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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ERIC HESTER, Defendant and Appellant.	B232836 (Los Angeles County Super. Ct. No. NA079174)

APPEAL from a judgment of the Superior Court of Los Angeles County. James B. Pierce, Judge. Affirmed in part and reversed in part with directions.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Nima Razfar, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Eric Hester appeals from the judgment entered following a jury trial in which he was convicted of forcible rape, forcible sodomy, and criminal threats. Defendant contends that the evidence was insufficient to support his criminal threats conviction. We agree and reverse as to that count.

BACKGROUND

In our prior unpublished opinion in this case (*People v. Hester* (Sept. 24, 2010, B215434)), we reversed defendant's convictions of forcible rape, forcible sodomy, and criminal threats due to prosecutorial misconduct. The present appeal stems from defendant's retrial on the same charges. Our streamlined recitation of the facts focuses on the only charge in controversy, the criminal threats conviction.

C.G. and her friend Amy D. moved into an apartment in Long Beach in July of 2006. (Unless otherwise noted, all date references pertain to 2006.) Sometime after midnight on August 6, C.G. awakened to the sound and sight of a man walking around inside the apartment. He wore something like a stocking over his face. He placed a double-edged knife against C.G.'s throat, then raped and sodomized her. Afterward, he said, "Don't say anything. I have your wallet and I.D." C.G. took this as a threat to kill her if she said anything, although the man did not say he would come back, kill her, or "do something" to her. The man left and C.G. crawled to Amy's bedroom, screamed, cried, and told Amy what happened. Amy wanted to call the police, but C.G. did not want her to do so, saying the man would kill her if she talked to anyone. C.G. said the man had stolen her purse and would find her and kill her if she said anything. Amy phoned 911. C.G. never found her purse, wallet, or identification. Her purse contained her driver's license (listing her prior address at her grandmother's house), her Disneyland employment identification, and some Disneyland tickets. Amy and C.G. never returned to the apartment, and C.G. never resumed working at Disneyland. The rapist's statement left C.G. afraid for a long time.

A DNA match in this case led to defendant's arrest in August of 2008.

Defendant testified that on August 6 he lived with his mother in an apartment located just across an alley from C.G.'s apartment. He met C.G. when she was moving in, and C.G. gave him the number for her "chirp" (walkie-talkie-type) telephone. Defendant "chirped" C.G. several times, including on August 5, when he asked if he could come over after work. C.G. said he could. He arrived at her apartment about 12:30 a.m. and C.G. let him in. They then had consensual sex and he left around 2:30 a.m.

The jury convicted defendant of forcible rape, forcible sodomy, and criminal threats and returned true findings on allegations that defendant personally used a knife in the commission of each of these crimes. (Pen. Code, §§ 667.61, subds. (a), (b), (e), 12022, subd. (b)(1); all further statutory references pertain to the Penal Code.) Defendant admitted allegations that he had suffered a prior robbery conviction that constituted both a prior serious felony (§ 667, subd. (a)(1)) and a "strike" under the "Three Strikes" law. He also admitted allegations that he had served a prior prison term within the scope of section 667.5, subdivision (b). The court sentenced defendant to a second strike term of 66 years to life in prison, consisting of two consecutive, doubled terms of 15 years to life for forcible rape and sodomy pursuant to section 667.61, subdivision (b), plus 6 years for the prior serious felony and prior prison term enhancements. The court stayed the sentence on the criminal threats count pursuant to section 654.

DISCUSSION

Defendant contends the evidence was insufficient to support his criminal threats conviction. To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

A criminal threat under section 422 requires a willful threat to commit a crime that will result in death or great bodily injury to another person. On its face and under the circumstances in which it is made, the threat must be "so unequivocal, unconditional,

immediate, and specific as to convey" to its subject a gravity of purpose and an immediate prospect of execution. The threat must reasonably cause its subject sustained fear for his or her safety or that of his or her immediate family, and must have been made with the specific intent that it be taken as a threat. No intent to actually carry out the threat is required. (§ 422.)

"[U]nequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim. The four qualities are simply the factors to be considered in determining whether a threat, considered together with its surrounding circumstances, conveys those impressions to the victim." (*People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157–1158.) "Immediate prospect of execution" refers not to the likelihood that the threat will be carried out immediately, but to the seriousness and imminence of the future prospect of the threat being carried out should conditions not be met. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1538.) "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, section 422 does not require those details to be expressed.'" (*People v. Butler* (2000) 85 Cal.App.4th 745, 752.) A statement that is facially ambiguous may be found to be a criminal threat if the surrounding circumstances clarify its meaning. (*In re George T.* (2004) 33 Cal.4th 620, 635 (*George T.*).)

Although it appears defendant intended his statement as a threat, section 422 does not encompass every threatening statement. It instead applies only to "a specific and narrow class of communication" (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 863), that is, threats to commit a crime that will result in death or great bodily injury, and that satisfy all of the remaining elements of section 422. On its face and under the circumstances in which it was made, defendant's statement did not threaten to commit a crime that would result in death or great bodily injury and was not "so unequivocal, unconditional, immediate, and specific as to convey" to C.G. a gravity of purpose and an

immediate prospect of execution. C.G. did not testify that defendant said he would kill or harm her if she said anything about the crimes, or that he made any gestures in conjunction with his statement from which such threat could be inferred, for example, showing C.G. the knife or gesturing with it. C.G.'s interpretation of the statement to mean defendant would find her and kill her if she said anything "does not alter the requirement that the words actually used must constitute a threat in light of the surrounding circumstances." (*George T.*, *supra*, 33 Cal.4th at p. 636.)

Defendant's reference to having C.G.'s wallet and identification added nothing, under the circumstances. Defendant committed the crimes in C.G.'s residence and thus knew where she lived without looking at her identification. Defendant's "threat" amounted to nothing more than a command not to say anything, with a vague, implicit "or else" that had something to do with her wallet and identification. This was neither a threat to commit a crime that would result in death or great bodily injury nor "so unequivocal, unconditional, immediate, and specific as to convey" a gravity of purpose and an immediate prospect of execution.

Section 422 does not encompass every "don't say anything or else" threat made to a crime victim, but only those threats that meet all of the requirements of section 422. Defendant's statement arguably violated section 136.1, subdivision (b)(1) [attempt to prevent or dissuade crime victim from reporting offense to law enforcement], but it fell short under section 422. Accordingly, the conviction must be reversed for insufficient evidence. Retrial is impermissible, but resentencing is unnecessary, as the trial court stayed the sentence on this conviction pursuant to section 654.

DISPOSITION

Defendant's conviction for making a criminal threat in violation of Penal Code section 422 is reversed. The judgment is otherwise affirmed. The trial court is directed to issue an amended abstract of judgment.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.