**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee*,<br><br>v.<br><br>STEVEN CURTIS BACHMEIER,<br>*Defendant-Appellant.* | No. 20-30019<br><br>D.C. No.<br>3:17-cr-00103-SLG-1<br><br>OPINION |

Appeal from the United States District Court
for the District of Alaska
Sharon L. Gleason, District Judge, Presiding

Argued and Submitted June 16, 2021
Anchorage, Alaska

Filed August 13, 2021

Before: Johnnie B. Rawlinson, Morgan Christen, and Ryan D. Nelson, Circuit Judges.

Opinion by Judge R. Nelson

## SUMMARY*

### Criminal Law

The panel affirmed a conviction under 18 U.S.C. § 876(c) for sending a communication that threatened the state judge assigned to the defendant's civil proceeding.

Section 876(c) prohibits an individual from (1) knowingly sending a communication through the mail that (2) is addressed to any other person and (3) contains any threat to kidnap any person or any threat to injure the person of the addressee or of another.

The defendant argued that the evidence did not sufficiently support a finding of the second element because his request was sent to the Kenai Courthouse, not a "person." The panel held that a rational jury could have found beyond a reasonable doubt that the judge, a natural person, was the addressee.

The defendant argued that the jury instructions were erroneous because they allowed the jury to convict based on the defendant's knowledge of the threat rather than his subjective intent to threaten. The district court relied on Ninth Circuit Model Criminal Jury Instruction 8.47A. The panel noted that case law makes clear that a subjective intent to threaten is the required mental state, not, as Instruction 8.47A allows, mere knowledge that the communication would be viewed as a threat. The panel held that the jury

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

instructions were therefore erroneous. Noting that the subjective-intent-to-threaten element was uncontested, and that the evidence overwhelmingly supports a finding that the defendant subjectively intended to threaten, the panel concluded that the instructional error was harmless beyond a reasonable doubt.

## COUNSEL

David Hammerstad (argued), Law Office of David Hammerstad, Seattle, Washington, for Defendant-Appellant.

Stephen L. Corso (argued), Assistant United States Attorney; Bryan Schroder, United States Attorney; United States Attorney's Office, Anchorage, Alaska; for Plaintiff-Appellee.

## OPINION

R. NELSON, Circuit Judge:

Steven Bachmeier appeals his conviction under 18 U.S.C. § 876(c) for sending a communication that threatened the state judge assigned to his civil proceeding. He argues: (1) the evidence submitted does not support his § 876(c) conviction, and (2) the jury instructions incorrectly stated § 876(c)'s mens rea requirement. We conclude that the evidence supports his convictions. And though a jury instruction was erroneous, that error was harmless beyond a reasonable doubt. We therefore affirm.

I

Over a decade ago, Bachmeier was convicted of various state crimes not relevant here. Judge Anna Moran oversaw those proceedings. During one telephonic hearing, Bachmeier grew belligerent and repeatedly called Judge Moran offensive names. After Judge Moran warned him to stop, Bachmeier became more inflamed and yelled a graphic and specific threat to gravely harm Judge Moran's family. At that point, Judge Moran muted Bachmeier and contacted judicial services, and later hearings proceeded without further outbursts. Bachmeier remains in state custody and is serving the rest of his sentence. This first threat looms as an important backdrop to Bachmeier's current § 876(c) conviction.

Seven years later, Bachmeier filed a pro se name change petition in the Superior Court in Kenai, Alaska ("Kenai Courthouse") while still in state custody. Per Alaska court procedure, the petition was randomly assigned to a Superior Court judge to rule on and oversee any motions filed with the petition—in this case, Judge Moran. In prior proceedings, Bachmeier sought and obtained judicial reassignments when Judge Moran was assigned to his case. But this time the reassignment request deadline passed before Bachmeier learned of Judge Moran's assignment.

Bachmeier mailed the following request to the Kenai Courthouse, which ultimately led to his § 876(c) conviction:

> Am requesting to cancel this proceeding. I never got a notice of judicial assignment. I would of struck Moran from this case as I have told her in the past Im going to kill her family which I still entend to do. Therefore she cannot be impartial. I will refile and this

> court will give me notice of judicial assignment, or els.

Bachmeier's request included a case name and number, and the clerk's office forwarded it to Judge Moran's chambers without reviewing its substance. When Judge Moran received the request, she was horrified at his statement that he still intended to carry out a death threat made almost a decade earlier.

The federal government indicted Bachmeier under 18 U.S.C. § 876(c) for mailing a threatening communication. Bachmeier moved to dismiss, arguing his request was addressed to the Kenai Courthouse, not a natural person as § 876(c) requires. The district court denied that motion and the subsequent motion to reconsider, and the case went to trial. At trial Bachmeier moved for acquittal after the government's case-in-chief on the same grounds. The district court deferred ruling on that motion until after the jury returned its verdict. Bachmeier requested that the jury be instructed that, to convict, it was required to find that "Bachmeier subjectively intended to threaten" Judge Moran. The district court rejected that proposed instruction, instead instructing the jury to find either that Bachmeier "intended to communicate a threat in the document, or acted with knowledge that the document would be viewed as a threat." The jury returned a guilty verdict, the district court denied Bachmeier's motion to acquit, and Bachmeier appealed his conviction.

## II

Section 876(c) prohibits an individual from (1) "knowingly" sending a communication through the mail that (2) is "addressed to any other person" and (3) "contain[s] any threat to kidnap any person or any threat

to injure the person of the addressee or of another." 18 U.S.C. § 876(c). Bachmeier argues that the evidence did not sufficiently support a finding of the second element because his request was sent to the Kenai Courthouse, not a "person." *See id.* Bachmeier also contends the jury instructions were erroneous because they allowed the jury to convict based on Bachmeier's knowledge of the threat rather than his subjective intent to threaten. Exercising our jurisdiction under 28 U.S.C. § 1291, we address both challenges in turn.

A

We review challenges to the sufficiency of evidence de novo. *United States v. Keyser*, 704 F.3d 631, 640 (9th Cir. 2012). "Evidence is sufficient if, viewing it in the light most favorable to the prosecution, any rational jury could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (cleaned up). Here, a rational jury could have found that § 876(c)'s "addressed to" element was satisfied.

To be convicted under § 876(c), the threatening communication must be "addressed to any other person." 18 U.S.C. § 876(c). The term "person" means a "natural person," not a non-natural entity. *United States v. Havelock*, 664 F.3d 1284, 1292–93 (9th Cir. 2012) (en banc). Thus, addressing a communication to non-natural entities like newspapers and websites, with no threat aimed at a natural person, is not enough to convict a defendant under § 876(c). *Id.* at 1296. But to determine the addressee, we are not limited to the address block on a package, parcel, or envelope. Rather, we look holistically at "the directions on the outside of the envelope or packaging, the salutation line, if any, and the contents of the communication." *Id.* The addressee can also be generally, rather than specifically,

identified. For example, it was enough in *Keyser* to send threatening letters to McDonald's and Starbucks managers without identifying the managers by name. 704 F.3d at 641. The managerial positions were always held by natural persons, so the letters adequately satisfied § 876(c)'s broad requirement that a letter be "addressed to any other person." *Id.*

Here, a rational jury could conclude that Bachmeier's request was addressed to a natural person. The request's envelope included only "Kenai Court House, 125 trading Bay Dr, Kenai AK 99641." But the Kenai Courthouse's walls and windows were not the addressee; someone inside was the intended recipient. Unlike in *Havelock*, though Bachmeier's request does not have a salutation line, its contents identify the addressee. The request spoke to the person responsible for deciding whether to dismiss his name change proceeding. And as that request had to be resolved by a natural person, not a computer or other non-natural entity, Bachmeier's request is most reasonably read as being addressed to the natural person who oversaw his petition. In short, Bachmeier's challenge fails because a rational jury could have found beyond a reasonable doubt that Judge Moran was the addressee. She was the person responsible for reviewing and ruling on Bachmeier's request. Only Judge Moran had authority to rule on Bachmeier's request as the assigned judge. Notably, the clerk who processed the request did not read or even remember the threat because it was not her job to read or rule on it.[1]

[1] We acknowledge that Bachmeier's request refers to Judge Moran in the third person, suggesting that she was not the intended recipient or addressee. But Bachmeier's potential misunderstanding as to who would review his request does not excuse the fact that he "knowingly"

B

Moving to Bachmeier's second challenge, we "review de novo whether the district court's jury instructions misstated or omitted an element of the charged offense." *United States v. Chi Mak*, 683 F.3d 1126, 1133 (9th Cir. 2012) (citation omitted). Prejudicial error occurs only "when, looking to the instructions as a whole, the substance of the applicable law was not fairly and correctly covered." *Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001) (cleaned up). Here, although the jury instruction failed to correctly explain § 876(c)'s mens rea element, that error was harmless beyond a reasonable doubt.

1

To reiterate, § 876(c) criminalizes "knowingly" mailing a communication that "contain[s] any threat to kidnap any person or any threat to injure the person of the addressee or of another." 18 U.S.C. § 876(c). Other provisions in § 876 criminalize actions "with intent to extort," but subsection (c) contains no such language. *Compare id.* § 876(b) & (d), *with id.* § 876(c). Thus, at first glance, § 876(c) may seem to punish any individual who knowingly sends a threat in the mail even if he or she had no intent to threaten. But case law has fleshed out this element and merits clarification of our court's precedent surrounding § 876(c)'s mens rea requirement. Initially, we added to § 876(c)'s statutory elements and "inferred . . . a general intent to threaten [a]s an essential element of the crime." *United States v. LeVision*, 418 F.2d 624, 626 (9th Cir. 1969). Several years later, we described § 876(c)'s requirements without

addressed his letter to the natural person who oversaw his name change petition, namely Judge Moran. *See* 18 U.S.C. § 876(c).

reference to an intent to threaten. *United States v. Sirhan*, 504 F.2d 818, 819 (9th Cir. 1974) (per curiam) ("First, the defendant must have written and mailed a letter (or other communication) containing a threat to injure another person. Secondly, he must have knowingly caused the letter to be deposited in the mails."). After that, we reaffirmed an intent-to-threaten element in § 876(c) as "a showing of specific intent" to threaten. *United States v. Twine*, 853 F.2d 676, 679–80 (9th Cir. 1988). And shortly thereafter, we explained that "[t]he only proof of specific intent required to support a conviction under 18 U.S.C. § 876 is that the defendant knowingly deposits a threatening letter in the mails, *not that he intended* or was able to carry out the threat." *United States v. Davis*, 876 F.2d 71, 73 (9th Cir. 1989) (per curiam) (emphasis added) (citation omitted).

The Supreme Court's decision in *Virginia v. Black*, 538 U.S. 343 (2003), held that a state can punish threatening speech only if "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359. In other words, the First Amendment allows criminalizing threats only if the speaker intended to make "true threats." *Id.* Applying this principle, we held that "a conviction under any threat statute that criminalizes pure speech" requires finding "sufficient evidence that the speech at issue constitutes a 'true threat.'" *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011). We concluded, "the subjective test set forth in *Black* must be read into all statutes that criminalize pure speech," *id.*, and "the speaker must

subjectively intend to threaten" to be convicted under § 876(c), *Keyser*, 704 F.3d at 638.[2]

The district court instructed the jury to find that either Bachmeier "intended to communicate a threat" or "acted with knowledge that the document would be viewed as a threat." Given a § 876(c) conviction requires showing a subjective intent to threaten, the jury instructions were erroneous.

The government argues that only a showing of general intent was required under *Elonis v. United States*, 575 U.S. 723 (2015). But *Elonis* does not stand for that proposition. True, the Supreme Court stated in passing that either intent or knowledge could satisfy § 875(c)'s mens rea requirements. *See id.* at 740; *see also Twine*, 853 F.2d at 679–80 (noting § 876(c) and § 875(c) are treated almost identically). Yet, the Court's analysis and holding did not specify which mental state was required—it simply held that negligence was insufficient. *Id.* at 741; *see also id.* at 742 (Alito, J., concurring) (criticizing the majority for "refus[ing] to explain what type of intent was necessary" and leaving attorneys and judges to guess). *Elonis* also did not reach the First Amendment issues presented here. *See id.* at 740.

The district court relied on our model criminal jury instructions, which in turn draw from *Elonis*. *See* Ninth Circuit Model Criminal Jury Instruction 8.47A, cmt. (2015). But the "use of a model jury instruction does not preclude a

[2] Because *Black* and our later holdings in *Bagdasarian* and *Keyser* agree with *Twine*, our precedents requiring anything less than a subjective intent to threaten have been effectively abrogated. *See generally, e.g.*, *Davis*, 876 F.2d 71.

finding of error." *Dang v. Cross*, 422 F.3d 800, 805 (9th Cir. 2005) (cleaned up). And case law makes clear that a subjective intent to threaten is the required mental state, not, as Instruction 8.47A allows, mere "knowledge that the [communication] would be viewed as a threat." Thus, the mens rea portion of Instruction 8.47A relying on *Elonis* is incorrect, and it was error to give such an instruction.

2

Ordinarily, "an error in criminal jury instruction requires reversal." *United States v. Pierre*, 254 F.3d 872, 877 (9th Cir. 2001) (alteration and citation omitted). That said, if "there is no reasonable possibility that the error materially affected the verdict," we need not reverse. *Id.* Instead, we will affirm if convinced "beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Neder v. United Sates*, 527 U.S. 1, 17 (1999). We must reverse if the omitted or erroneous element was contested, or if evidence was raised "sufficient to support a contrary finding." *See id.* at 19. Since this analysis essentially places us in the jury's shoes, we "conduct a thorough examination of the record" to ensure a defendant's right to trial by jury is safeguarded. *Id.* Considering the full record here, the district court's error was harmless beyond a reasonable doubt.

Bachmeier requested a specific-intent-to-threaten instruction. But he did not contest the evidence supporting his specific intent to threaten. He only presented evidence that his request was not addressed to Judge Moran. Thus, the subjective intent-to-threaten element was uncontested.

The evidence also overwhelmingly supports a finding that Bachmeier subjectively intended to threaten. At trial,

the evidence mostly focused on to whom the letter was addressed; court and prison policies; and the reaction of Judge Moran, her family, and her clerks. But Bachmeier's request itself plainly demonstrates his intent to threaten. Rather than only explaining his past threat, Bachmeier *reiterated* his original threat as something he still intended to do. What is more, Bachmeier gave an ultimatum—"I will refile and this court will give me notice of judicial assignment, or els." This letter leaves no room for doubt that Bachmeier subjectively intended to make a true threat. Though his request's primary purpose was to dismiss his name change petition, he sought to achieve that purpose by means of threat. We are persuaded beyond a reasonable doubt that, absent the district court's instructional error, the jury would have reached the same verdict. *See Neder*, 527 U.S. at 16.

## III

We hold that the evidence presented at trial sufficiently supported a finding that Bachmeier's request was addressed to a natural person. Though the district court erred in instructing the jury, that error was harmless beyond a reasonable doubt.

**AFFIRMED.**