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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 102

ANTHONY LAGANO,

Respondent.

20 Eagle Street
Albany, New York
November 17, 2022

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Our next appeal is
2 number 102, People v. Anthony Lagano.

3 MR. LITSKY: Good afternoon. Appellant
4 respectfully req - - - requests three minutes for rebuttal.
5 Thank you.

6 ACTING CHIEF JUDGE CANNATARO: You have three
7 minutes.

8 MR. LITSKY: May it please the court and counsel,
9 my name is Thomas Litsky, appearing for Appellant.

10 This is a straightforward legal sufficiency case.
11 Viewing the facts in a light most favorable to the
12 prosecution, the question is whether there is a valid line
13 of reasoning and permissible inferences from which a
14 rational factfinder could have found the elements of
15 harassment in the second degree beyond a reasonable doubt.

16 As the court is aware, to establish second degree
17 harassment requires that the People are required to prove
18 that the Defendant threatened to strike, shove, or
19 otherwise subject another person to physical contact and
20 Defendant did so with intent to harass, annoy, or alarm.
21 And intent may be inferred from the proven facts and
22 consideration of the circumstances surrounding the
23 Defendant's conduct, or in this case, his statements.

24 In this case, Defendant Lagano, known to carry a
25 firearm, told the complainant that he would shoot the



1 complainant's children in the head, and kill the
2 complainant. The statements are not disputed. They were
3 recorded by the complainant, and the complainant testified
4 about them at trial.

5 ACTING CHIEF JUDGE CANNATARO: It's arguably not
6 an imminent threat. Is - - - is that of any significance
7 to the legal analysis?

8 MR. LITSKY: Oh, I - - - I - - - I would say that
9 it is imminent if there had been threats previously,
10 although not fleshed out in the record what the subject of
11 those other threats were. But in this instance, he
12 threatened to shoot the - - -

13 ACTING CHIEF JUDGE CANNATARO: Well, that would
14 make it a credible threat, and I didn't say it wasn't
15 credible. I'm saying, you know, they weren't together when
16 this happened, and there was no timeframe put on when those
17 things were going to happen. And I'm just wondering if you
18 think that even factors in - - - to the analysis.

19 MR. LITSKY: It - - - it's certainly, it's one of
20 the factors to be considered, and here the fact that the
21 Defendant was known to carry a gun, and had threatened to
22 use that gun to shoot the complainant's children is
23 relevant. And also, that he knew where she lived. They
24 were in a relationship. This is not some isolated stranger
25 talking - - -



1 JUDGE TROUTMAN: Didn't he show - - - didn't he
2 show up when she was talking to another police officer at
3 one point, at her home, in the middle of the night?

4 MR. LITSKY: He - - - he - - - he did - - - there
5 is tes - - -

6 JUDGE TROUTMAN: And he drove - - -

7 MR. LITSKY: - - - yes, he - - - yes, Your Honor.
8 There is testimony in the record that the Defendant drove
9 by the complainant's house. She saw his vehicle, and they
10 spoke at - - - at - - - at that - - - that point on that
11 evening.

12 JUDGE TROUTMAN: So is it your argument that you
13 take all the facts into consideration in determining
14 whether it - - - this is in fact legally sufficient? The
15 facts that she knew, she knew he carried a gun, he was a
16 police officer, he knew where she lived, and he had shown
17 up, even unannounced.

18 MR. LITSKY: Yes, absolutely. You have to look
19 at all - - - all of the facts. Here, the Appellate Term
20 found that this was not a genuine threat of physical - - -
21 oh, I'm sorry, the Appellate Term recognized that genuine
22 threats of physical harm fall within the scope of the
23 statute. But thought that here this evidence was
24 insufficient. But it's the People's considered position
25 that if the Defendant Lagano's statement in these

1 circumstances, coupled with the fact that he carried a gun,
2 does not constitute a genui - - - a genuine threat within
3 the scope of the second degree harassment statute that
4 we're not quite sure what - - - what does. This is - - -

5 JUDGE RIVERA: So just to be clear, is it each of
6 the - - - the - - - the actions, are they separate threats,
7 or is it all of them together, are what makes this ob - - -
8 an obvious threat of physical contact - - - conduct?

9 MR. LITSKY: I - - - I'm sorry, I don't - - - I
10 don't - - -

11 JUDGE RIVERA: Is it - - - is it the threat that
12 I'm going to kill you all. Is it the threat that I'm going
13 to firebomb you. Is it the threat that your children will
14 have a bullet in their head? Is it - - - is it all of
15 those together, or is any one of those individually, is
16 enough?

17 MR. LITSKY: I - - - I think in this case, all of
18 it in consideration is sufficient. And that's where the
19 court erred below. Now th - - -

20 JUDGE RIVERA: Let me ask you a different
21 question. What is the - - - the - - - is it a subjective
22 or objective standard? Is it that sh - - - she, the victim
23 here, has to perceive it as a threat, or that objectively
24 anyone would, regardless of whether or not she perceived it
25 as a threat? A real threat.



1 MR. LITSKY: I - - - I - - - I - - - the - - -
2 the better approach would be an objective approach.
3 Whether an ordinary, reasonable person familiar with the
4 context of the communication could believe the Defendant's
5 statement that he would kill the complainant and shoot her
6 children. But whatever standard applies, whether it's
7 objective, or subjective from the point of view of the
8 complainant who feared for her safety and for her children,
9 the - - - the People have es - - - established - - -

10 JUDGE RIVERA: Well, if she - - - if she
11 was - - - if she apprehended it as a - - - a real threat.
12 And these are very serious types of threats, right, the
13 firebombing, the shooting, the killing, all of this. Why -
14 - - why not call 911? Why not hang up and call 911?

15 MR. LITSKY: I - - - I - - - I can't speak to
16 having been the victim of such threats, but there is
17 evidence in the record that the victim herself was in
18 shock. Also, the victim had this recording, and she was
19 concerned that if she contacted the police at that moment,
20 at midnight, it - - - she was concerned with preservation
21 of the evidence. Because she knew it was significant, and
22 it established that what had - - - what had happened - - -
23 to her and it wasn't just her word.

24 JUDGE RIVERA: And is it perhaps more the weight
25 of the evidence, that really is what my question is about,



1 versus the sufficiency. That that goes more to how the
2 jury might weigh her credibility.

3 MR. LITSKY: Well, in - - - in this case - - -

4 JUDGE RIVERA: As opposed to the sufficiency.
5 Because that standard is in fav - - - favors the people,
6 right?

7 MR. LITSKY: I - - - I - - - all of the facts
8 have to be taken into account. And here the trier of fact,
9 Judge Rajeswari, heard the evidence, found - - - obviously,
10 found the complainant to be credible, and found the
11 Defendant guilty of the violation. Thank you.

12 ACTING CHIEF JUDGE CANNATARO: Thank you.

13 MR. BRILL: Good afternoon. May it please the
14 court, counsel, my name is Peter Brill, and I represent Mr.
15 Lagano.

16 I'd just like to initially push back a bit on the
17 assumption that the initial statement is, or was, in fact a
18 threat.

19 JUDGE RIVERA: Let me ask you, subjective or
20 objective test?

21 MR. BRILL: I - - - I think it has to be an
22 objective test.

23 JUDGE RIVERA: Um-hum.

24 MR. BRILL: Because each and every person's
25 mental state can't be part of a - - - a consistent analysis



1 of the statute.

2 JUDGE WILSON: So if she testified, I'm - - - I
3 wasn't afraid of him at all, I know him, he does this all
4 this time, it's not a big deal, you would still say if it
5 meets an objective standard, he can be prosecuted?

6 MR. BRILL: I would say that the - - - there's a
7 certain discretion with regard to the prosecution when that
8 - - - when that comes about. And there - - - that type of
9 statement might negate the proof, but I think from an
10 objective standard, you'd still have to be able to
11 prosecute a case like that. Because there may be other
12 factors that go into why a person would say that. But
13 here, Ms. Derasio (ph.) was very clearly - - - knew what
14 she was doing right at the beginning. She knew she was
15 taping this conversation. She'd had a specific intent as
16 to why she was taping this conversation. She wanted to get
17 Mr. Lagano in trouble with his job.

18 JUDGE RIVERA: The - - - the - - - but again,
19 doesn't that go to the credibility, that's not about the
20 sufficiency, unless you think she's completely incredible,
21 which I think that's a very hard argument to make here.

22 MR. BRILL: I don't think it's a question of
23 whether she was completely incredible. I think that
24 the - - - the sufficiency versus the - - - yeah,
25 that - - - the - - - it's - - - it's a fine point. But in



1 the situation where we have a fifty-four minute
2 conversation - - -

3 JUDGE RIVERA: Um-hum.

4 MR. BRILL: - - - and forty-six minutes of
5 those - - - that conversation is Ms. Derasio winding him
6 up, and pushing his buttons, knowing exactly what she wants
7 him to say so she can get him on tape, so she can take that
8 to his job, along with the argument that, well, he's in
9 uniform on Facebook, so I'm going to get you in trouble for
10 that also. I mean, it seemed like - - -

11 JUDGE SINGAS: Mr. Brill, don't those facts
12 actually give him more of a motive to harm her?

13 MR. BRILL: It - - - given the testimony on the
14 record of the nature of this relationship, this was a - - -
15 a volatile, verbal relationship, there was no actual
16 violence in this relationship. So there's no basis to
17 believe that he had any interest to harm her.

18 JUDGE WILSON: You don't need - - - you don't
19 need actual violence to prosecute harassment - - -

20 MR. BRILL: No, no, of course not. No, I - - - I
21 agree with that. But the - - - the point being that
22 the - - - the People's argument rests on the concept of he
23 has access to a gun, so therefore, it's more likely,
24 and - - -

25 JUDGE WILSON: Well, does that - - - does that



1 count at all, or we should disre - - - disregard it
2 entirely?

3 MR. BRILL: I think, it doesn't really count.
4 You know, we have one-and-a-half million families,
5 households in this country that, in this state, excuse me,
6 that have access to firearms, you know, if someone said I'm
7 going to stab you with a fork, we have probably a hundred
8 percent of households in this state that have access to a
9 fork.

10 JUDGE RIVERA: It - - - it - - - it does go
11 to - - - well, but he's a trained offer, trained in the use
12 of a gun.

13 MR. BRILL: Which would - - -

14 JUDGE RIVERA: Perhaps very well versed in how to
15 firebomb, but - - - but put that aside for one moment on
16 the firebombing. It - - - it does go to whether or not
17 the - - - and if - - - if we're using the objective
18 standard, any reasonable person, under the circumstances,
19 would take this as a real threat that someone who has a
20 gun, is trained in the use of the gun, is actually
21 threatening the use of the gun - - -

22 MR. BRILL: Respectfully, I - - -

23 JUDGE RIVERA: - - - on the children, at a
24 minimum - - - on the children at a minimum.

25 MR. BRILL: - - - Ju - - - Judge Rivera,



1 respectfully, I think it - - - it actually argues the
2 opposite. We have a responsible gun owner, who is trained
3 in the use of that gun, would know to use that gun
4 responsibly.

5 JUDGE RIVERA: Well, then he's also an - - - an
6 officer, who one would think is measured in any statement,
7 even in a phone call where, agreed, you know, emotions are
8 running high, to say something, I mean, I - - - if I - - -
9 if I understand the record, the next day he went to his
10 commanding officer and said, I - - -

11 MR. BRILL: I said some things I shouldn't have.

12 JUDGE RIVERA: - - - I sai - - - I did something
13 wrong.

14 MR. BRILL: Correct. No, absolutely. But I
15 think he knew - - -

16 JUDGE RIVERA: And in fact, contradicted what he
17 told her on the phone. On the phone, he said I never
18 threatened your kids, and then he says to the commanding
19 officer, I threatened to shoot the kids.

20 MR. BRILL: I don't think that's exactly what he
21 said to his commanding officer, but I think it's important
22 also to go back to my first point - - -

23 JUDGE TROUTMAN: But he was concerned that he
24 shouldn't have said what he said to her?

25 MR. BRILL: Because I - - - I think he was trying



1 to head her off at the pass, because he knew that she was
2 going to bring this recording and get him in trouble. So
3 he figured that he could minimize that by bringing it up
4 himself. But the threat that he allegedly made is not
5 really a threat, it's a contingent threat, right. Your
6 kids are going to get a bullet in the head, not, I am going
7 to shoot your kids. And I think that there's a significant
8 distinction there, as well. And I know you - - - you might
9 not agree with me.

10 JUDGE TROUTMAN: Th - - - that - - - that is
11 quite surprising. You - - - a - - - a parent, someone has
12 a gun, they carry guns, and they say I'm going to harm your
13 child. I - - - I don't know if one would argue it's a
14 contingency. The question would be, whether one would
15 believe that they're making a threat they intend to carry
16 out - - -

17 MR. BRILL: I agree.

18 JUDGE TROUTMAN: - - - or are capable of carrying
19 out.

20 MR. BRILL: Well, that part I agree with. I
21 think in a situation where he is making an observation, is
22 the way I would - - - would say it, that your kids are
23 going to get a bullet to the head, doesn't actually - - -

24 ACTING CHIEF JUDGE CANNATARO: So - - - so you're
25 saying because he didn't say, I'm going to put a bullet in



1 your kid's head, that's - - -

2 MR. BRILL: I think that if it doesn't - - -

3 ACTING CHIEF JUDGE CANNATARO: - - - that takes
4 it out of a threat?

5 MR. BRILL: - - - if it doesn't have a specific
6 intent in the statement, that doesn't necessarily mean that
7 he was intending to do it.

8 JUDGE WILSON: So it might just have been, your
9 kid, might be the accidental victim of a drive-by shooting?

10 MR. BRILL: I don't think necessarily that. But
11 based upon the entire record, given the relationship and
12 given his innate knowledge of her children, an observation
13 that this is the road your children are headed down, could
14 be just as reasonable, a takeaway, from that statement.

15 ACTING CHIEF JUDGE CANNATARO: Again, sounds a
16 lot like a jury question.

17 JUDGE GARCIA: And doesn't he say right after
18 that, I'll kill you all?

19 MR. BRILL: Well, it was about six minutes later,
20 he - - - because again, he's getting wound up, his - - -
21 pushing - - - his buttons are getting pushed, and all of a
22 sudden - - -

23 JUDGE GARCIA: Does that put shooting in the
24 head, in light of his later statement, and I'll kill you
25 all, to mean that he would kill the children, as well?



1 MR. BRILL: I think I'll firebomb you, I'll kill
2 yous all, is - - - is the statement.

3 JUDGE RIVERA: Firebomb your house.

4 JUDGE SINGAS: And doesn't the six minutes also
5 cut against your arguments, because it's not just him being
6 wound up, and then saying something like an outburst at one
7 second, that he regrets, he - - - he waits a full minute,
8 minute and-a-half, I mean, we have the tape, that we - - -
9 we can listen to it. And so he's thinking about it, and
10 then he again, makes - - - he continues with that threat.
11 So doesn't the - - - the timing of it - - -

12 MR. BRILL: Well, I think it cuts both ways,
13 because - - -

14 JUDGE SINGAS: - - - isn't it significant?

15 MR. BRILL: - - - again, a few minutes later,
16 when she directly confronts him. He completely denies it,
17 so if you're - - - if you're analyzing his - - -

18 JUDGE TROUTMAN: But again, the difference
19 between legal sufficiency and a jury determining beyond a
20 reasonable doubt, aren't they different?

21 MR. BRILL: Of course, they're different. But
22 the - - - the analysis here is whether, as Mr. Litsky said,
23 a - - - a reasonable jury could actually arrive at this,
24 was there clear and present danger as the prior case law in
25 our state has that this was actually something that - - -



1 that was going to be carried out.

2 JUDGE WILSON: Did you make a weight of the
3 evidence argument in the Appellate Term?

4 MR. BRILL: Forgive me, I can't recall at the
5 moment. I'm sorry.

6 So ultimately, we believe that this was actually
7 a - - - a scheme or a - - - a plan that was really carried
8 out by the complainant to get a specific result, the result
9 that what she did get - - -

10 JUDGE RIVERA: Well, let's say - - - let's say
11 you're right about that. Let - - - let's say it's obvious
12 on it's face, let's not even say it - - - that - - - it's a
13 question for the factfinder in this moment, or any
14 factfinder would have found it out that way. Does that
15 mean he didn't threaten her?

16 MR. BRILL: No, it's a - - - it's not a question
17 of - - -

18 JUDGE RIVERA: So she incites him, but he
19 actually goes th - - - makes this threat, he's somehow not
20 criminally liable for it?

21 MR. BRILL: It's not really a question, and I
22 take your point, but it's not really a question of whether
23 - - -

24 JUDGE RIVERA: It sounds like you're
25 basically - - -



1 MR. BRILL: - - - he made a threat.

2 JUDGE RIVERA: - - - saying she doesn't feel
3 threatened, as opposed to the objective standard, which is
4 what I asked you up front.

5 MR. BRILL: She a, doesn't feel threatened, but
6 the things that he said, our position is - - - are not
7 threats that are sufficient under our current law.

8 JUDGE SINGAS: So it's her fault?

9 MR. BRILL: No, not at all. But it's an argument
10 that she was a willing participant in, and she had her own
11 motives for recording that. And I think she fully intended
12 to get that type of outburst on tape so she could use it
13 against him. She was jealous of his other girlfriend. She
14 was angry at the way she was being treated.

15 JUDGE RIVERA: Again, all - - - all that may be
16 true. The point is, did this gentleman violate the law
17 with his statements, that's the point.

18 MR. BRILL: Agreed. And going back to - - -

19 JUDGE RIVERA: She may have done all those
20 things. I'm not going to argue that with you.

21 MR. BRILL: Right. But going back to Dietze and
22 - - - and other cases, is this is a clear and present
23 danger under the circumstances, no. He's on the phone.
24 He's far - - - he's not - - -

25 JUDGE RIVERA: Is that the standard, clear and



1 present danger?

2 MR. BRILL: That's one of the standards that has
3 been - - -

4 JUDGE RIVERA: On - - - on the section that had
5 to do with sufficiency it seemed the court was focused on
6 something else.

7 MR. BRILL: Not on the stand - - -

8 JUDGE RIVERA: And didn't - - - and didn't use
9 that standard, did it?

10 MR. BRILL: Not on the sufficiency standard,
11 correct.

12 JUDGE RIVERA: Correct. And that - - - isn't
13 that what we're worried about in this case? A different
14 provision, but we're also worried about the sufficiency.

15 MR. BRILL: Right.

16 JUDGE RIVERA: That's what we're trying to
17 resolve.

18 MR. BRILL: Understood.

19 JUDGE RIVERA: Yeah.

20 MR. BRILL: Thank you.

21 JUDGE RIVERA: Thank you.

22 MR. LITSKY: Very briefly. This case did not
23 involve a threat with a fork. This was someone that was
24 armed, had a gun, obviously knew how to use it, and had
25 threatened to kill the complainant. And it's not about



1 blaming someone who's in a contentious relationship, or the
2 end of a relationship.

3 JUDGE RIVERA: Does it matter whether or not he
4 actually intended to shoot her? Is that what the statute
5 requires - - -

6 MR. LITSKY: No.

7 JUDGE RIVERA: - - - or does it require that he
8 intended - - - he intended to alarm her?

9 MR. LITSKY: That - - - that's correct - - -
10 that's correct.

11 JUDGE RIVERA: Annoy her with this, as any - - -
12 as - - - as my fellow member of the bench has suggested,
13 someone who is a parent would be troubled by someone
14 suggesting that their children are going to get a bullet in
15 the head.

16 MR. LITSKY: Yes. And this is not a - - -
17 and - - - and the - - - and the remarks are obviously
18 serious in nature - - -

19 JUDGE RIVERA: Yes.

20 MR. LITSKY: - - - and she got the message. She
21 was afraid, and - - -

22 JUDGE RIVERA: They do appear to escalate during
23 the conversation.

24 MR. LITSKY: I'm sorry?

25 JUDGE RIVERA: They do appear to escalate during



1 the conversation, I think.

2 MR. LITSKY: Yes, but - - - but - - - but - - -

3 JUDGE RIVERA: Several members have pointed that
4 out, I think.

5 MR. LITSKY: - - - yes, it - - - it - - -
6 thankfully, it didn't escalate further than simply words
7 that were exchanged. And of course, the statute
8 specifically does not require that.

9 JUDGE RIVERA: But it is - - - I'm - - - I'm a
10 little unclear, when was he arrested, was it the following
11 day?

12 MR. LITSKY: It - - - it was that morning.
13 He - - - he - - - he came to work, and re - - - and I'm not
14 sure if he was to work that day, but he reported to a
15 supervisor at the precinct that he said something he should
16 not have said in a conversa - - - in a heated conversation,
17 he said that he would shoot this person's children. In sum
18 and substance, that's what - - - what the testimony was
19 from the captain. And he was arrested later that day,
20 following an investigation.

21 JUDGE RIVERA: There was an investigator who
22 spoke with the victim, yeah?

23 MR. LITSKY: Ye - - - there - - - there - - -
24 yes, there was a supervisor at the precinct who spoke to
25 him. His state - - -



1 JUDGE RIVERA: Well, I said, who spoke to her?
2 Didn't someone speak to her?

3 MR. LITSKY: Yes, there was a - - - yes, there
4 was - - - there was an investigation, and the complainant
5 was - - - did - - - wh - - - did speak to the police, and
6 he was charged. And this case is not Dietz, Dietz did not
7 involve a firearm, Dietz did not involve a threat to kill.
8 And the cases that Dietz relied on, Watts and Todaro, those
9 were expressly conditional or equivocal statements that
10 were made. Here, there's no way this was equivocal in
11 nature. It was very clear. And thankfully it ended with
12 the officer simply being charged - - -

13 JUDGE RIVERA: Um-hum.

14 MR. LITSKY: - - - and not something worse.

15 ACTING CHIEF JUDGE CANNATARO: Thank you,
16 counselor.

17 MR. LITSKY: Thank you very much.

18 We ask that you reverse the Appellate Term's
19 order.

20 ACTING CHIEF JUDGE CANNATARO: Thank you.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Kelly Vadeboncoeur, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Anthony Lagano, No. 102 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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