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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE, HARBOR JUSTICE CENTER

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff

VS.

ADAM STUART ZUCKERMAN,

Defendant.

CASE NO. 01HF1383

PEOPLE'S OPPOSITION TO P.C. §§ 17(B) & 1203.4 MOTIONS.

STATEMENT OF THE CASE

Defendant was originally charged in November, 2001, along with two codefendants, Henderson and Rigsby, with violating Penal Code sections 245(b) (Assault With A Semi-Automatic Firearm), 243(d) (Battery With Serious Bodily Injury), 245(a)(1) (Assault By Means of Force Likely To Produce Great Bodily Injury), 236 (False Imprisonment By Violence) and 422(Criminal Threats). He ultimately pleaded guilty to only the last count, the violation of Penal Code section 422, was sentence to 60 days in jail, and given formal probation on the condition that he not contact the victim and pay restitution. He now moves to have his felony conviction reduced to a misdemeanor pursuant to Penal Code section 17(b) and have the case dismissed pursuant to Penal Code section 1203.4. The People oppose both motions.

STATEMENT OF FACTS

The facts and circumstances underlying the original charges are disturbing to say the least. The police reports indicate that on October 12, 2001, defendant was the apparent victim of a commercial burglary at his business in which \$20,000.00 was stolen from a safe. Suspecting that a person named Paul Brown was the culprit, defendant had Brown come to his business, took him into an office, and closed the door, which was secured by an access code that Brown did not know. When Brown denied taking the money, defendant had several other people, including codefendants Rigsby and Henderson come into the room. Rigsby is 6-4 and weights 260 lbs. Henderson is 5-11 and weighs Rigsby punched Brown in the face, breaking his jaw, and told Brown he better start talking or things would get worse.

Defendant Henderson then put a gun to Brown's head while defendant demanded that Brown give him the names and addresses of the persons involved in the theft or he "would take him out to the desert and it would be over." Defendant also recited the addresses of Brown's mother sister and girlfriend to Brown. Defendant told Brown that when Brown was "gone," he, Rigsby and Henderson would go after his family simply because Brown had "pissed him off."

At that point Brown told defendant he knew who had taken the money and gave defendant the name of one of his friends. Defendant then had Rigsby and Henderson drive Brown to his friends house in Buena Park, presumably to retrieve the stolen money. The friend, seeing them drive up to his residence, called the police. Rigsby and Henderson then drove Brown back to defendant's business, where Brown pretended to liquidate stocks to compensate defendant for his loss so that defendant would not have him hurt him further or kill him. Henderson and Rigsby eventually left.

Meanwhile, a police officer investigating the original theft had returned to defendant's business hoping to learn if defendant had heard from victim Brown. Defendant told the officer that Brown had returned a page after the officer had left earlier that day and denied taking the money. Defendant neglected to mention that he had summoned Brown to his business and that Brown was in fact inside the business at that moment. As this was occurring the officer received radio communication that Brown had been kidnaped and was being held by two Black male subjects and was being taken to defendant's business. The reporting party also stated that she had called Brown's

 cell phone and that defendant had answered. She said that defendant had threatened to kill Brown and his family. She also said there was a handgun inside the business.

At this point victim Brown walked out of the business and approached the officer. He initially denied what was going on, but upon further questioning said that he was having trouble talking because he thought his jaw was broken. He said he had been beaten up by two Black males because defendant thought he had taken his money. He asked the officer to handcuff him and take him away from the business because he was "scared to death of them." The officer did so.

The police ultimately interviewed defendants Henderson, Zuckerman and Rigsby. Henderson and Rigsby had left the business before the police arrived and were apprehended later elsewhere. Henderson said that he had gone to defendant's business, learned that defendant Zuckerman suspected Brown of theft, heard Brown deny it, and accompanied Brown to Buena Park along with defendant Rigsby. He said he did so because defendant Zuckerman "did not want anything to happened to Brown." He denied having a gun at the business in Irvine. When asked why Rigsby had hit Brown in the face, Henderson initially said he didn't know, then said "Did he do it? I don't know." He then said he "heard about" Rigsby hitting Brown, but had been in the hallway of the business when it happened. Henderson initially denied knowing anything about a gun but, when told that DNA testing would reveal whether he had touched it, then said he had in fact touched a gun belonging to defendant Zuckerman about a week earlier.

Defendant Zuckerman said that he had borrowed from a friend named "Scott" weeks ago. He admitted that the gun was inside the business, but claimed that he had not seen it for about a week. He said he usually keeps it unloaded in his desk in his bedroom. He said he had no idea whether defendant Henderson had taken the gun at some point in time. He said that both defendants Henderson and Rigsby had been in the bedroom where the gun was kept earlier that day.

Defendant Zuckerman admitted that he had accused Brown of stealing the money at the business that day but, like defendant Henderson, denied being in the room when defendant Rigsby hit Brown in the jaw. He said that Brown ultimately told him he knew who had stolen the money that Brown wanted Henderson and Rigsby to accompany him to retrieve it. He denied using violence against Brown or threatening him.

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Defendant Rigsby admitted working for defendant Zuckerman and said that defendant Henderson was his cousin. He said that Brown came to a nearby strip club where Rigsby and Henderson were talking to some girls and asked them to help him retrieve some money that he was owed. He said that he, Henderson and Brown then drove to Buena Park.

Rigsby then admitted that he was lying. He admitted that he was at Zuckerman's business when Brown had denied stealing the money and that he (Rigsby) had hit Brown in the fact. He admitted that defendant Henderson had pointed the gun at Brown's head, but said that the gun was not loaded and that Henderson had only done so as a "scare tactic." He said the did not clearly recall defendant Zuckerman threatening to take Brown out to the desert, but did recall Zuckerman making threatening statements such as, "I will kick your ass!"

On November 20, 2001, all three defendants were charged by felony complaint as set forth above. Attorney Paul Meyer appeared for defendant Zuckerman on December 5, 2001, and within a short time attorney Meyer began producing signed declarations from various people. One was from one of defendant Zuckerman's employees, Corey Dennan, who swore that victim Brown had actually threatened him. One was from defendant Rigsby stating that what had "really happened" was that there never was a gun and that he had gone along with the Brown's "story" because Brown had threatened him. Another was from a person named Boas Peres, who swore that he had heard Rigsby threatening to steal from defendant Zuckerman. One was from another employee of defendant Zuckerman, Adam Tomeo, stating that he was present at Zuckerman's business the day of the alleged offenses while victim Brown was there and did not "hear anyone threaten Paul Brown, nor . . . see a gun. At no time did I hear Mr. Zuckerman or anyone else suggest or order anyone to threaten, commit a battery upon anyone, nor detain or kidnap any individual." Another was from another employee of defendant Zuckerman, David Klepinger, stating that he was present in his office at Zuckerman's business the day of the alleged offenses and hadn't heard anything. He said he saw victim Brown leaving with defendant Henderson and Rigsby, but he looked normal. He opined that there was nothing preventing Brown from asking him for help. Contradicting Zuckerman's own statement to police, another person swore that he had loaned Zuckerman a gun, but had retrieved it prior to the alleged offenses. Finally, in February, 2002, Zuckerman's employee Corey Dennan

signed a second statement saying that victim Brown had, in essence, tried to extort money from Zuckerman after the alleged offenses.

Apparently, based on these declarations the prosecutor dismissed all of the charges against defendant with the exception of the violation of Penal Code section 422.

POINTS, AUTHORITIES & ARGUMENT

I.

DEFENDANT'S FELONY CONVICTION FOR VIOLATION OF PENAL SECTION 422 SHOULD NOT BE REDUCED TO A MISDEMEANOR DUE TO THE SERIOUS NATURE AND CIRCUMSTANCES OF THE UNDERLYING OFFENSE, DEFENDANT'S APPARENT LACK OF APPRECIATION OF THE GRAVITY OF THE OFFENSE, AND BECAUSE DOING SO WOULD NOT ACHIEVE THE OBJECTIVES FOR SENTENCING SET FORTH IN CALIFORNIA RULE OF COURT 4.410.

Read in conjunction with the relevant charging statute, the decision whether to reduce a wobbler offense at sentencing to a misdemeanor under Pen C § 17(b), rests solely in the discretion of the court. By its terms, the statute sets a broad generic standard. Since all discretionary authority is contextual, those factors that direct similar sentencing decisions are relevant, including the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or the defendant's traits of character as evidenced by his or her behavior and demeanor at the trial. When appropriate, judges should also consider the general objectives of sentencing, such as those set forth in former California Rule of Court, Rule 410 (see now Cal. Rule of Ct., Rule 4.410). A determination made outside the perimeters drawn by individualized consideration of the offense, the offender, and the public interest "exceeds the bounds of reason." (People v Superior Court (Alvarez) (1997) 14 Cal. 4th 968, 977-978.)

California Rules of Court, rule 410 states as follows:

"GENERAL OBJECTIVES OF SENTENCING INCLUDE: [P] (a) Protecting society. [P] (b) Punishing the defendant. [P] © Encouraging the defendant to lead a law abiding life in the future and deterring him from future offenses. [P] (d) Deterring others from criminal conduct by demonstrating its consequences. [P] (e) Preventing the defendant from committing new crimes by isolating him for the period of incarceration. [P] (f) Securing restitution for the victims of crime. [P] (g) Achieving uniformity in sentencing. [P] Because in some instances these objectives

may suggest inconsistent dispositions, the sentencing judge shall consider which objectives are of primary importance in the particular case. [P] The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case."

Here, an evaluation of the factors set forth in Alvarez militates strongly against reducing defendant's conviction for violation of Penal Code section 422 to a misdemeanor pursuant to Penal Code section 17(b). First, the nature and circumstances of the offense are extremely serious. Despite the flurry of "declarations" submitted by defense counsel prior to the plea to massage the case, the victim, Brown's, version of the events was essentially corroborated by the three codefendants. (1) Defendant admitted to threatening to kill the victim, Brown, in his guilty plea; (2) codefendant Rigsby admitted striking Brown in his police interview; and (3) codefendant Henderson admitted handling a handgun, which codefendant Rigsby told police Henderson had pointed at Brown in his police interview.

Second, defendant makes absolutely *no* showing that he has any "appreciation of" the gravity of the offense. If he has an appreciation of anything based on this case, it is an appreciation of the leniency of the justice system. Rather than going to prison for threatening Brown and having him kidnaped as he probably should have by rights, defendant pleaded guilty to only one offense. Then, instead of serving his sixty day sentence in jail, defendant's attorney first went back to the court after the plea secured the court's permission for defendant to do a work program in lieu of jail, then somehow was able to do voluntary community service instead of CALTRANS work. Indeed, defendant's only "attitude toward the offense" seems to be one of denial and avoidance of the consequences of his conduct.

Third, reducing the conviction to a misdemeanor would, in the People's view, hardly serve the objectives of sentencing set forth in California Rule of Court 4.410. It would not ensure that defendant was appropriately punished. It would not encourage defendant to lead a law abiding life and deter him from future misconduct. To the contrary, it would seem to condone his conduct and send him a signal that he was somehow justified in his felonious conduct. It would hardly deter others from criminal conduct by demonstrating its consequences. In summary, the defendant is simply not deserving of a reduced charge.

CONCLUSION

For the foregoing reasons, the People respectfully request that the court deny defendant motions to reduce the felony conviction to a misdemeanor pursuant to Penal Code section 17(b) and then dismiss it pursuant to Penal Code section 1203.4.

Dated this 6th day of December, 2005.

Tony Rackauckas, District Attorney County of Orange, State of California

KEVIN J. HASKINS Senior Deputy District Attorney