IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Supreme Court) No. S207542
Plaintiff and Respondent,	) Court of Appeal) No. E054154
v.	) Superior Court
BEN CHANDLER, JR.,	) No. SWF027980
Defendant and Appellant.	)

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY

Honorable Mark Johnson, Judge

APPELLANT'S OPENING BRIEF

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By appointment of the California
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ISSUE PRESENTED.

(California Rules of Court, rule 8.516 (a)(1).

Consistent with First Amendment protections, can appellant be convicted of an attempted criminal threat based only on his subjective intent, regardless of whether the uttered statement is viewed objectively as a threat? If the statement must, at a minimum, be viewed objectively as a threat, does instruction with the general concepts of attempt (CALCRIM No. 460) and the completed criminal threat (CALCRIM No. 1300) convey this required element?

INTRODUCTION.

When the state criminalizes threatening speech, it must do so within the constraints of the First Amendment. (*Watts v. United States* (1969) 394 U.S. 705, 707 [89 S.Ct. 1399, 22 L.Ed.2d 664] [statement that speaker would kill the president not a true criminal threat but political hyperbole privileged under the first amendment].) Crafted carefully to follow the guidelines set forth in *United States v. Kelner* (2nd. Cir. 1976) 534 F.2d 1020, the current criminal threat statute, codified in Penal Code[1] section 422, respects this parameter. (*People v. Bolin* (1998) 18 Cal.4th 297, 338-339 [current version of section 422 is constitutional]; *People v. Mirmirani* (1981) 30 Cal.3d 375, 383 [former section 422 unconstitutionally vague]; see generally *In re M.S.* (1995) 10 Cal.4th 698.) Based on the interplay of sections 21a, 422, and 664, this court found there is a crime of attempted criminal threat. (*People v. Toledo* (2001) 26 Cal.4th 221.)

One essential component of the completed criminal threat crime is the reasonableness of the fear; it must be reasonable under the circumstances. (*People v. Toledo, supra,* 26 Cal.4th 221, 228.) This element necessarily distinguishes a true threat from hyperbolic speech. Given this significant purpose, the element must exist not only in the completed criminal threat but also in the attempt criminal threat crime. Otherwise words that do not amount to a crime could be made criminal by

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[1] All further references are to the Penal Code, unless noted.

the mere application of attempt law. Such an anomalous result is inconsistent with the protections of the First Amendment.

To instruct properly on the attempt criminal threat crime, the court must inform the jury of this essential element: that the statement at issue would cause reasonable fear under the circumstances. Trying to comply with this duty in the instant case, the trial court gave the standard attempt instruction and the standard completed criminal threat instruction. Although usually the giving of the completed crime instruction and the general attempt instruction is sufficient to convey the necessary requirements of an attempt crime, such is not the case when speech is criminalized – for example, in the attempt criminal threats context. This is so because the two instructions fail to convey the necessary requirement of objective reasonableness when defining the attempt criminal threat crime – it is only described in the context of the completed crime, and thus is only defined in the context of a defendant's subjective intent.

While the need for an additional instruction beyond the general attempt instruction and the completed crime instruction is unusual, it is not without precedent. Attempt murder requires the giving of the CALCRIM No. 600 instruction, instead of the general attempt instruction and the completed crime instruction. This is because the attempt murder cannot be based on implied malice without the finding of an intent to kill, a mental state on which the completed murder crime can be based and which is

defined in the basic murder instruction (CALCRIM No. 520). (See *People v. Collie* (1981) 30 Cal.3d 43.)

STATEMENT OF THE CASE.

An amended information filed on June 3, 2011 charged appellant Ben Chandler, Jr. in count one with stalking (§ 646.9, subd. (a)); and in counts two and three with criminal threats. (§ 422.) It was further alleged that appellant had suffered two prior serious felony convictions, or strike priors, pursuant to sections 1170.12, subdivisions (a)-(d) and 667, subdivisions (b)-(i), and two serious felony priors, pursuant to section 667, subdivision (a). (1CT pp. 224-226.)

Trial began on May 31, 2011. (1CT p. 212.) On June 10, 2011, a jury found appellant not guilty on counts one through three, and guilty on the lesser included offenses of attempted criminal threats on counts two and three. The jury could not reach a decision on the lesser included offense to count one, and the court declared a mistrial. The jury then found the prior convictions true. (1CT pp. 277-278.)

On July 1, 2011, defendant filed a motion inviting the court to strike one or more of his prior strike convictions. (2CT p. 300.) On that same day, the court struck a strike prior as to count two, and then sentenced appellant to the mid-term of eighteen months, doubled to three years by the strike prior, plus five years for one of the serious felony priors, as the court determined that only one serious felony prior could be imposed; the second

serious felony prior was stricken. The court then sentenced appellant to a consecutive twenty five years to life on count three, denying the motion to strike a strike prior. The total indeterminate term was twenty five years to life, with a determinate term of eight years. Count one was dismissed by the court. Appellant was given credit for 765 days of pre-sentence custody, consisting of 511 actual days, and 254 conduct days pursuant to section 4019. (2CT pp. 305-306.)

Appellant filed a timely notice of appeal from the judgment on July 27, 2011. (2CT p. 333.)

On November 19, 2012, the Court of Appeal issued a partially published opinion affirming the judgment. On February 13, 2013, this court granted review.

STATEMENT OF FACTS.

Appellant lived on Pottery Lane, just off of Scrivner Lane in Lake Elsinore. (1RT p. 129.) Jaime Lopez lived just around the corner on Scrivner Lane with her two children, having lived there since 2003. (1RT pp. 114-115, 129.)

A. Evidence in Support of Count One and Count Two.

Sometime in January 2009, Lopez stated that appellant drove by her and called her a bitch. The remark scared her. (1RT p. 117.) Appellant stated, "I know when you are alone." The next day appellant drove by and said, "fuck you bitch" to Lopez. (1RT pp. 121-123.) Lopez stated that

appellant would walk up and down the middle of the street using profanity and laughing at her. (1RT pp. 125, 127.) Lopez said that "weird" things began happening at her house, like the sound of a tennis ball being bounced off her windows, and a pipe thrown at the front door. (1RT p. 127.) One day a large quantity of nails was spread in the street and her driveway, with the word "fuck" spray painted on the street. (1RT p. 128.)

On January 29, 2009, Lopez observed appellant walking up the street carrying an object and stating, "fuck you bitch, I'm going to kill you." (1RT p. 141, 3RT p. 365.) Lopez spent the night at her neighbor Deborah Alva's house. That night she and Alva heard appellant singing a popular song from his front porch, that included the lyrics "it always feels like someone's watching you." (1RT p. 143, 2RT pp. 299, 311.)

On January 30, 2009, Lopez was taking her two children and a neighbor, Daniel Alva, to Knotts Berry Farm. While Lopez was stopped at a stop sign appellant approached her and said, "I'm going to kill you bitch." Lopez was frightened and drove away. (1RT p. 131, 2RT p. 250-254, 3RT p. 359.) These incidents formed the basis for the charges in count one and count two.

For two months thereafter Lopez would check the house before letting her kids in. (1RT p. 133.) Lopez heard that appellant had previously assaulted someone, and went to the courthouse to look at the records on the case. (1RT p. 140.) Lopez was told that appellant believed he had a child

with her. (1RT p. 151.) Lopez was very afraid of appellant and eventually moved away from the neighborhood. (1RT pp. 147-148.)

B. Evidence in Support of Count Three.

Deborah Alva stated that she was friends with appellant, and that her family had spent Thanksgiving, Christmas, and New Years with appellant. (2RT p. 280.) She later had a business dispute with appellant, and claimed that appellant owed her money. (2RT p. 282.) On January 29, 2009, she heard a disturbance, walked outside, and saw appellant walking up the street swinging a golf club, saying "I'm going to kill you, you fucking bitch." (2RT p. 293.) Alva said the remark was directed at her, and Alva responded "bring it on," stating that she wasn't afraid, but was "afraid inside." (2RT p. 295.) Alva stated that she was afraid appellant would do some damage to her car, but appellant turned around and went back to his property. (2RT pp. 295-296.) Later Alva stated she was afraid for her safety *if* appellant had come up to her porch. (2RT p. 312.) Alva believed that appellant was ranting and raving because he was under the influence of drugs. (2RT p. 297.) This incident formed the basis of the charges in count three.

C. Defense Evidence.

Appellant denied placing any nails in the street or writing graffiti on the street. (3RT pp. 401, 408.) He stated that he has walked on Scrivner, as he takes long walks in the neighborhood every morning. (3RT pp. 402,

404.) On January 29, 2009, appellant was chipping golf balls in his back yard when he noticed a laser light on his chest. (3RT pp. 408-409.) Appellant was alarmed as he had been shot at the week before. (3RT p. 410.) Appellant noticed that the light was coming from a group of people gathered at the top of Scrivner Lane. (3RT p. 418.) He yelled, "stop pointing that fucking thing at me" and heard Alva laughing, before the group dispersed and went into a house on Scrivner Lave. (3RT pp. 419-420.) Appellant stated that he swung his golf club at a tree, and then turned and went inside the house. (3RT pp. 421-422.)

Appellant denied knowing or ever seeing Jaime Lopez. (3RT p. 401.) He stated that he had two children that lived in Temecula, and he never claimed to have fathered a child with Jaime Lopez. (3RT p. 423.)

ARGUMENT.

I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY THAT IT MUST DECIDE ON A CHARGE OF ATTEMPTED CRIMINAL THREATS WHETHER THE INTENDED THREAT REASONABLY COULD HAVE CAUSED SUSTAINED FEAR UNDER THE CIRCUMSTANCES.

A. Introduction.

The opinion of the Court of Appeal in the instant case is in direct conflict with the published opinion of the Sixth District Court of Appeal in *People v. Jackson* (2009) 178 Cal.App.4th 590, as well as the opinion of this court in *People v. Lowery* (2011) 52 Cal.4th 419.

Jackson held that, just as a statement must be viewed objectively from the point of view of a reasonable person in determining whether it constitutes a criminal threat, an attempted criminal threat must be viewed from the same perspective in determining whether it constitutes an attempted criminal threat. This is so, the court reasoned, in order to insure that punishment will apply only to speech that clearly falls outside First Amendment protection. (*People v. Jackson, supra,* 178 Cal.App.4th 590, 598.) *Jackson* found that the trial court had committed instructional error because the instructions given for the attempted crime simply referred the jury back to the elements of the substantive completed crime. The problem with that was that the instruction on the substantive completed crime included the reasonableness element only as part of the result of the completed crime, and did not instruct the jury to consider whether the intended threat reasonably could have caused sustained fear under the circumstances of the attempted crime. (*Id.* at p. 599.)

The Court of Appeal in this case rejected the reasoning of *Jackson*, holding that an attempt to make a criminal threat is a crime regardless of whether it was objectively reasonable, under the circumstances, for the victim to be in fear. (E054154, Slip opinion at p. 18.)

The Court of Appeal's opinion is also in conflict with the opinion of this court in *People v. Lowery, supra,* 52 Cal.4th 419. In *Lowery*, the issue was the constitutionality of section 140, subdivision (a), which makes it a

crime to threaten to use force or violence on a victim of or a witness to a crime. The defendant argued that the statute was unconstitutional because it did not require the intent to intimidate the victim or witness. This court held that section 140 was constitutional because it "appl[ied] only to those threatening statements that a reasonable listener would understand, in light of the context and surrounding circumstances, to constitute a true threat . . . ." (*People v. Lowery*, *supra*, 52 Cal.4th at p. 427.) The Court of Appeal's holding in this case is a repudiation of this court's objective standard of a true threat adopted in *Lowery*.

B. The Standard of Review.

The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1).

C. The State Can Criminalize Threatening Speech Without Contravening the First Amendment if it Does So Within Well Established Parameters.

"As originally enacted, section 422 made it a felony to 'willfully threaten [ ] to commit a crime which will result in death or great bodily injury to another person, with intent to terrorize another or with reckless disregard of the risk of terrorizing another,' if such threats cause another person 'reasonably to be in sustained fear for his or her[ ] or their immediate family's safety.' To 'terrorize' was defined by section 422.5 as

" 'creat[ing] a climate of fear and intimidation by means of threats or violent action causing sustained fear for personal safety *in order to achieve social or political goals.*' " [Citation.] Thus, read together, the two statutes penalized only threats made with intent to achieve 'social or political goals.' [Citation.]" (*In re Ge M.*(1991) 226 Cal.App.3d 1519, 1522.)

In 1981, this court found then-sections 422 and 422.5 were unconstitutional because the phrase "social or political goals" was void for vagueness. (*People v. Mirmirani*, *supra,* 30 Cal.3d 375, 383, 388.) Since the crime defined by the two statutes could be committed by words alone, the statutes were subject to the "strict standards" required by the First Amendment to evaluate a vagueness challenge. (*People v. Mirmirani*, *supra,* 30 Cal.3d 375, 383.) *Mirmirani* concluded that the phrase " 'social or political goals' " had "no established legal meaning," the statutes did not provide clear lines "by which citizens, law enforcement officials, judges and juries can understand what is prohibited and what is not," and it was "virtually impossible to determine what conduct by an individual in a democratic society could not in some way be construed as an attempt to achieve a 'social' or 'political' goal." (*Id.* at p. 384.)

Mirmirani acknowledged the Legislature may constitutionally penalize threats, "even though they are pure speech," but statutes which attempt to do so "must be narrowly directed only to threats which truly pose a danger to society," and cited to a series of federal courts of appeals

and United States Supreme Court opinions on this point, including *Watts v. United States*, *supra,* 394 U.S. 705 and *United States v. Kelner, supra,* 534 F.2d 1020. (*People v. Mirmirani*, *supra,* 30 Cal.3d 375, 388, fn. 10.)

In *Kelner,* the defendant, a member of the Jewish Defense League, had been convicted under a federal statute for threatening to assassinate Palestinian leader Yasser Arafat, who was to be in New York for a meeting at the United Nations. *Kelner* argued that without proof he specifically intended to carry out the threat, his statement was political hyperbole protected by the First Amendment rather than a punishable true threat. (*United States v. Kelner, supra,* 534 F.2d at p. 1025.)

The reviewing court disagreed and concluded threats are punishable consonant with constitutional protections "when the following criteria are satisfied. So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied." (*United States v. Kelner, supra,* 534 F.2d at p. 1027.) In formulating this rationale, the *Kelner* court drew on the analysis in *Watts v. United States*, *supra,* 394 U.S. 705, in which the United States Supreme Court reversed a conviction for threatening the President of the United States. Defendant Watts had stated, in a small discussion group during a political rally, " 'And now I have already received my draft classification as 1–A and I have got to report for

my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.' " (*Id.* at p. 706,.) Both Watts and the crowd laughed after the statement was made. (*Id.* at p. 707.) The Supreme Court determined that taken in context, and considering the conditional nature of the threat and the reaction of the listeners, the only possible conclusion was that the statement was not a punishable true threat, but political hyperbole privileged under the First Amendment. (*Id.* at pp. 707–708.)

As the *Kelner* court understood this analysis, the Supreme Court was not adopting a bright line test based on the use of conditional language but simply illustrating the general principle that punishable true threats must express an intention of being carried out. (See *United States v. Kelner, supra,* 534 F.2d at p. 1026.) "In effect, the Court was stating that threats punishable consistently with the First Amendment were only those which according to their language and context conveyed a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected [attacks on government and political officials]." (*Ibid.*) Accordingly, "[t]he purpose and effect of the *Watts* constitutionally-limited definition of the term 'threat' is to insure that only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished–only such threats, in short, as are of the same

nature as those threats which are ... 'properly punished every day under statutes prohibiting extortion, blackmail and assault....' " (*Id.* at p. 1027.)

Sections 422 and 422.5 were repealed in 1987. (*In re Ge M., supra,* 226 Cal.App.3d at p. 1522.) In 1988, section 422 was amended and reenacted to prohibit "criminal" rather than "terrorist" threats. (*In re Ge M., supra*, 226 Cal.App.3d at p. 1522; *People v. Moore* (2004) 118 Cal.App.4th 74, 78–79.) Section 422 now states:

> Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, 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 thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

"The Legislature ... enacted a substantially revised version [of section 422] in 1988, adopting almost verbatim language from *United States v. Kelner, supra,* 534 F.2d 1020. [Citations.]" (*People v. Bolin, supra,* 18 Cal.4th 297, 338.)

The current version of section 422 "has been carefully drafted to comport with the detailed guidelines articulated by the *Kelner* court" and is

not constitutionally overbroad. (*People v. Fisher* (1993) 12 Cal.App.4th 1556, 1560; *In re David L.* (1991) 234 Cal.App.3d 1655, 1661.)

"[T]he standard set forth in [the current version of] section 422 is both the statutory definition of a crime and the constitutional standard for distinguishing between punishable threats and protected speech. Accordingly, in applying section 422, courts must be cautious to ensure that the statutory standard is not expanded beyond that which is constitutionally permissible. [Citation.]" (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861–862.)

Thus, section 422 cannot be applied to constitutionally protected speech. (*In re Ryan D., supra,* 100 Cal.App.4th at p. 861.) " 'When a reasonable person would foresee that the context and import of the words will cause the listener to believe he or she will be subjected to physical violence, the threat falls outside First Amendment protection.' " (*People v. Toledo, supra,* 26 Cal.4th 221, 233, quoting *In re M.S., supra,* 10 Cal.4th 698, 710, italics omitted.) In drafting the current version of section 422, "the Legislature limited the punishment for criminal threats to this type of unprotected speech. [Citation.]" (*People v. Jackson, supra,* 178 Cal.App.4th 590, 598.)

D. The Trial Court Committed Instructional Error.

The trial court has a sua sponte duty to instruct the jury on all elements of a criminal charge. (*People v. Cummings* (1993) 4 Cal.4th 1233,

1311.) Failure to do so violates the defendant's rights under both the due process clause of the Fourteenth Amendment to the United States Constitution, and article I, section 15, of the California Constitution. (*People v. Flood* (1998) 18 Cal.4th 470, 479–481.)

1. In *Toledo,* This Court Found There Does Exist the Crime of Attempted Criminal Threats.

The crime of attempted criminal threat was examined by this court in *People v. Toledo*, *supra,* 26 Cal.4th 221. In *Toledo,* the jury returned a verdict on the lesser included offense of attempted criminal threat. The issue on appeal was whether there was, under California law, such a crime. This court found there was, and that the jury properly convicted defendant of that offense. (*Id.* at p. 224.) In that case, the defendant and his wife got in an argument on their drive home from her work. When they arrived home the dispute escalated. The defendant threw a telephone, tossed a chair, and punched a hole in a door. His wife told defendant she did not care if he destroyed their apartment and, to demonstrate, she picked up a lamp and dropped it to the floor. After the defendant told her, " 'You know, death is going to become you tonight. I am going to kill you,' " the wife said she did not care and walked away. (*Id.* at p. 225.) The defendant then approached her holding scissors over his shoulder. He plunged the scissors towards her neck and she moved back. The defendant stopped the motion of the scissors before they touched wife and said, " 'You don't want to die tonight, do you?

You're not worth going to jail for.' " (*Ibid.*) The wife left and went to a neighbor's apartment. She was crying, shaking, and appeared frightened. Later, the neighbor began to escort the wife back to her apartment. When the defendant saw them, he chased after the wife and screamed at her. The wife and the neighbor returned to the neighbor's apartment. They heard a loud noise, which was an iron hitting a wall and shattering into pieces. When questioned by an investigating officer, wife said she was afraid defendant was going to kill her. At trial, however, the wife "denied that she had entertained any fear of defendant on the evening in question." (*Ibid.*)

The *Toledo* court provided section 422's statutory language, the elements of the offense, and sections 664 and 21a, the statutory provisions relating to attempts, and the court concluded there is a crime of attempted criminal threats in California. (*People v. Toledo, supra,* 26 Cal.4th 221, 230.) That decision explained: "Under the provisions of [Penal Code] section 21a, a defendant properly may be found guilty of attempted criminal threat whenever, acting with the specific intent to commit the offense of criminal threat, the defendant performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action. Furthermore, in view of the elements of the offense of criminal threat, a defendant acts with the specific intent to commit the offense of criminal threat only if he or she specifically intends to threaten to commit a crime resulting in death or great bodily injury with the further intent that the

threat be taken as a threat, under circumstances sufficient to convey to the person threatened a gravity of purpose and an immediate prospect of execution so as to reasonably cause the person to be in sustained fear for his or her own safety or for his or her family's safety." (*Id.* at pp. 230–231.)

The *Toledo* court then listed examples of potential attempted criminal threats: "[I]f a defendant takes all steps necessary to perpetrate the completed crime of criminal threat by means of a written threat, but the crime is not completed only because the written threat is intercepted before delivery to the threatened person, the defendant properly may be found guilty of attempted criminal threat. Similarly, if a defendant, with the requisite intent, orally makes a sufficient threat directly to the threatened person, but for some reason the threatened person does not understand the threat, an attempted criminal threat also would occur. Further, if a defendant, again acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat. In each of these situations, only a fortuity, not intended by the defendant, has prevented the defendant from perpetrating the completed

offense of criminal threat itself." (*People v. Toledo, supra,* 26 Cal.4th 221, 231.)

It is this latter scenario that is present in this case. Appellant, presumably acting with the requisite intent, made a sufficient threat that was received and was understood by the threatened person. Based on the instructions given, the jury found that, for whatever reason, the threat did not *actually* cause the threatened person to be in sustained fear for his or her safety. The unresolved issue is whether, under the circumstances, it was reasonable for that person to have been placed in such fear.

2. To Instruct the Jury on this Crime, the Trial Court Gave the Standard Completed Criminal Threat Instruction, and the Standard Attempt Instruction.

The court in this case instructed the jury on the charged offense of criminal threats and the lesser included offense of attempted criminal threats. In instructing the jury on criminal threats, the trial court stated:

> The defendant is charged in count two with having made a criminal threat.
>
> To prove defendant is guilty of this crime, the People must prove that:
>
> (1) The defendant willfully threatened to unlawfully kill or to unlawfully cause great bodily injury to Jamie Lopez, she's in count two, or Deborah Alva, count three;
>
> (2) The defendant made the threat orally;
>
> (3) The defendant intended that his statement be understood as a threat and intended that it be communicated to Jamie Lopez or Deborah Alva, and that's count two and then count three;
>
> (4) The threat was so clear, immediate, unconditional, and specific that it communicated to Jamie Lopez or

Deborah Alva the serious intention and immediate prospect that the threat would be carried out;

(5) The threat actually caused Jamie Lopez in count two or Deborah Alva in count three to be in sustained fear for her own safety or for the safety of her immediate family;

and (6) Jamie Lopez, that's count two, Deborah Alva's, that's count three, fear was reasonable under the circumstances. (3RT pp. 567-568, CALCRIM No. 1300.)

The trial court, in instructing the jury on attempted criminal threats, instructed as follows:

To prove that the defendant is guilty of this crime, in other words, an attempt to commit either stalking or a criminal threat, the People must prove that,

(1) the defendant took a direct but ineffectual step towards committing stalking as to count one or criminal threats in counts two and three;

and (2) the defendant intended to commit stalking, that's count one, or criminal threats, counts two and three.

A direct step means more than merely planning or preparing to commit the target offense of stalking/criminal threats or obtaining or arranging for something needed to commit stalking or criminal threats. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step includes a definite and unambiguous attempt to commit the target offense. It is a directed movement towards the commission of the crime after preparations have been made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

A person who attempts to commit the target offense – target offense, and I use that word interchangeably with either stalking or criminal threats depending on what count your looking at – is guilty of attempted stalking. And let me just add here, I'm going to read "or attempted criminal threats," I'm going to ask you with your pens to add that in, the words "or attempted" right before "criminal threats" there – even if

> after taking a direct step towards committing the crime he or she abandoned further efforts to complete the crime or if his or her attempt failed or was interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step towards committing the target offense, then that person is not guilty of stalking or criminal threats or attempted criminal threats.
>
> To decide whether the defendant intended to commit the target offenses of stalking and/or criminal threats, please refer to the separate instructions I have given you on those crimes. (3RT pp. 570-571, CALCRIM No. 460.)

Therefore in instructing on the charged offense the court instructed the jury that they must find that the victims suffered sustained fear from the threats, and that fear was reasonable under the circumstances. (3RT pp. 567-568.) In instructing on attempt the court provided the elements of an attempt and then referred the jury back to the elements of the substantive crime. (3RT pp. 570-571.) The problem with this approach was that the instruction on the substantive crime included the reasonableness element only as part of the result of the completed crime, i.e., that Lopez and Alva suffered fear and that the fear they experienced was reasonable. Thus, in deciding whether appellant had the intent necessary to support convictions for attempted criminal threats, the jury was not instructed to consider whether the intended threat reasonably could have caused sustained fear under the circumstances.

3. The Court of Appeal in *People v. Jackson* Cogently Explains Why Those Standard Instructions Are Insufficient to Instruct on the Necessary Element at Issue.

People v. Jackson, supra, 178 Cal.App.4th 590, in which the trial court used substantially the same jury instructions as used in this case, determined this was error. In *Jackson*, the landlords asked the defendant to leave the apartment where he had been staying. In response, the defendant threatened to both blow up and chop off their heads. After making the threats, the defendant ranted and raved outside until the police arrived. A victim testified she " 'feared for everybody's safety who was at the house. I didn't know what he was going to do.' " (*Id.* at p. 594) When asked if she believed the defendant was going to kill her, she said: " 'I didn't think anything one way or the other, other than I didn't know what he was going to do next.' " (*Ibid.*) The jury acquitted the defendant of two counts of the substantive offense and convicted him of two counts of attempted criminal threats. (*Id.* at p. 595.)

On appeal, the defendant claimed the trial court erred by failing to instruct the jury sua sponte that, "in order to find him guilty of attempted criminal threat, it must find that 'it would have been reasonable for a person to have suffered sustained fear as a result of the threat under the circumstances of this case.' " (*People v. Jackson, supra*, 178 Cal.App.4th 590, 595.) The Attorney General responded that, when a defendant has done everything he needs to do to complete the crime of criminal threat, but

he has not achieved his intended result, he has committed an attempted criminal threat regardless of whether the intended threat reasonably could have caused the target to suffer sustained fear. (*Id.* at pp. 595–596.) The *Jackson* court rejected the Attorney General's argument because the *Toledo* court's "definition of the crime of attempted criminal threat expressly includes a reasonableness element." (*Id.* at pp. 596–597.)

The *Jackson* court held the jury instructions were erroneous because the reasonableness element was included only in the substantive offense instruction and not in the attempt instruction. (*People v. Jackson, supra*, 178 Cal.App.4th 590 , 599-600.) Thus, the court reasoned the "jury was not instructed to consider whether the intended threat *reasonably could have* caused sustained fear under the circumstances." (*Id.* at p. 599, italics added.) In concluding the instructional error was prejudicial, the court noted counsel's arguments did not fill the gaps left by the trial court's instructions. The court stated the prosecutor argued the jury could find the defendant guilty of attempted criminal threats if it concluded the victims were not afraid and defense counsel simply urged the jury to find the defendant not guilty based on the victims' actions. The court concluded, "In short, there was nothing in the instructions or the argument of counsel that told the jury that to be guilty of attempted criminal threat defendant's intended threat had to be one that reasonably could have caused the person to suffer sustained fear." (*Id.* at p. 599.)

The *Jackson* court noted the jury must have found defendant made threats, and had intended them to be taken as threats, but, in acquitting him on the substantive offense, the jury must also have found "that one or both of the last two elements of the completed crime was missing." (*People v. Jackson, supra*, 178 Cal.App.4th at p. 600.) The court noted the evidence would have supported findings that one or both elements were missing. (*Ibid.*) Thus, the court explained the jury could have concluded the victims did not suffer sustained fear, i.e., the jury might not have believed the victims' testimony that they feared for their lives. This scenario is sufficient to support a conviction of attempted criminal threats only upon a finding that a reasonable person could have suffered fear in those circumstances, something the jury was not asked to decide. (*Ibid.*) Alternatively, the court stated the jury could have concluded the victims' fear was unreasonable under the circumstances, i.e., the victims were safely inside the house with a telephone to call the police while the defendant sat out front. This scenario is legally insufficient to support an attempted criminal threat conviction. (*Ibid.*)

The identical scenarios are presented here. The jury may have found that neither Lopez or Alva were in sustained fear for their own safety or for their immediate family's safety. While Lopez stated she was in fear for her safety (1RT pp. 131, 147), Alva stated she was in fear of damage being done to her car (2RT pp. 295-296), until later prompted to say she was in

fear of her own safety, although she qualified her fear to state she would have been afraid if appellant came onto her property, which he did not do. (1RT pp. 306, 312, 314.) Thus, the jury could have concluded that the victims did not suffer sustained fear, i.e., the jury might not have believed the victims' testimony that they feared for their lives. This scenario is sufficient to support a conviction of attempted criminal threats only upon a finding that a reasonable person could have suffered fear in those circumstances, something the jury was not asked to decide. (*People v. Jackson, supra,* 178 Cal.App.4th 590, 600.)

Alternatively, the jury could have concluded that the victims' fear was unreasonable under the circumstances. While again Lopez stated she was in fear for her safety (1RT pp. 131, 147), the jury may have determined that her fear was not reasonable under the circumstances, that appellant was merely ranting. Alva stated she was in fear of damage being done to her car (2RT pp. 295-296), until later prompted to say she was in fear of her own safety, although she qualified her fear to state she would have been afraid if appellant came onto her property, which he did not do. (1RT pp. 306, 312, 314.) The jury may have also determined that this "fear" was not reasonable under the circumstances, because Alva wasn't really afraid. This scenario is legally insufficient to support an attempted criminal threat conviction. (*People v. Jackson, supra,* 178 Cal.App.4th 590, 600.) Under either scenario the instructions given the jury were erroneous. (*Ibid.*)

The *Jackson* court went on to state "It is important to remember that the crime of criminal threat, or attempted criminal threat, punishes speech and, consequently, risks offending the First Amendment. But, as *Toledo* explained, penalizing speech does not offend First Amendment principles as long as, 'the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection.' [Citation] '*When a reasonable person would foresee that the context and import of the words will cause the listener to believe he or she will be subjected to physical violence, the threat falls outside* First Amendment protection.' (*People v. Toledo, supra,* 26 Cal.4th 221 at p. 233, italics original, internal quotation marks omitted.) In drafting the current version of section 422, the Legislature limited the punishment for criminal threats to this type of unprotected speech. (*People v. Toledo, supra,* 26 Cal.4th 221 at p. 233.) Punishment for an attempted criminal threat must reach no further. By insisting that the intended threat be evaluated from the point of view of a reasonable person under the circumstances of the case, we can insure that punishment will apply only to speech that clearly falls outside First Amendment protection." (*People v. Jackson, supra,* 178 Cal.App.4th 590, 598.)

The opinion of the Court of Appeal in the instant case reflects a misunderstanding of the holding in *Jackson.* The court stated " In our view, the *Jackson* court went astray in part because it did not clearly distinguish

the (counterfactual) intended crime from the (actual) attempt. Indeed, at times, it seems to say that the defendant need only *intend* the circumstances to be such that the victim's fear would be reasonable. (E.g., *People v. Jackson*, *supra*, 178 Cal.App.4th at pp. 593, 597, 599.) We agree with this proposition. It follows from the general principle, stated in Penal Code section 21a, that in order to be guilty of an attempt, the defendant must have the specific intent to commit the completed crime.

" If that were the true holding of *Jackson*, however, the court would have affirmed, not reversed. The standard instruction on making a criminal threat and the standard instruction on attempt, when combined, adequately inform a jury that the defendant must *intend* the victim reasonably to be in fear. *Jackson* held, however, that the attempt instruction 'simply referred the jury back to the elements of the substantive crime. The problem with that was that the instruction on the substantive crime included the reasonableness element only as part of the result of the completed crime . . . . Thus, in deciding whether defendant had the intent necessary to support conviction for attempted criminal threat, the jury was not instructed to consider whether the intended threat reasonably could have caused sustained fear under the circumstances.' (*People v. Jackson*, *supra*, 178 Cal.App.4th at p. 599.) '[T]here was nothing in the instructions . . . that told the jury that to be guilty of attempted criminal threat defendant's intended threat had to be one that reasonably could have caused the person

to suffer sustained fear."\' (*Ibid.*) Thus, the court necessarily held that the *actual* circumstances must be such that the victim reasonably could have been in fear." (E054154, Slip opinion at pp. 15-16, italics original.)

The flaw in this analysis is that the intermediate court confuses a defendant's subjective intent, a necessary element of an attempt, with the objectively reasonableness requirement of a criminal threat. It is not enough that a defendant intended a threat that he believed would cause the victim reasonably to be in fear. For the threat to be a criminal offense it must *also* be perceived as a threat from the perspective of the reasonable person. "By insisting that the intended threat be evaluated from the point of view of a reasonable person under the circumstances of the case, we can insure that punishment will apply only to speech that clearly falls outside First Amendment protection." (*People v. Jackson, supra,* 178 Cal.App.4th 590, 598.)

Further, "[u]nder well-established precedent, of course, a statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question. (See, e.g., *Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828; *In re Kay* (1970) 1 Cal.3d 930, 942; *People v. Amor* (1974) 12 Cal.3d 20, 30.)" (*People v. Engram* (2010) 50 Cal.4th 1131, 1161.) The holding of *Jackson* complies with this requirement.

4. The Court of Appeal Opinion Misunderstands The Teachings of This Court in the Recent *People v. Lowery* Opinion.

The Court of Appeal in the instant case has eliminated the requirement that the intended threat be evaluated from the point of view of a reasonable person under the circumstances of the case, holding instead "that California can constitutionally declare it a crime to attempt to make a criminal threat even when, under the circumstances, it would not be actually reasonable for the victim to be in fear." (E054154, Slip opinion at p. 18.)

This opinion is not only in conflict with *Jackson*, but is also in conflict with this court's opinion in *Lowery*. As noted *infra*, the issue in *Lowery* was the constitutionality of section 140, subdivision (a), which makes it a crime to threaten to use force or violence on a victim of or a witness to a crime. In *Lowery,* an 88 year old man hired the defendant and his wife to clean his mobile home. He then left for several hours. When he returned, the couple had already departed. The man soon discovered the loss of some $250,000 in cash, which he had wrapped in small bundles and hidden under a couch. He called the police and eventually the defendant and his wife were charged with theft of the money. They were tried separately. The defendant was acquitted but his wife was convicted. She was sentenced to state prison and ordered to pay $250,000 in restitution. (*People v. Lowery*, *supra*, 52 Cal.4th at p. 422.)

On several occasions, while the wife was incarcerated, the defendant talked to her by telephone. Those talks, as generally occurs with inmates' telephone calls, were periodically interrupted by recorded warnings that the conversations were being tape-recorded. Included in the recorded telephone conversations between the defendant and his wife, were these statements by the defendant: "I'm going down to Gorman's and I'm gonna steal 250,000 dollars! I'm a [*sic*] blow his fucken [*sic*] head away! I will kill the fucken [*sic*] bastard that said I stole 250,000! I will do it! You know what? I stole 100,000 dollars ... Listen! Listen! I stole 100,000 dollars! I burned it all! Okay?! Well, guess what I'm gonna do?! I'm gonna kill the bastard! And I'm gonna go down to Mr. Gorman's house, maybe this week, and I'm gonna blow his fucken [*sic*] head away!" (*People v. Lowery*, *supra*, 52 Cal.4th at p. 422.)

Also: "I'm not getting mad at you about it, I'm getting ... I'm gonna get mad at the Lawyer and the D.A. and, and Mr. Gorman, I'm gonna go down there and tell him, 'Look! You say my wife stole 250,000 ... you said I stole 250,000! Let's get the 250,000 out of your house right now!' Yeah, but he needed to take the 250,000 dollars off, because I'm gonna tell the ... the ... that blond-headed chic[k], uh ... that was uh ... the D.A..... I'm gonna kill her! And I'm gonna kill a lot of people! So I might do life in prison! We might be in the same prison!" (*People v. Lowery*, *supra*, 52 Cal.4th at pp. 422-423.)

And: "Listen! Okay, listen! You, you tell 'em that [your] husband's going down and get 250,000 dollars from that man, and then when he gets the 250,000 dollars, he's ... he's gonna kill anybody that steps in his way!!" (*People v. Lowery*, *supra*, 52 Cal.4th at p. 423.)

These statements by the defendant led to his prosecution under section 140, subdivision (a), which prohibits "willfully" threatening to use physical force against a crime victim or witness. The defendant argued that the statute was unconstitutional because it did not require the intent to intimidate the victim or witness. (*People v. Lowery*, *supra*, 52 Cal.4th at p. 425.) His argument was supported by the Ninth Circuit's holding, in *U.S. v. Bagdasarian* (9th Cir. 2011) 652 F.3d 1113, that a true threat requires the subjective intent to intimidate. (See *People v. Lowery*, *supra*, 52 Cal.4th at p. 427, fn. 1; see also *id.* at p. 432 [conc. opn. of Baxter, J.].)

This court, however, disagreed with *Bagdasarian*; it held that section 140 was constitutional because it "appl[ied] only to those threatening statements that a reasonable listener would understand, in light of the context and surrounding circumstances, to constitute a true threat . . . ." (*People v. Lowery*, *supra*, 52 Cal.4th at p. 427.) Justice Baxter's concurring opinion, joined by a majority of the court, the that it was adopting the "objective standard" of a true threat and rejecting *Bagdasarian*'s "subjective standard." (*People v. Lowery*, *supra*, 52 Cal.4th at pp. 432-433 [conc. opn. of Baxter, J.].)

The Court of Appeal in this case stated " Thus, *Lowery* held that a subjective intent to intimidate is not a *necessary* condition of a true threat; an objective or apparent intent to intimidate can also be *sufficient*. Even aside from the fact that *Lowery* is binding on us, we agree. We merely conclude that a subjective intent to intimidate can *also* be sufficient. While the *Lowery* majority, in dictum, expressed some doubt about this (*People v. Lowery*, *supra*, 52 Cal.4th at p. 432 [conc. opn. of Baxter, J.]), it follows from *Black*." (E054154, Slip opinion at p. 19, italics original.) This last reference was to *Virginia v. Black* (2003) 538 U.S. 343 [123 S.Ct. 1536, 155 L.Ed.2d 535], in which the United States Supreme Court held that "[t]he First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate . . . ." (*Virginia v. Black*, *supra*, 538 U.S. at p. 363.) The Court of Appeal noted that " This was even though the Virginia law at issue did not require that anybody actually be intimidated, much less that it be reasonable for someone to be intimidated under the circumstances. (See *id.* at p. 348.) It was closely analogous to the California crime of attempting to make a criminal threat, in that all it required was the specific intent to intimidate, along with the direct step of burning a cross — 'a particularly virulent form of intimidation' (*id.* at p. 363), to be sure, but still, an act made criminal by its intended effect, not its actual effect." (E054154, Slip opinion at pp. 17-18.)

The flaw in the Court of Appeal's analysis of *Lowery* is its statement "that a subjective intent to intimidate is not a *necessary* condition of a true threat; an objective or apparent intent to intimidate can also be *sufficient*." (E054154, Slip opinion at p. 19, italics original.) This is incorrect; *Lowery* holds that an objective or apparent intent to intimidate is *required*. (*People v. Lowery*, *supra*, 52 Cal.4th at pp. 427, 432-433.)

5. Appellant's Position is Consistent With *Virginia v. Black.*

Black does not eliminate the objective standard in evaluating a threat. At issue in *Black* was a state-law prohibition on cross burning, which forbade cross burning with "an intent to intimidate a person or group of persons. " (*Virginia v. Black, supra*, 538 U.S. at p. 347.) Of critical import, the statute "treat[ed] any cross burning as prima facie evidence of intent to intimidate." (*Id.* at pp. 347–48.) The Court upheld the statute's prohibition on cross burning but struck down the prima facie evidence provision as overbroad because "a burning cross is not always intended to intimidate." (*Id.* at p. 365.) A cross burning used in a movie or at a political rally, the Court explained, would be protected speech and could not be used as prima facie evidence of criminal intimidation. (*Id.* at p, 366.) The case merely applies - it does not innovate - the principle that "[w]hat is a threat must be distinguished from what is constitutionally protected speech." (*Watts v. United States, supra,* 394 U.S. 705, 707.) It says nothing about imposing a subjective standard on other threat -

prohibiting statutes, and indeed had no occasion to do so: the Virginia law itself required subjective "intent." The problem in *Black* thus did not turn on subjective versus objective standards for construing threats. It turned on overbreadth - that the statute lacked any standard at all. The prima facie evidence provision failed to distinguish true threats from constitutionally protected speech because it "ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate," and allowed convictions "based solely on the fact of cross burning itself." (*Virginia v. Black, supra*, 538 U.S. at pp. 365, 367.)

The reasonable-person standard winnows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made: A juror cannot permissibly ignore contextual cues in deciding whether a "reasonable person" would perceive the charged conduct "as a serious expression of an intention to inflict bodily harm." (*United States v. Alkhabaz* (6th Cir. 1997) 104 F.3d 1492, 1495.) Unlike Virginia's cross-burning statute, which did "not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn," (*Virginia v. Black, supra*, 538 U.S. at pp. 366), the reasonable-person standard accounts for such distinctions. A reasonable listener understands that a gangster growling " I'd like to sew your mouth shut" to a recalcitrant debtor carries a different connotation from the impression left when a candidate uses those same words during a political

debate. And a reasonable listener knows that the words " I'll tear your head off" mean something different when uttered by a professional football player from when uttered by a serial killer.

The objective standard also complements the explanation for excluding threats of violence from First Amendment protection in the first place. Much like their cousins libel, obscenity, and fighting words, true threats "by their very utterance inflict injury" on the recipient. (*Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 572 [62 S.Ct. 766, 86 L.Ed. 1031].) While the First Amendment generally permits individuals to say what they wish, it allows government to "protect[ ] individuals" from the effects of some words—"from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." (*R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 388 [112 S.Ct. 2538, 120 L.Ed.2d 305]; *Virginia v. Black, supra*, 538 U.S. at pp. 344.) "What is excluded from First Amendment protection—threats rooted in their effect on the listener—works well with a test that focuses not on the intent of the speaker but on the effect on a reasonable listener of the speech." (*U.S. v. Jeffries* (6th Cir. 2012) 692 F.3d 473, 480, cert. petition pending *sub. nom. Jeffries v. U.S.* (12-1185).)

Indeed, in *Lowery,* this court recognized that *Black* did not work the sea change in jurisprudence that the opinion of the Court of Appeal below implies. This court stated: " Our ruling today is consistent with the

understanding of most courts that have considered the issue since *Black* was decided. (*City of San Jose v. Garbett* (2010) 190 Cal.App.4th 526, 539 [*Black* does not require the defendant have 'an intent that a statement 'be received as a threat' ']; *United States v. Armel* (4th Cir. 2009) 585 F.3d 182, 185 ['Statements constitute a 'true threat' if 'an ordinary reasonable recipient who is familiar with the[ir] context ... would interpret [those statements] as a threat of injury' ']; *United States v. Jongewaard* (8th Cir. 2009) 567 F.3d 336, 339, fn. 2 ['In this circuit, the test for distinguishing a true threat from constitutionally protected speech is whether an objectively reasonable recipient would interpret the purported threat 'as a serious expression of an intent to harm or cause injury to another' ']; *Porter v. Ascension Parish Sch. Bd.* (5th Cir. 2004) 393 F.3d 608, 616 ['Speech is a 'true threat' and therefore unprotected if an objectively reasonable person would interpret the speech as a 'serious expression of an intent to cause a present or future harm.' The protected status of the threatening speech is not determined by whether the speaker had the subjective intent to carry out the threat; rather, to lose the protection of the First Amendment and be lawfully punished, the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person.' (fns. omitted)]; *United States v. Zavrel* (3d Cir. 2004) 384 F.3d 130, 136; *United States v. Nishnianidze* (1st Cir. 2003) 342 F.3d 6, 14–15 ['A true threat is one that a reasonable recipient familiar with the context of the

communication would find threatening'; thus the government had to prove only ' that the defendant intended to transmit the interstate communication and that the communication contained a true threat']; *United States v. Syring* (D.D.C. 2007) 522 F.Supp.2d 125, 129 ['courts in all jurisdictions consider whether a reasonable person would consider the statement a serious expression of an intent to inflict harm']; *New York ex rel. Spitzer v. Cain* (S.D.N.Y. 2006) 418 F.Supp.2d 457, 479 ['The relevant intent is the intent to communicate a threat, not as defense counsel maintains, the intent to threaten']; *Citizen Publ'g Co. v. Miller* (2005) 210 Ariz. 513, 115 P.3d 107, 114 [under Arizona's test, which is 'substantially similar' to *Black,* ' '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]' ']; *People v. Stanley* (Colo.App. 2007) 170 P.3d 782, 789 ['*Black* does not hold that subjective intent to threaten must be proved']; *State v. Deloreto* (2003) 265 Conn. 145, 827 A.2d 671, 680 ['In the context of a threat of physical violence, 'whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether 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 intent to harm or assault' ']; *Hearn*

v. State (Miss. 2008) 3 So.3d 722, 739, fn. 22 ['The protected status of threatening speech is not based upon the subjective intent of the speaker']; *State v. Johnston* (2006) 156 Wash.2d 355, 127 P.3d 707, 710 [' ' [W]hether a true threat has been made is determined under an objective standard that focuses on the speaker' ']; see generally Citron, *Cyber Civil Rights* (2009) 89 B.U. L.Rev. 61, 107, fn. 321 ['Only the Ninth Circuit requires proof that the defendant subjectively intended to threaten the victim.']" (*People v. Lowery, supra*, 52 Cal.4th at pp. 430-431.)

The United States Supreme Court, in *Black,* stated that the "prohibition on true threats 'protects individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.' " (*Virginia v. Black, supra*, 538 U.S. at p. 360.) The need for such protection, as noted above, does not depend on whether the speaker *subjectively* intended to threaten the victim. "A standard for threats that focused on the speaker's subjective intent to the exclusion of the effect of the statement on the listener would be dangerously under inclusive with respect to the first two rationales for the exemption of threats from protected speech." (*New York ex rel. Spitzer v. Cain, supra,* 418 F.Supp.2d at p. 479.) The opinion of the Court of Appeal in the present case therefore creates the scenario where a statement is made, heard, and understood by the recipient. If it is objectively considered a threat by a reasonable person

it is a crime, a violation of section 422. If it is not objectively considered to be a threat by a reasonable person it is not a crime, it is not a violation of section 422, but the defendant's subjective intention that it be considered a threat would change the statement into an attempted criminal threat. Since the statement itself is constitutionally protected because it is not a threat and does not trigger fear or otherwise cause any disruption, making the statement cannot be considered a crime.

The Court of Appeal created this dilemma at the outset when it stated " As the Supreme Court held in *Toledo*, the general attempt principles of Penal Code sections 21a and 664 apply to the crime of making a criminal threat just as they do to any other crime. Under Penal Code section 422, the completed crime of making a criminal threat requires that the victim's fear must be reasonable under the circumstances. Statutorily, then, the crime of attempting to make a criminal threat does *not* require that it would *actually* be reasonable under the circumstances for the victim to be in fear. All it requires is that (1) the defendant took a direct but ineffectual step toward making a criminal threat, and (2) the defendant had the specific intent to make a criminal threat, including the specific *intent* that the victim be in fear and that the victim's fear be reasonable under the circumstances. (See Pen. Code, § 21a.)" (E054154, Slip opinion at p. 12, italics original.) The court seems to be acknowledging the need for the victim's fear to be objectively reasonable under the circumstances, but measures that

objectivity from the point of view of the speaker of the statement instead of the victim, a position not adopted by any court, as far as counsel can determine. That interpretation creates an impossible situation for a jury to render a reviewable verdict in a case with the fact pattern presented here.

Appellant's statements, as testified to by Lopez and Alva, do not make any sense from the perspective of the ordinary reasonable person. They do not seem to be motivated by anything, do not seem to be in response to anything, and, quite frankly, seem to be barely coherent rambling. The jury's not guilty finding on the charges of criminal threats seem to reflect this, that appellant was ranting and raving. The jury could look at these statements objectively, from the standpoint of a reasonable person, and conclude they were not criminal threats, that no reasonable person would be in fear.

If, in considering an attempt, the jury were forced to make the determination of whether a statement was a threat not from the standpoint of the reasonable person, but from the standpoint of appellant, they have necessarily abandoned the reasonable person standard in favor of trying to infer whether appellant intended the victim's fear to be reasonable. This is an abandonment of the reasonable person standard, the objective measure, and an adoption of some subjective standard that cannot be reviewed – reasonableness from the point of view of one person who is *not* reasonable.

How does a reviewing court make that determination? The simple answer is it cannot.

6. A Contrary Result is Not Required By the Supreme Court's Decision in *U.S. v. Williams.*

As previously noted, the holding of the Court of Appeal in the instant case sets up the potential scenario where the statement made is protected under the First Amendment, it is not a criminal threat, but the attempt to make such a protected statement is a crime. The Court of Appeal addressed this anomaly:

"Beyond the narrow issue of true threats lurks the broader question of how the First Amendment applies to attempt offenses in general. Would it be constitutional to convict a defendant of attempted criminal libel if the apparently libelous statement, unbeknownst to the defendant, was actually true? Or to convict a defendant of attempted possession of child pornography if the apparent child, unbeknownst to the defendant, was actually 18?

"The United States Supreme Court shed some light on these questions in *U.S. v. Williams* (2008) 553 U.S. 285 [128 S.Ct. 1830, 170 L.Ed.2d 650]. Earlier, as *Williams* noted, *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234 had held that the government could not ban 'virtual images of children generated by a computer . . . because the child-protection rationale for speech restriction does not apply to materials

produced without children.' (*Williams*, at p. 289.) Accordingly, in *Williams*, the Eleventh Circuit had reversed the defendant's conviction for offering or requesting child pornography, including material depicting 'virtual' children (*id.* at pp. 292-293), in part because 'it would be unconstitutional to punish someone for mistakenly distributing virtual child pornography as real child pornography.' (*Id.* at p. 300.)

"The Supreme Court stated, 'We disagree. Offers to deal in illegal products or otherwise engage in illegal activity do not acquire First Amendment protection when the offeror is mistaken about the factual predicate of his offer. The pandering and solicitation made unlawful by the Act are sorts of inchoate crimes — acts looking toward the commission of another crime, the delivery of child pornography. As with other inchoate crimes — attempt and conspiracy, for example — impossibility of completing the crime because the facts were not as the defendant believed is not a defense.' (*U.S. v. Williams*, *supra*, 553 U.S. at p. 300.) Thus, the Supreme Court indicated that it can be constitutional to punish even protected speech as an attempt to engage in unprotected speech, provided the speaker intended the speech to be unprotected and it is protected only fortuitously." (E054154, Slip opinion at pp. 20-21.)

Williams does not support the intermediate court's position because it recognizes that there is an objective component in determining what is

and what is not protected speech. In *Williams,* the defendant, using a sexually explicit screen name, signed in to a public Internet chat room. A Secret Service agent had also signed in to the chat room under the moniker "Lisa n Miami." The agent noticed that Williams had posted a message that read: "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." The agent struck up a conversation with Williams, leading to an electronic exchange of nonpornographic pictures of children. (The agent's picture was in fact a doctored photograph of an adult.) Soon thereafter, Williams messaged that he had photographs of men molesting his 4–year–old daughter. Suspicious that "Lisa n Miami" was a law-enforcement agent, before proceeding further Williams demanded that the agent produce additional pictures. When he did not, Williams posted the following public message in the chat room: "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL—SHE CANT." Appended to this declaration was a hyperlink that, when clicked, led to seven pictures of actual children, aged approximately 5 to 15, engaging in sexually explicit conduct and displaying their genitals. The Secret Service then obtained a search warrant for Williams's home, where agents seized two hard drives containing at least 22 images of real children engaged in sexually explicit conduct, some of it sadomasochistic. (*U.S. v. Williams*, *supra,* 553 U.S. 285, 292-293.)

Williams was charged with one count of pandering child pornography and one count of possessing child pornography. He pleaded guilty to both counts but reserved the right to challenge the constitutionality of the pandering conviction. (*U.S. v. Williams, supra,* 553 U.S. 285, 293.)

Obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment. (See *Roth v. United States* (1957) 354 U.S. 476, 484–485 [77 S.Ct. 1304, 1 L.Ed.2d 1498].) But to protect explicit material that has social value, the court has limited the scope of the obscenity exception, and has overturned convictions for the distribution of sexually graphic but non-obscene material. (See *Miller v. California* (1973) 413 U.S. 15, 23–24 [93 S.Ct. 2607, 37 L.Ed.2d 419]; see also, *e.g., Jenkins v. Georgia* (1974) 418 U.S. 153, 161 [94 S.Ct. 2750, 41 L.Ed.2d 642].)

A ban on the distribution and possession of child pornography – sexually explicit visual portraits that feature children – does not violate the first amendment, even if the material does not qualify as obscenity. (*New York v. Ferber* (1982) 458 U.S. 747, 751-753, 756-764 [102 S.Ct. 3348, 73 L.Ed.2d 1113; *Osborne v. Ohio* (1990) 495 U.S. 103, 111 [110 S.Ct. 1691, 109 L.Ed.2d 98].) The state cannot, however, ban material featuring a youthful looking adult or virtual images of children generated by a computer. (*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 239-

241 [122 S.Ct. 1389, 152 L.Ed.2d 403].) This is because the child-protection rationale for speech restriction does not apply to materials produced without children. (*Id.* at pp 249-251.)

The statute at issue in *Williams,* generally speaking, prohibits offers to provide and requests to obtain child pornography. The statute does not require the actual existence of child pornography. Rather than targeting the underlying material, this statute bans the collateral speech that introduces such material into the child-pornography distribution network. Thus, an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute. (*U.S. v. Williams, supra,* 553 U.S. 285, 293.)

"According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. (*Virginia v. Hicks* (2003) 539 U.S. 113, 119–120 [123 S.Ct. 2191, 156 L.Ed.2d 148].) On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a

law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." (*U.S. v. Williams, supra,* 553 U.S. 285, 292.) The court held that offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment. (*Id.* at p. 299.)

Among other issues, the statute in question in *Williams* provided for the possibility of a person being punished for mistakenly distributing virtual child pornography as real child pornography. (*U.S. v. Williams, supra,* 553 U.S. 285, 300.) This was not unconstitutional because "Offers to deal in illegal products or otherwise engage in illegal activity do not acquire First Amendment protection when the offeror is mistaken about the factual predicate of his offer. The pandering and solicitation made unlawful by the Act are sorts of inchoate crimes—acts looking toward the commission of another crime, the delivery of child pornography. As with other inchoate crimes—attempt and conspiracy, for example—impossibility of completing the crime because the facts were not as the defendant believed is not a defense." (*Ibid.*)

The holding in *Williams,* consistent with the position advanced in this argument, is that a person can be punished for distributing what he believes to be actual child pornography, that would actually be obscene if his belief is true. This must be contrasted with a scenario where a person subjectively believes that the material is obscene, but the material is not. The *Williams* court (but not the Court of Appeal in this case) addressed this: "the Eleventh Circuit also thought that the statute could apply to someone who subjectively believes that an innocuous picture of a child is 'lascivious.' Clause (v) of the definition of 'sexually explicit conduct' is 'lascivious exhibition of the genitals or pubic area of any person.' [Citation] That is not so. The defendant must believe that the picture contains certain material, and that material in fact (and not merely in his estimation) must meet the statutory definition. Where the material at issue is a harmless picture of a child in a bathtub and the defendant, knowing that material, erroneously believes that it constitutes a 'lascivious exhibition of the genitals,' the statute has no application." (*U.S. v. Williams*, *supra,* 553 U.S. 285, 301.)

The two different scenarios illustrated in *Williams* can be applied to the issue in this case. In the first scenario the person delivers what he believes to be a true threat, believes he has delivered the true threat, but the threat is garbled or not understood. It objectively would have been a true

threat if understood but it was not. This is the second example envisioned in *Toledo,* that "if a defendant, with the requisite intent, orally makes a sufficient threat directly to the threatened person, but for some reason the threatened person does not understand the threat, an attempted criminal threat also would occur." (*People v. Toledo, supra,* 26 Cal.4th 221, 231.) The person intends to deliver a threat and what he intended to deliver was objectively a threat. The person can be punished for the crime of attempt criminal threats.

The second scenario is one where the person delivers what he believes to be a true threat, but when objectively evaluated from the perspective of the reasonable person, it is not a true threat. In this scenario the person has not committed a crime. His subjective intent is not the determining factor, because his "threat" is not objectively a threat. (*U.S. v. Williams*, *supra,* 553 U.S. 285, 301. ["The defendant must believe that the picture contains certain material, and that material in fact (and not merely in his estimation) must meet the statutory definition."].)

This second scenario is what most likely occurred during jury deliberations in this case. As there was no question that appellant's statements were heard and understood by Lopez and Alva, the jury's not guilty verdict on the criminal threats charges were most likely because the jury concluded that the victims did not suffer sustained fear. Consistent

with the holding in *Williams,* appellant could therefore only be convicted of attempted criminal threats if a reasonable person could have suffered fear in those circumstances; in other words, if the statement was an actual criminal threat.

In both of the scenarios taken from *Williams* there is a standard of objective reasonableness. The first scenario involved the distribution of a virtual depiction of child pornography, that the sender believed to be real child pornography. As long as what the sender believed he was sending was real child pornography he can be punished. If, however, what the sender was sending was exactly what the sender thought it was – real not virtual depictions, but it was not objectively child pornography, then the sender cannot be punished. This is nothing more than a recognition of application of the objectively reasonable standard to speech.

The holding in *Williams* therefore supports appellant's position in this case. It is not enough that a defendant intended a threat that he believed would cause the victim reasonably to be in fear. Just as in *Williams* where the "material in fact (and not merely in [defendant's] estimation) must meet the statutory definition," for the threat to be a criminal offense it must *also* be perceived as a threat from the perspective of the reasonable person. "By insisting that the intended threat be evaluated from the point of view of a reasonable person under the circumstances of the case, we can insure that

punishment will apply only to speech that clearly falls outside First Amendment protection." (*People v. Jackson, supra,* 178 Cal.App.4th 590, 598.)

E. Remedy.

This court has observed that the proper standard for assessing prejudice from instructional error that relieves the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense has been evolving for many years and "remains uncertain under California and federal law." (*People v. Flood, supra,* 18 Cal.4th 470, 479–480.) "If a defendant was convicted following a trial, at which he or she was represented by counsel and could present evidence and argument before an impartial judge and jury, and the court did not direct a verdict for the prosecution, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis rather than reversible error per se." (6 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Reversible Error, § 21, at p. 475; see also, *People v. Lee* (1987) 43 Cal.3d 666, 674–676.) *Flood* held that the prejudicial effect of the error was to be determined under the harmless error provision embodied in article VI, section 13 of the California Constitution, which directs that " '[n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury ... unless, after an examination of the

entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'" (*People v. Flood, supra*, 18 Cal.4th at p. 487.) *Flood* explained that "misdirection of the jury" encompasses " ' "every kind of instructional error," ' " including " ' "incorrect, ambiguous, conflicting, or wrongly omitted instructions." ' " (*Ibid.*, quoting *People v. Wims* (1995) 10 Cal.4th 293, 314–315.)

However where the error complained of impermissibly lightens the prosecutor's burden of proof on an essential element of the crime, the error must be analyzed under the Federal standard. *Flood* concluded that "an instructional error that improperly describes or omits an element of an offense, or that raises an improper presumption or directs a finding or a partial verdict upon a particular element, generally is not a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal under the federal Constitution. Indeed, the high court never has held that an erroneous instruction affecting a single element of a crime will amount to structural error ... and the court's most recent decisions, suggest that such an error, like the vast majority of other constitutional errors, falls within the broad category of trial error subject to Chapman review." (*People v. Flood, supra,* 18 Cal.4th at pp.502–503.)

Yates v. Evatt (1991) 500 U.S. 391 [111 S.Ct. 1884, 114 L.Ed.2d 432], overruled on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62,

72 [112 S.Ct. 475, 116 L.Ed.2d 385], reiterated that the applicable test is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " (*Yates v. Evatt, supra*, 500 U.S. 391, 403, quoting *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L. Ed. 2d 705]; accord *Neder v. U.S.* (1999) 527 U.S. 1, 15-16 [119 S.Ct. 1827, 144 L.Ed.2d 35].) A conclusion that the error did not contribute to the verdict may be made, *Yates* held, when "the force of the evidence presumably considered by the jury in accordance with the instructions [independently of the improper presumption] is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption." (*Yates v. Evatt, supra*, 500 U.S. 391, 405.)

The instructional error in this case calls for reversal whether analyzed under either the federal or the state standard. The jury could have concluded that the victims did not suffer sustained fear. This scenario is sufficient to support a conviction of attempted criminal threats only upon a finding that a reasonable person could have suffered fear in those circumstances, something the jury was not asked to decide. On the other hand the jury could have concluded that the victims' fear was unreasonable under the circumstances. This scenario is legally insufficient to support an attempted criminal threat conviction. Since there is nothing in the record

upon which to find that the verdict was actually based on a valid ground, appellant's convictions must be reversed. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

CONCLUSION

Just as a statement must be viewed objectively from the point of view of a reasonable person in determining whether it constitutes a criminal threat, an attempted criminal threat must be viewed from the same perspective, in order to insure that punishment will apply only to speech that clearly falls outside First Amendment protection. In this case the court committed instructional error because the instructions given simply referred the jury back to the elements of the substantive crime, but the instruction on the substantive crime included the reasonableness element only as part of the result of the completed crime, and did not instruct the jury to consider whether the intended threat reasonably could have caused sustained fear under the circumstances. Appellant's convictions must therefore be reversed due to instructional error.

Dated: April 30, 2013

Respectfully submitted,

_____

Stephen M. Hinkle
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

WITH CALIFORNIA RULES OF COURT, RULE 8.360.

Case Name: People v. BEN CHANDLER, JR.,

Supreme Court No. S207542

I, Stephen M. Hinkle, certify under penalty of perjury under the laws of the State of California that the attached APPELLANT'S OPENING BRIEF contains 13, 596 words as calculated by Microsoft Word 2003.

Dated: April 30, 2013

_____

Stephen Hinkle

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SUPREME COURT CASE NO. S207542
SUPERIOR COURT CASE NO. SWF027980

People v. BEN CHANDLER, JR.,

DECLARATION OF SERVICE

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APPELLANT'S OPENING BRIEF

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Clerk of the Court
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Attn: Hon. Mark Johnson, Judge

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Truckee, California, on May 1, 2013. I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 1, 2013, at Truckee, California.

_____
Stephen Hinkle