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OPINION	:	No. 79-818
	:	
of	:	<u>January 4, 1980</u>
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SUBJECT: THREATS—Communicating the words “I am going to kill the governor” to the governor or a member of his staff may violate Penal Code sections 71, 653m, 518, 240, or 422 if all of the elements of any such crimes are present. A threat is not “directly communicated” to a public officer where it is received by a secretary or other employee of the officer and turned over to police without reaching the public officer.

The Honorable John V. Briggs, Senator, Thirty-Fifth District, has requested an opinion on the following questions:

1. Is it a crime under state law for a person to communicate the words, “I am going to kill the governor,” to the governor or a member of his staff?
2. Under Penal Code section 71, is a threat to a public officer “directly communicated” to the officer where it is communicated by telephone or letter and received by a secretary or other employee of the officer and turned over to the police?

CONCLUSIONS

1. Communicating the words “I am going to kill the governor” to the governor or a member of his staff may violate Penal Code sections 71, 653m, 518, 240, or 422 if all of the elements of any such crimes are present.

2. Under Penal Code section 71, a threat is not “directly communicated” to a public officer where it is received by a secretary or other employee of the officer and turned over to police without reaching the public officer.

ANALYSIS

No conduct is criminal in California unless a statute or ordinance makes such conduct a crime. (Pen. Code, § 6; *In re James M.* (1973) 9 Cal. 3d 517, 521–522.)¹ California has no statute specifically proscribing threats against the Governor such as 18 U.S.C. § 871,² which makes it a Federal crime to threaten harm to the President.

Your first question is not limited to the use of the words as a threat. The words, “I am going to kill the governor,” may be communicated to the governor or a member of his staff in the form of quoting another, in obvious jest, or in a manner otherwise making it clear that the person communicating the words is not expressing any threat to the governor.

If the words are, however, communicated as a threat, a violation of section 71 may occur if all of its elements are present. Section 71 provides:

“Every person who, with intent to cause, attempts to cause, or causes, any officer or employee of any public or private educational institution or any public officer or employee to do, or refrain from doing, any act in the

¹ Unless otherwise indicated, all section references are to the Penal Code.

² Federal law makes it a crime to threaten to kill the President. 18 U.S.C. § 871 provides: in part:

“(a) Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.”

performance of his duties, by means of a threat, directly communicated to such person, to inflict an unlawful injury upon any person or property, and it reasonably appears to the recipient of the threat that such threat could be carried out, is guilty of a public offense punishable as follows:

“(1) Upon a first conviction, such person is punishable by a fine not exceeding five thousand dollars (\$5,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment.

“(2) If such person has been previously convicted of a violation of this section, such previous conviction shall be charged in the accusatory pleading, and if such previous conviction is found to be true by the jury, upon a jury trial, or by the court, upon a court trial, or is admitted by the defendant, he is punishable by imprisonment in the state prison.

“As used in this section, ‘directly communicated’ includes, but is not limited to, a communication to the recipient of the threat by telephone, telegraph, or letter.”

The elements of this offense are (1) a threat to inflict an unlawful injury upon any person or property; (2) direct communication of the threat to a public officer or employee; (3) the intent to influence the performance of the officer or employee’s official duties; and (4) the apparent ability to carry out the threat. Under this section, a threat to kill the governor, made to the governor or a member of his staff would be a criminally punishable act only if all the elements of the crime are present.

We find no statute in California which criminally punishes the mere communication of the words “I am going to kill the governor” as a threat, or otherwise³ except section 653m, subdivision (a), which provides that it is a misdemeanor to threaten a person by telephone with the intent to annoy. Section 653m, subdivision (a) provides:

“Every person who with intent to annoy telephones another and . . . addresses to such other person any threat to inflict injury to the person or property of the person addressed or any member of his family, is guilty of a misdemeanor”

³ Certainly any statute which would proscribe the mere communication of the words, “I am going to kill the governor” must meet constitutional scrutiny with regard to the right of free speech. (See *Watts v. United States* (1969) 394 U.S. 705, 707–708; see also *Brandenburg v. Ohio* (1969) 395 U.S. 444, 447.)

If a telephone call threatening the governor with the requisite interest to annoy, were intercepted by a staff member and not communicated to the governor, a violation of section 653m would not be completed, but the separate offense of an attempt to commit that crime would be committed, punishable under section 664.

The communication of the words, “I am going to kill the governor” as a threat, to the governor or a member of his staff may, in combination with other conduct, constitute other crimes such as assault (§ 240 *et seq.*), extortion (§ 518 *et seq.*), and terrorist threats (§ 422 *et seq.*). Of course, all of the elements of a particular offense must be present for the threat to be criminally punishable as a completed crime. With the latter two crimes, a threat which does not fulfill all of the elements of the crime may constitute an attempt punishable under section 664. However, there is no crime of attempted assault. (*In re James M.*, *supra.*)

In your second question you ask whether a threat to inflict unlawful injury is “directly communicated” to a public officer under section 71, where it is communicated by telephone or letter which is received by an employee of the officer, and turned over to police without reaching the officer.

Section 71 defines “directly communicated” to include “a communication to the recipient of the threat by telephone, telegraph or letter.” We have found no cases construing this language.

The primary consideration in construing a statute is to ascertain the legislative intent. (*Select Base Materials v. Board of Equal.* (1959) 51 Cal. 2d 640, 645.) In ascertaining the Legislature’s intent, we must give effect to each word and phrase of a statute and interpret words according to their ordinary meaning. (*Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230.)

The last sentence of section 71, quoted above, demonstrates that the Legislature did not intend the words “directly communicated” to limit the methods by which a threat may be conveyed to the public officer. Consequently, if a threat intended for a public officer were contained in a letter which was delivered to the officer’s secretary, who in turn delivered it to the officer, the threat would be directly communicated.

By use of the word “directly” we believe the Legislature intended that the threat must be communicated to the officer by the method of communication selected by the person making the threat and delivered in a manner normally utilized by that method of communication. We conclude the Legislature used the word “directly” intending it to have its ordinary meaning and thus require that a threat must reach the public officer personally to be “directly communicated” to the officer within the meaning of section 71.
