Supreme Court Copy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	**No. S179422**
vs.	
EDDIE JASON LOWERY, Defendant and Appellant.	

APPELLANT'S REPLY BRIEF ON THE MERITS

After Decision by the Court of Appeal,
Fourth Appellate District, Division Two, No. E047614
Riverside County Superior Court No. INF062558

THE HONORABLE JOHN G. EVANS, JUDGE

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THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. **EDDIE JASON LOWERY,** Defendant and Appellant.	)	**Supreme Court No. S179422**

ISSUE PRESENTED

1. Whether the threat proscriptions of Penal Code section 140, subdivision (a)[1] are constitutionally overbroad in violation of the First Amendment to the United States Constitution by failing to require specific intent, apparent ability to carry out threats, or their statutory equivalents.

[1]/ Subsequent undesignated statutory references are to the Penal Code.

NO WAIVER OR ABANDONMENT OF ASSIGNMENTS OF ERROR RAISED IN APPELLANT'S OPENING BRIEF ON THE MERITS, GENERALLY

This reply brief on the merits is intended to supplement appellant's opening brief on the merits and to reply to contentions or assertions raised in the respondent's answer brief on the merits where reply is deemed to be helpful or necessary to the Court's consideration of the issue or issues raised. Appellant does not intend to waive or abandon any issue or assignment of error raised in the opening brief on the merits.

I

BY FAILING TO REQUIRE SPECIFIC INTENT, APPARENT ABILITY TO CARRY OUT THREATS BY ANY MEANS, OR THEIR EQUIVALENT STATUTORY SAFEGUARDS, THE THREAT PROSCRIPTIONS OF PENAL CODE SECTION 140, SUBDIVISION (a) ARE CONSTITUTIONALLY OVERBROAD, AND AS APPLIED, IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

In the opening brief on the merits, appellant demonstrated that because the crime defined by section 140, subdivision (a) lacks the constitutionally necessary mens rea element of intent, it violates the First Amendment. Based on recent United States Supreme Court decisions and other federal appellate interpretive decisional law, some showing of intent -- more than mere willfulness -- is required of section 140, subdivision (a) in order for pure speech punished by the statute to fall within the First Amendment exception to threats.

Respondent asserts that the "narrow scope of Penal Code section 140, subdivision (a) takes the proscribed language out of the realm of the protected marketplace of ideas and that the statute, accordingly, is not unconstitutionally overbroad on its face of as applied in this case." (RABM ["respondent's answer brief on the merits"] 2.)

Respondent argues that "true threats" which encompass "serious expressions of intention to inflict bodily harm" fall outside of the scope of the First Amendment. (RABM 2.) Lifting this language from *Virginia v. Black* (2003) 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535, respondent fails to state that the

United States Supreme Court actually included or required an element of intent in its definition of true threats and proscribable intimidation. In *Black*, the plurality of the United States Supreme Court stated as follows:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. [Citations.] The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protects individuals from the fear of violence,' and 'from the disruption that fear engenders,' in additional to protecting people 'from the possibility that the threatened violence will occur.' [Citation.] *Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.*

(*Id.* at pp. 358-360, italics added.)

As discussed in appellant's opening brief on the merits, with the possible exception of Justice Thomas' dissenting opinion, all of the high court's opinions in *Black*, including Justice O'Connor's four-Justice plurality opinion, took the same view of the necessity of an intent element in order for a threat to be criminally punishable. Justice Scalia agreed that the Virginia statute was unconstitutional insofar as it failed to require the state to prove the defendant's intent. (*Virginia v. Black, supra,* 538 U.S. at p. 368 [Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part].)

Respondent's argument in support of section 140, subdivision (a) is

logically and legally unsound. Respondent's legal analysis fails because it ignores the teachings of the United States Supreme Court in *Black* and other federal appellate decisions requiring an element of intent in true threat situations. In *Black*, the statute at issue explicitly required proof of intent to intimidate. The high court found that the statute was constitutional, so long as the government was not allowed to use an act of cross-burning itself as prima facie evidence that the actor intended to intimidate or threaten. Instead the government was required to prove that the actor so intended. (*Virginia v. Black, supra*, 538 U.S. at pp. 359-363; see also *United States v. Sutcliffe* (9th Cir. 2007 505 F.3d 944, 953 [making interstate threats to injure requires specific intent to threaten, and only true threats may be prohibited; jury instructed that specific intent to threaten is essential element of crime]; *United States v. Bly* (4th Cir. 2007) 510 F.3d 453, 458 ["True threats have been characterized by the Supreme Court as statements by a speaker who '*means* to communicate *a serious expression of an intent* to commit an unlawful act of violence to a particular individual or group.'"].)

Respondent's logic is also circular: only true threats may be proscribed, and section 140, subdivision (a) proscribes only true threats. According to respondent the statute is not unconstitutionally overbroad because "threats [within the ambit of the statute], by their very nature, are true threats … ." (BABM 7.) Further, according to respondent, "[t[his is true even in the case of a hypothetical defendant who lacks the specific intent and apparent ability to carry out a threat." (RABM 7.)

In convoluted discussion and analysis, respondent goes off track by

discussing the issue of "objective" versus "subjective" intent in such cases as *United States v. Cassel* (9th Cir. 2005) 408 F.3d 622; *United States v. Romo* (9th Cir. 2005) 413 F.3d 1044; *United States v. Stewart* (9th Cir. 2005) 420 F.3d 1007; *Fogel v. Collins* (9th Cir. 2008) 531 F.3d 824; and *United States v. Parr* (7th Cir. 2008) 545 F.3d 491. Respondent ignores that whether an objective or subjective true threat definition applies, a statute which proscribes threats only satisfies the First Amendment if it contains an intent element. (See *United States v. Stewart, supra,* 420 F.3d at p. 1017.)

Respondent cites *New York ex rel Spitzer v. Cain* (S.D.N.Y. 2006) 418 F.Supp.2d 457, asserting that the district court in that case rejected the defendant's argument that the decision in *Black* imposed an intent element on the First Amendment analysis of true threats. Respondent's reliance on *Spitzer* is misplaced in that the court actually articulated an intent requirement. As noted by the court in *Spitzer*, "The relevant intent is the intent to communicate a threat, not ... the intent to threaten." (*Id.* at p. 479.) Elsewhere the court noted as follows:

> Counsel's argument in summation was unclear as to exactly what kind of intent he imagined *Black* to require, an intent to threaten, or an intent to carry out the threatened action. And the latter is squarely foreclosed by *Black* itself, see 538 U.S. at 359-60, 123 S.Ct. 1536 ("The speaker need not actually intend to carry out the threat."), this Opinion will proceed on the assumption that counsel tends to argue the former."

(*Id.* at p. 478, fn. 15.)

It is noteworthy that even in *Spitzer*, the court did not eliminate an intent

requirement, holding that the test for whether a statement is a true threat is objective, with a focus on how the statement would be interpreted by a reasonable recipient. (*Id.* at p. 479.) Here, of course, section 140, subdivision (a) on its face imposes only a willfulness requirement, eliminating both subjective and objective intent as a requisite element of a true threat. (See also *Fogel v. Collins, supra,* 531 F.3d at p. 831 [noting that use of the objective standard in determining whether there has been a true threat asks whether it is reasonably foreseeable to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm, whereas under the subjective test, there must be proof that the speaker subjectively intended the speech as a threat].)

None of the other cases cited by respondent eliminates an intent requirement for true threats. For example, in *Porter v. Ascension Parish School Bd.* (5th Cir. 2004) 393 F.3d 608, the Court of Appeals discussed that speech is a "true threat" and therefore unprotected if an objectively reasonable person would interpret the speech as a "serious express of an intent to cause a present or future harm." That intent standard is a far cry from the "willfulness" language of section 140, subdivision (a).

In discussing objective versus subjective intent, respondent also fails to mention or discuss *Doe v. Pulaski County Special School District* (8th Cir. 2002) 306 F.3d 616 on which the *Porter* court relied in its decision. Although pre-*Black*, the Court of Appeals for the Eighth Circuit in *Doe* discussed that the federal courts of appeals that have announced a test "to parse true threats" from protected speech

essentially fall into two camps." (*Id.* at p. 622.) The court in *Doe* discussed that "[a]ll the courts to have reached the same issue have consistently adopted an objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm [Citation omitted.] The views among the courts diverge, however, in determining from whose viewpoint the statement should be interpreted. Some ask whether a reasonable person standing in the shoes of the speaker would foresee that the recipient would perceive the statement as a threat, whereas others ask how a reasonable person standing in the recipient's shoes would view the alleged threat." (*Ibid.*) In the present case, section 140, subdivision (a) on its face does not require or ask either of these questions deemed essential to distinguish true threats from protected speech.

Respondent's reliance on *Washington v. Johnston* (2006) 156 Wash.2d 355, 127 P.3d 707 is also misplaced. *Johnston* actually supports appellant's contention that section 140, subdivision (a) is unconstitutionally overbroad on its face by failing to proscribe only true threats or require a showing of intent to threaten, whether subjective or objective.

Petitioner Johnston was convicted of violating a Washington threat statute (RCW 9.61.160(a)) by threatening to bomb the Sea-Tac international airport while on an airplane flight into that airport. At the beginning of its analysis in *Johnston*, the Washington Supreme Court noted that the parties agreed that the statute had to be construed to limit its application to true threats in order to avoid facial

invalidation on overbreadth grounds under the First Amendment to the United States Constitution and the comparable Washington constitutional provision. The Washington Supreme Court discussed that since the statute regulated pure speech, it had to be interpreted with the commands of the First Amendment clearly in mind. The court then discussed that it had previously adopted an objective standard for determining what constitutes a true threat. A "true threat" is a statement "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious express of an intention to inflict bodily harm upon or to take the life of [another individual]." The *Johnston* court confirmed that whether a true threat has been made is determined under an objective standard that focuses on the speaker, noting that a threat is a serious threat, not one said in jest or idle talk, among other motivations.

Citing *Black v. Virginia*, the Washington Supreme Court in *Johnston* further noted that "[t]rue threats encompass those statements where the speaker *means* to communicate a serious express of *an intent* to commit an act of unlawful violence to a particular individual or group of individuals." (*Id.* at p. 710.) In language apposite the to the present case, the Washington Supreme Court also stated as follows:

> As the parties here agree, unless the bomb threat statute is given a limiting instruction so that it proscribes only true threats, it is overbroad. A law criminalizing speech is unconstitutionally overbroad under the First Amendment "if it

> sweeps within its prohibitions constitutionally protected free speech activities." ... Here, the statute reaches a substantial amount of protected speech. For example, threats made in jest, . . . would be proscribed unless the statute is limited to true threats. Accordingly, the statute must be limited to apply to only true threats. [¶] We construe RCW 9.61.160 to avoid an overbreadth problem by limiting it to true threats.

(*Id.* at pp. 711-712.)

The Washington Supreme Court concluded by reversing Johnston's conviction, finding that the jury, as in the present case, was not instructed with the proper intent standard and because, again as here, the jury instructions did not define true threat. Moreover, the jury was instructed in *Johnston* that it could infer "it could convict merely on the basis that Johnston said the words" -- in other words, a constitutionally impermissible "willfulness" standard, as in section 140, subdivision (a). Here, there was more than a mere inference as in *Johnston* permitting the jury to convict appellant merely on the basis that he said the words. The jury not was instructed on the proper intent standard but instead was explicitly informed in the language of CALCRIM No. 2624 that that it could convict appellant simply on the basis that he uttered words willingly or on purpose.

Respondent also cites *Citizens Publishing Co. v. Miller* (2005) 210 Ariz 513, 520, 115 P.3d 107 in which the Supreme Court of Arizona considered the issue whether liability for intentional infliction of emotional distress could be imposed against a newspaper for printing a letter to the editor about the war in Iraq. In marking this determination, the court considered whether a letter to the

editor constituted a true threat. Summarizing and quoting the United States Supreme Court's decision in *Black*, the Arizona Supreme Court noted that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent* of placing the victim in fear of bodily harm or death." (*Citizens Publishing Co. v. Miller, supr*a, 115 P.3d at p. 114 (italics added).)

The Arizona Supreme Court continued its discussion in *Citizens Publishing Co.* as follows:

> Our court of appeals has adopted a substantially similar test for determining a "true threat" under the First Amendment. *In re Kyle M.* involved the interpretation of A.R.S. § 13-1202(A)(1), which proscribes "threatening" or "intimidating." 200 Ariz. 447, 448 ¶ 1, 27 P.3d 804, 805 (App.2001). The court of appeals recognized that the dictionary definition of "threaten" could encompass some constitutionally protected speech. *Id.* at 450-51 ¶¶ 18-19, 27 P.3d at 807-08. *Therefore, to avoid constitutional conflict, the court interpreted "threat" in the statute as concurrent with the true threat doctrine. Id. at 451 ¶ 22, 27 P.3d at 808. Relying on "[c]ases decided since Watts," the court determined that "true threats" are those statements made "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of [a person]." Id.* at 451 ¶ 21, 27 P.3d at 808 (quoting *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990).

(*Id.* at p.114.)

Here, in the present case, the trial court did not interpret threat in

the statute as concurrent with the true threat doctrine which requires some showing of intent -- a serious expression of an intention to inflict bodily harm or to take a life. The only requirement of section 140, subdivision (a) is a showing of "willfulness" which has not been interpreted as concurrent with the true threat doctrine. Nor was the jury given an instruction defining true threat as was the case, for example, in *State v. Tellez* (Wash. App. 2007) 170 P.3d 75, 76, where the trial court instructed jury as follows: "A true threat is a statement made in a context or under such circumstances where a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to carry out the threat." The basis for such in instruction was explained by Justice O'Connor in the plurality opinion in *Black:* "True threats encompass those statements where the speaker *means* to communicate *a serious expression of an intent* to commit an act of unlawful violence to a particular individual or group of individuals." (*Black v. Virginia, supra*, 538 U.S. at p. 359 [plurality opinion of Justice O'Connor].)

Respondent also cites and relies on *State v. Deloreto* (2003) 265 Conn. 145, 156, 827 A.2d 671 in which the defendant was convicted of a state breach of the peace statute. Respondent does not inform the Court that the statute involved actually provides for criminal liability only if the defendant "*with intent* to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof ... (3) threatens to commit any crime against the person ... ." The Supreme Court of Connecticut concluded in *Deloreto* that to avoid invalidation of the statute on

grounds of overbreadth, "we adopt, by way of judicial gloss, the conclusion that the defendant could be convicted only for extremely offensive behavior supporting an inference that the actor *wished"* -- that is, intended -- "to provoke violence." (*Id.* at p. 169.)

Fundamentally, respondent conflates a willful threat with a true threat, overlooking thereby that the former, as in section 140, subdivision (a), is a general intent crime, whereas the latter requires some showing of intent to threaten as required by *Black v. Virginia, supra*. Even respondent concedes, in the language of *Black*, that "the speaker must have the intent to retaliate." (RABM 30.) By thus acknowledging some intent requirement of a constitutional, true-threat statute, respondent's argument in support of section 140, subdivision (a) makes no sense. Section 140, subdivision (a) on its face and by its clear and unambiguous language does not impose any intent requirement whatsoever, even the intent to retaliate.

Respondent tries to avoid the contradictions of its own logic by asserting elsewhere that "the relevant intent is the general intent to communicate a 'serious expression of an intent to commit an act of unlawful violence,' i.e., to communicate a 'true threat.'" (RABM 28.) Section 140, subdivision (a), of course, does not articulate or require any such standard or showing. The jury was not instructed with this intent standard, and the court's instructions did not define true threat. The jury was simply told that it could convict appellant on the basis that appellant said the words, which is not the same as an intent to communicate a serious expression of an intent to commit an act of unlawful violence.

Respondent points to appellant's statements (RABM 22), arguing that they add nothing to the protected marketplace of ideas. Again, using circular logic, respondent argues that "such threats" are not constitutionally protected. (RABM 22.) Here, too, respondent overlooks or ignores that the speaker must intend to communicate a serious expression of an intent to commit an act of unlawful violence. After *Black*, language does not amount to a proscribable or true threat unless it is uttered with the requisite intent.

Finally, respondent asserts that appellant claims "without elaboration" that section 140, subdivision (a) is constitutionally invalid as applied to him. (RABM 31.)

Appellant offers that whatever remedy the Court may adopt to cure the facial infirmities of section 140, subdivision (a), as applied to appellant in this case, the statute's constitutional deficiencies cannot and should not be deemed harmless beyond a reasonable doubt.

Where the trial court fails to instruct, or misinstructs, the jury on an element of an offense, the beyond-a-reasonable-doubt harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824 applies. (*People v. Cox* (2000) 23 Cal.4th 665, 676-677; *People v. Flood* (1998) 18 Cal.4th 470, 479-480.) In this case, there were no other instructions that obligated the People to prove the required intent to threaten. Indeed, the jury was instructed in the language of CALCRIM No. 250 that the crime in this case was a general intent crime. The jury was also instructed that it was only necessary for the People to

prove that appellant "willfully threatened" to use force of violence against the victim, meaning that he acted "willingly and on purpose." No other intent had to be shown. No other instructions that correctly defined or specified the omitted elements of the crime were given to the jury. It is presumed by law that the jury faithfully followed the court's instructions. (*People v. Hardy* (1992) 2 Cal.4th 86, 208; see also *Francis v. Franklin* (1985) 471 U.S. 307, 324-325, fn. 9, 85 L.Ed.2d 344, 105 S.Ct. 1965 [high court presumed jury followed language of instructions given].)

Had the jury been properly instructed on the requisite intent of a facially-valid true threat statute, appellant might have been completely exonerated. No evidence was introduced during the trial as to appellant's intent or his ability to carry out the charged threats. (See *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218 [meaning of defendant's threat must be gleaned from the words and all of the surrounding circumstances]; *People v. Gudger* (1994) 29 Cal.App.4th 310, 321 [necessary to review language and context of threat to determine if speaker had specific intent his statement was to be taken as a threat]; *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1159 [statute does not concentrate on precise words of threat but whether threat communicated a gravity of purpose].)

Moreover, there was no evidence that appellant ever committed a prior serious or violent felony. He did not have any history of violence. (See *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431 [defendant's lengthy history of threatening and assaultive conduct considered in determining whether he would follow through

on threats made from jail].) Appellant's conversation with his wife hardly manifested the gravity or seriousness of purpose required of true threats. Appellant's single prior conviction involved a 1994 guilty plea to cashing a stolen check with a forged signature in Riverside County Case No. ICR18689. (See 1 RT 177-178.) In addition, there was no evidence that appellant made any effort to contact or attempted to call or contact Joseph Gorman before or after he spoke with his wife. In sum, there was absolutely no evidence in the record of any intent to commit or any act of violence or retaliation against Joseph Gorman.

In addition, the argument of counsel may also be considered in determining whether the instructional error was prejudicial. (See *People v. Webster* (1991) 54 Cal.3d 411, 451-452 [whether prosecutor's argument exploited possible ambiguities in instructions]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1254-1255 [neither counsel discussed issue that was inadequately addressed in instruction].) Here, during closing argument, the prosecutor repeatedly told the jury that intent and apparent ability were not elements of the crime and did not have to be proved. According to the prosecutor, those elements were of no import or concern in the jury's deliberations: "*It doesn't matter whether [appellant] had the ability to carry it out or what he intended it to be taken as.* ... And the only mental state that I have to prove is that he [appellant] willfully, meaning he intentionally, made the statement." (1 RT 214.)

These arguments by the prosecutor served only to reinforce the trial court's instructions, and, unlike *People v. Richardson* (2007) 151 Cal.App.4th 790, 803,

the prosecutor's argument did not clear up the error. Consequently, in light of the evidence at trial, the court's instructions, and the prosecutor's argument to the jury, the unconstitutional application of section 140, subdivision (a) to appellant in this case could not have been harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 368 U.S. at p. 24.)

CONCLUSION

By reason of the foregoing, and of the arguments advanced in the opening brief on the merits, appellant Eddie J. Lowery respectfully requests that the judgment of the Court of Appeal, Fourth Appellate District, Division Two, affirming appellant's conviction on count 1 in violation of section 140, subdivision (a), be reversed.

DATED: August 12, 2010.

Respectfully submitted,

WILLIAM D. FARBER
Attorney at Law

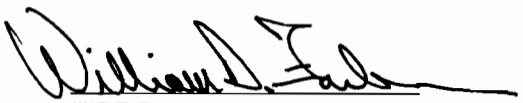
Attorney for Appellant Lowery

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Opening Brief on the Merits uses a 13-point Times New Roman font and contains 4,327 words.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: August 12, 2010.



WILLIAM D. FARBER

PROOF OF SERVICE

People v. Lowery
Court of Appeal No. E047614

I, William D. Farber, declare under penalty of perjury that I am counsel of record for defendant and appellant Eddie J. Lowery in this case, and further that my business address is William D. Farber, Attorney at Law, P.O. Box 2026, San Rafael, CA 94912-2026. On August 12, 2010, I served the within **APPELLANT'S REPLY BRIEF ON THE MERITS** by depositing copies each in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service, at Petaluma, California, addressed respectively as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on August 12, 2010, at Petaluma, California.

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