a year—called 'the Purge'—in which all crime is legal and all police, fire, and medical emergency services are shut down for 12 hours, from 7 pm till 7 am. [¶] The purge has resulted in crime rates plummeting, unemployment rates under 1% and a strong economy. Although the population believes it is simply an act of catharsis, in reality, it is used as a method of artificial population control, as the people living in poverty and [in] poor areas are usually the main targets." At the beginning of the movie, on the eve of the purge, "people across the country are preparing either to commit acts of violence or to barricade themselves indoors against the mayhem." Once the purge begins, characters begin fighting and killing each other.

For about two weeks, appellant and Javier talked about the movie. Appellant said the movie was "great," and that the purge should be part of American tradition the way it is in the movie. His Facebook page contained photographs from the movie.

Appellant posted the following entry on Facebook: "the purge is in three days!!!! to all my boys ready to cense our soles and release the beast, sharpen your knifes, buff your masks, clean your bats and lode your guns. were gonna have some fun. This Years Targets: - Andy - Miranda - Brandon - Placerita staff members, - La Mesa staff members @[100003590480764:2048:Javier Sandoval] - certain people who

live in my townhome complex... - Ben – all of our ex's... ALL of them... - that guy who trolls everyone in COD - certain people in certain schools in the hart district . . . you know who u are - my dignity - Javier [S.] - my brother - that one person...bless our new founding fathers, a nation reborn. may god be with you all."

During lunch time at school, Javier heard about appellant's Facebook post from another student. Javier logged on to his Facebook account, went to appellant's profile, and saw the post.

After reading the post, Javier sent a Facebook IM to appellant that said, "So you are going to kill me?" Appellant responded, "Probably not unless I see any of the targets beside you." Appellant wrote, "What weapon are you bringing?" and Javier replied, "A knife, I guess." This prompted appellant to write, "I am bringing a machete and my dad's gun." Also, appellant wrote, "Sharpening my machete." He asked Javier if he had shown Hayes-Rennels any of their texts, and Javier told him no.

Although he thought appellant was joking, Javier brought the threat to the attention of Malave. Javier logged into his Facebook account on Malave's computer and showed him the threat. Once Hayes-Rennels was made aware of the threat, she informed the school's deputy, Los Angeles County Deputy Sheriff Javier Guzman, of the situation. Deputy Guzman, along with two other detectives, went to find appellant.

In Malave's office, Javier showed Hayes-Rennels what appellant had posted on Facebook. He also showed her the IM messages he had exchanged with appellant. Javier said he was scared.

Hayes-Rennels was concerned for her own safety because she believed "Placerita staff" included herself, and because the

administration, assistant principals, and herself "had been involved in previous behavioral discipline situations with [appellant]" and "this looked like retaliation targeting" her directly. Hayes-Rennels was also concerned for the safety of the entire school. She testified that a "post like this gave us an indication that something really huge could happen . . . like we see on the news unfortunately all the time."

Hayes-Rennels believed that appellant was "quite capable of hurting multiple people at one time based on conversations [she] had had directly with [appellant] in [her] office [following] a previous incident where he had talked about a lot of grave, dark, internal things that led [her] to believe he was quite emotionally or mentally capable of doing something even more dangerous." Additionally, based on things Hayes-Rennels had read in appellant's school planner, she knew appellant was obsessed with a character named Jeff the Killer. Based on appellant's cumulative school record, Hayes-Rennels was aware that appellant's behavior continued to escalate every time there was an incident, and that appellant had physically threatened other students in the past. At the time Hayes-Rennels read the threat, she was familiar with the movie The Purge.

Deputy Guzman and the other detectives found appellant at his grandparents' home. He said he was kidding when he posted the messages on Facebook, that he does not have access to guns, machetes or weapons, and that he had no intention of hurting anyone. Appellant's family reported that they did not have guns or weapons in any of their homes.

DISCUSSION

Section 422, subdivision (a) makes it unlawful for a person to willfully threaten to commit a crime which will result in death

or great bodily injury to another person if (1) there is specific intent that the statement be taken as a threat, even if there is no intent of actually carrying it out, (2) on its face and under the circumstances, the threat 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 (3) the threatened person reasonably fears for his or her own safety. "[W]here the accused did not personally communicate a threat to the victim, it must be shown that he specifically intended that the threat be conveyed to the victim. [Citations.]" (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861 (*Ryan D.*).) The First Amendment does not protect a criminal threat that satisfies the provisions of section 422. (*People v. Toledo* (2001) 26 Cal.4th 221, 233.)

Appellant contends that the true finding on count 1 should be reversed because he did not willfully threaten to commit a crime which will result in death or great bodily injury to another person; he did not make a threat with the specific intent that the statement be taken as a threat; and his Facebook post was vague horror-movie rhetoric without any prospect of execution. As we discuss below, appellant's contentions lack merit because the prosecutor established the elements of section 422, and the First Amendment is not implicated.

I. Standard of Proof; Standard of Review.

The elements of a crime in a juvenile delinquency case must be proved beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364–368; *In re Myresheia W.* (1998) 61 Cal.App.4th 734, 737.) When the sufficiency of the evidence in a criminal case is challenged, the reviewing court must view the evidence in the light most favorable to the prosecution and determine whether

any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) The foregoing aside, our Supreme Court instructs that an appellate court must independently review the record in a section 422 case "when a defendant raises a plausible First Amendment defense[.]" (*In re George T.* (2004) 33 Cal.4th 620, 632 (*George T.*).) According to the court, this "ensures that a speaker's free speech rights have not been infringed by a trier of fact's determination that the communication at issue constitutes a criminal threat. [Citation.]" (*Ibid.*)

II. Willful Threat Established.

Whether or not his Facebook post was willful,[3] appellant argues that it did not support a true finding on count 1 because it was ambiguous. In other words, he contends that it did not amount to a threat to commit a crime which will result in death or great bodily injury to another person.

The law cuts against appellant's position.

"A threat is sufficiently specific where it threatens death or great bodily injury. A threat is not insufficient simply because it does 'not communicate a time or precise manner of execution[.] [S]ection 422 does not require those details to be expressed.' [Citation.]" (*People v. Butler* (2000) 85 Cal.App.4th 745, 752.) Moreover, "it is the circumstances under which the threat is made that give meaning to the actual words used. Even an ambiguous statement may be a basis for a violation of section 422. [Citations.]" (*Id.* at pp. 753–754.) "'The parties' history can

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[3] In a penal statute, the term "willfully" refers to an act that was intentional. The accused's motive or ignorance of the act's unlawfulness is not relevant. (*People v. Atkins* (2001) 25 Cal.4th 76, 85.)

also be considered as one of the relevant circumstances. [Citation.]" (*Id*. at p. 754.)

In our view, the Facebook post was an unambiguous threat. When taken together, the call to appellant's "boys" to prepare knives, bats and guns, the reference to having "fun," and the listing of specific targets amounted to a threat to inflict on them the types of injuries that knives, bats and guns inflict. Context confirmed the threat. Appellant's Facebook page contained photographs from The Purge: Anarchy, and the plot of that movie pertains to people engaging in unfettered violence for 12 hours during a "purge." Appellant thought the movie was "great," and thought purges should be part of the American tradition. When appellant's threat referenced "the purge," that was a clear reference to The Purge: Anarchy and thereby established that the post was calling for appellant's "boys" to engage in a purge of their own. In other words, he was calling on his boys to engage in unfettered violence against the named targets. Based on the movie, that unfettered violence included murder. Furthermore, Hayes-Rennels was involved in disciplining appellant and placing him on home study, appellant's cumulative school record indicated that his behavior escalated every time there was an incident, appellant had spoken about grave, dark, internal things to Hayes-Rennels in the past, appellant was obsessed with a character named Jeff the Killer, and appellant had threatened students in the past. After Javier saw the post, he asked appellant what weapons he was going to bring. Appellant said he was going to bring a machete and his father's gun. These facts established that the threat had been made by a student who was unstable, fixated on violent behavior, and angry at Placerita staff.

Appellant notes that his post targeted "dignity" and "certain people in certain schools in the Hart district," and that these targets are either nonsensical or ambiguous. While that may be true, it does not make the targeting of the Placerita staff any less unambiguous. Appellant suggests that the post is confusing regarding the timing of the advocated purge because the post says "the purge is in three days" but also refers to "this years targets." We do not perceive any confusion. In The Purge: Anarchy, a purge happens only once a year. Appellant's post clearly expressed the idea that what the purge called for would happen in three days. Moving on, appellant points out that he listed Javier as a target, who is a friend. Appellant argues that listing Javier establishes that the post was clearly a joke. But while it is clear that the Placerita staff is a target, it is not clear that Javier is a target. It would seem, rather, that "Ben" and Javier belong to the group of "boys" appellant is calling to action. Notably, after the post, appellant asked Javier what weapon he was going to bring. Regardless, the threat to Placerita staff was unambiguous, which is sufficient.

It is suggested by appellant that we should view this case by the lights of *George T.* In that case, the accused asked a female student about a poetry class, then handed her three sheets of paper. The first sheet of paper contained a note stating, "'These poems describe me and my feelings. Tell me if they describe you and your feelings.'" (*George T.*, *supra*, 33 Cal.4th at p. 625.) The other sheets of paper contained poems, one of which was labeled "'Dark Poetry'" and entitled "'Faces.'" (*Ibid.*) It read: "Who are these faces around me? Where did they come from? They would probably become the next doctors or [lawyers] or something. All really intelligent and ahead in their game. I wish

I had a choice on what I want to be like they do. All so happy and vagrant. Each orig[i]nal in their own way. They make me want to puke. For I am Dark, Destructive, & Dangerous. I slap on my face of happiness but inside I am evil!! For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I'm BACK!! by: Julius AKA Angel[.]" (*Ibid*.) The accused gave the poem to a second female student. (*Id*. at pp. 626–629.)

The *George T.* court held that on its face the poem was not so unequivocal as to have conveyed to the two female students a gravity of purpose and an immediate prospect of execution of a threat. Moreover, the court noted that "incriminating circumstances in this case are noticeably lacking: there was no history of animosity or conflict between the students [citations], no threatening gestures or mannerisms accompanied the poem [citations], and no conduct suggested to [the two female students] that there was an immediate prospect of execution of a threat to kill [citation]." (*George T.*, *supra*, 33 Cal.4th at pp. 637–638.)

We find no analogy to *George T.* The poem in that case referred to things the accused "can" do rather than things he will, and it did not specify targets. Appellant's Facebook post is distinguishable on that basis.

III. Specific Intent Established.

Though appellant argues that the prosecutor failed to establish specific intent that the Facebook post be taken as a threat, there was ample evidence otherwise. The language and context of the post established a clear threat to Placerita staff, including Hayes-Rennels, from which the requisite specific intent can be strongly inferred. Appellant inquired as to whether Javier had shown the post to Hayes-Rennels, which indicates that

appellant was anticipating that she had seen or would see the post. It was logical for him to assume this because she had disciplined him in the past. In addition, appellant had a history of engaging in threatening behavior, which suggested his threat was part of a pattern. We conclude the prosecutor proved appellant's specific intent that Hayes-Rennels take the post as a threat.

IV. Immediate Prospect of Execution Established.

Appellant posits that his Facebook post and the circumstances did not convey an immediate prospect of execution of the threat. We disagree.

"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. [Citation.]" (*Ryan D.*, *supra*, 100 Cal.App.4th at p. 861.) Here, the communication was sufficiently unequivocal, unconditional and immediate. On its face, in three days, the post threatened Placerita staff with the type of violence that occurred in The Purge: Anarchy. Appellant's history lent gravity to the threat. And then, after he made the post, appellant represented that he was going to bring a machete and his father's gun.

All other issues are moot.[4]

DISPOSITION

The juvenile court's order sustaining count 1 against appellant is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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[4] Appellant anticipated that he might be barred from raising his First Amendment claim because defense counsel did not object below. As a result, he raised an ineffective assistance of counsel argument. We need not reach this issue. The People did not assert that the argument was forfeited. In any event, an ineffective assistance of counsel argument would have failed because the First Amendment was not a viable defense, so appellant could not have shown prejudice.

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.