ROP v. Bells, 13 ROP 216 (Tr. Div. 2005)
REPUBLIC OF PALAU,
Plaintiff,

v.

ANTONIO BELLS and MARINO BELLS,
Defendants.

CRIMINAL CASE NOS. 05-129 and 05-151

Supreme Court, Trial Division
Republic of Palau

Decided: October 27, 2005
⊥217
LARRY W. MILLER, Associate Justice:

These two consolidated cases are before the Court following a two-day trial and the presentation of written and oral closing arguments. This opinion constitutes the Court's findings of fact and conclusions of law.

I. Forgery

Both defendants are charged with the crime of forgery, 17 PNC § 1501, which is defined as follows:

> Every person who shall unlawfully and falsely make or materially alter a writing or document of apparent legal weight and authenticity, with intent thereby to defraud, shall be guilty of forgery, and upon conviction thereof shall be imprisoned for a period of not more than five years.

Marino Bells is accused in Count 1 of the Information against him of forging a court ⊥218 order dated March 31, 2005, and bearing the purported signature of former Justice Michelsen. Antonio Bells is accused in Count 1 of the Information against him of forging a second Court order dated April 7, 2005, and also purportedly signed by Justice Michelsen. He is charged in Count 2 with assisting his brother Marino in creating the document dated March 31.

Both defendants have stipulated that the documents they are accused of creating do not bear the genuine signature of Justice Michelsen and are thus forgeries at least to that extent. There is proof beyond a reasonable doubt as well that each actually created the texts of the respective orders as well. Marino Bells admitted that he had created the March 31 "order" in a discussion with the Special Prosecutor testified to by the Special Prosecutor's investigator, Bradley Kumangai, and in Marino's own trial testimony. Antonio Bells stated that he had created the April 7 document during a telephone conversation testified to by Assistant Attorney General Christopher Boeder. There is no reason, given the testimony regarding phone calls back

and forth and messages left, to doubt the authenticity of this information, *i.e.*, that it was really Antonio Bells on the phone; nor is there reason to doubt Mr. Boeder's account of what was said, particularly as it was based on detailed and sometimes verbatim contemporaneous notes. Finally, although Marino Bells took umbrage at the suggestion that he needed his brother's help in preparing the March 31 order, Antonio Bells told Boeder that he had helped Marino draft it and there is no reason to believe he lied about that.[1]

The Court further finds that both purported orders were "of apparent legal weight and authenticity" within the meaning of the forgery statute. That, as stipulated, neither order bore the court's "filed" stamp is immaterial. As the Special Prosecutor noted in argument, a file stamp is not a *sine qua non* of an effective legal order, and, even if it were, "the mere fact that an instrument is legally unenforceable is not a defense to a prosecution for forgery so long as upon its face it may have the effect to defraud one who acts upon it as genuine." *People v. Jones*, 210 Cal. App. 2d 805, 808 (1962). The question is not whether the orders were so convincing that even a lawyer would have been fooled, but whether they might deceive "a person of reasonable and ordinary observation or business capacity." 36 Am. Jur. 2d *Forgery* § 25 (2001). "The law should protect, in this respect, the members of the community who may be ignorant or gullible as well as those who are cautious and aware of the legal requirements of the genuine instrument." *Jones*, 210 Cal. App. 2d at 809.

Finally, as far as the elements of the crime are concerned, the evidence was sufficient to prove that each order was made with the intent to defraud. Three points are worth making here. First, the question is one of intent, not results. "It is not necessary that the person receiving the forged instrument be actually defrauded to complete the crime." *People v. Conefare* , 102 P.3d 302, 307 (Colo. ⊥219 2004); *Forgery, supra*, § 31. Thus, it is irrelevant that the recipient of the orders, defendants' brother, Robert Bells, eventually figured out that they were not real. Second, an intent to defraud "is simply a purpose to use a false writing as if it were genuine in order to gain some advantage, generally at someone else's expense," and need not have a monetary element. *State v. May* , 93 Idaho 343, 461 P.2d 126, 128 (1969). Rather, it is sufficient that the forged document was intended to induce its recipient to act in some way that he would not otherwise have done. The April 7 order clearly meets this standard. It was intended to convince Robert Bells that he was legally obligated to leave Palau. The March 31 order is perhaps less drastic in that it directs Robert Bells to stay away from certain named individuals. But it is nevertheless an attempt to deceive Robert Bells - with the explicit threat that the "Police will be sent to arrest you and put you in Jail" - into believing that legal restrictions had been imposed upon his liberty that did not really exist.

Third, it is no defense to say, as does one of the defendants, that while they may have intended to fool their brother, "their true intent was to help the community." It is true, as certain cases say, that "good faith" is a complete defense to a crime requiring fraudulent intent. But

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[1] At one point in closing argument, Antonio Bells' counsel alluded to the prohibition in Article IV, Section 7, of the Constitution against "a person be[ing] convicted or punished solely on the basis of a confession without corroborating evidence." The Court has interpreted that provision in the past to mean that a person should not be convicted where his confession is the only evidence that a crime was committed. That is plainly not the case here.

"good faith" within the meaning of those cases is the antithesis of an "intent to defraud." That is, a defendant who acts in good faith is one who did not intend to defraud anyone. It is not, as defendants would have it, that one acted to defraud someone for a good reason.

For all of these reasons, the Court concludes that the government has proven beyond a reasonable doubt all of the elements of Count 1 of both informations and of Count 2 of the information against Antonio Bells. The Court thus turns to the question whether the defense of "necessity", which defendants have raised,[2] applies and excuses their actions here. "The defense of necessity applies when the defendant is faced with this choice of two evils: he may either do something which violates the literal terms of the criminal law and thus produce some harm, or not do it and so produce a greater harm. If, however, there is open to him a third alternative, which will cause less harm than will be caused by violating the law, he is not justified in violating the law." LaFave & Scott, *Criminal Law* § 5.4(d)(5) at p.448 (2d ed. 1986). "The defense of necessity does not arise from a 'choice' of several courses of action, it is instead based on a real emergency." *United States v. Seward*, 687 F.2d 1270, 1276 (10th Cir. 1982). Defendants assert that it was necessary for them to commit the crime of forgery to prevent the greater harm of their brother Robert causing serious injury to someone. The government responds that defendants were not truly faced with a "real emergency" and that, even if they were, they had a "third alternative" - of seeking assistance from police. The Court agrees.

⊥220 Although different courts have set out various multi-factor tests for considering the applicability of the necessity defense, the Court believes that they are all substantially the same, and that a relatively succinct statement of the defense is set forth in recent cases cited both by defendants and the government. According to those cases, for the defense to apply, it must be determined "(1) that defendant was faced with a choice of evils and chose the lesser evil, (2) that he acted to prevent imminent harm, (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided, and (4) that there were no other legal alternatives to violating the law." *United States v. Cervantes-Flores*, 421 F.3d 825 (9th Cir. 2005); *accord, United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1991).

The Court will assume that factors (1) and (3) are satisfied in the circumstances of this case. The harm caused by the creation of false court orders - at least those of the type at issue here - is surely less than that caused by the infliction of serious bodily harm on an individual or individuals. Likewise, the Court will credit defendant Marino Bells' testimony, based on his brother's quiescent reaction to a prior (real) court order issued by Judge Mokoll, that he reasonably anticipated that giving the forged court orders to Robert Bells would induce him to cease his threatening behavior. The Court must note, however, that from the testimony of Officer Julio Ringang and former Senator Harry Fritz, it appears that Robert's receipt of the false court

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[2]Although some of the cases cited by the parties place the burden of establishing the defense on defendants, the majority rule - and more in line with Palau's treatment of other criminal defenses - is that while the burden of production is always on the defendant, the burden of persuasion is on the government. 2 P. Robinson, *Criminal Law Defenses* § 124(a) (1984); *see Sadao v. ROP*, 5 ROP Intrm. 250, 256 (1996) ("where evidence of heat of passion is presented in a murder trial, the government must prove beyond a reasonable doubt that the homicide was not committed in the heat of passion in response to adequate provocation in order to convict for murder"); *Polloi v. ROP*, 9 ROP 186, 190 (2002) (same).

orders, and his learning of their falseness - an outcome that defendants could also have "reasonably anticipated" - actually led to an incident in which Robert was said to have menaced Sure-Save staff and customers with a knife protruding from a piece of PVC pipe.

Factors (2) and (4), however, are each problematic. Although the timing of some of the incidents cited at trial was unclear, [3] the Court takes it as established that, in the months between his return from Guam in late 2004 and the creation of the fake court orders in late March and early April 2005, Robert Bells had been involved in several incidents of unprovoked threatening behavior toward various people. In particular, the Court credits the testimony of Nancy Wong, Marino Bells' wife, that Robert had twice in a single day come into Winchell's donut shop while she was working there and asked for her uncle, Victor Isimang, the second time telling her that the reason he was looking for him was because he wanted to beat him up. Marino testified that his wife had informed him of these events and that they provided the immediate impetus to the creation of the fake orders.

All that having been said, however, the Court is not convinced that there was a danger of imminent harm or, more importantly, that defendants were themselves convinced that such a dangers existed. An imminent harm is one that is about to happen - "the possibility of harm at an indeterminate date in the future is insufficient to satisfy ... the necessity defense." *State v. Howley*, 128 Idaho 874, 920 P.2d 391, 396 (1996). Here, the flip side of the evidence about Robert Bells' threatening behavior was that he had never followed through on any threats. The Court ⊥221 does not mean to suggest that defendants should have ignored the threats and done nothing. It was altogether likely that Robert would continue threatening and disturbing people and it was surely possible that someday he might actually harm someone. The Court finds it telling, however, that the choice Marino made to deal with what he described as a walking "time bomb" was not to go to the police nor even to rush to Victor Isimang's house and warn him that he was in danger, but to sit down at his computer and begin preparing a document that wasn't even delivered to Robert until as much as a week later.

Even were the Court to accept that defendants were acting in the face of an "imminent harm," another thing that both Marino and Antonio Bells failed to do, of course, was call the police. One of the cases cited by defendants makes clear that that is "[t]he normal and appropriate response to a perceived criminal emergency . . .," *People v. Miceli*, 104 Cal. App. 4th 256, 267 (2002), and that the failure to do so negates any showing that there was "no adequate alternative to breaking the law." [4] *Id.* Defendants cite the case for the further proposition that

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[3] As often happens with the Court (though more often as to the passage of years rather than months), many witnesses appeared to have a compressed sense of the passage of time, testifying that events which defendants argued had taken place back in March or earlier had happened just a month or two ago. Given the names that appear on the March 31 order, the Court is persuaded that at least some of those incidents occurred in the time frame urged by defendants.

[4] As was recounted at trial, Antonio Bells did go to see the Director of the Bureau of Public Safety, but it was to ask him to deliver the orders to Robert, not to report any present or imminent emergency. That fact does not assist, and if anything undercuts, the argument that defendants had no alternative to breaking the law, nor does it provide them with any other defense. Even were the Court to find that the Director was aware that the orders were criminal forgeries (which he denied, saying he was provided with sealed envelopes), defendants have no plausible claim of entrapment and it is simply untrue

"[t]he failure to report an emergency to the proper authorities does not bar a necessity defense if the evidence shows a history of futile complaints which makes any result from such complaints illusory." *Id.* at 268 (internal quotation omitted). But the discussion that follows makes clear that even a history of complaints does not suffice unless it can be shown that another call relating the specific circumstances constituting the imminent emergency would itself have been futile. *Id.*[5]

Here, there had been a single encounter with the police which, though frustrating, did not portend that the police would refuse to act in the face of a true emergency. According to Marino Bells, following an incident in which Robert Bells had menaced Mitsuo Klewei with a piece of rebar at T-Dock, he was visited by a police officer who inquired whether there was any existing document from the Division of Behavior Health regarding Robert Bells that would justify taking him into custody and who appeared unwilling to act on the basis of the T-Dock incident itself. As indicated by its questioning of the police officers at trial and as discussed below, the Court shares with defendants some puzzlement at this reluctance to act. But it is too big a leap from that one encounter to a reasonable belief on defendants' part that a specific request for ⊥222 assistance to the police reporting what they believed to be a true imminent threat - "We believe that our brother is about to injure Victor Isimang" - would have fallen on deaf ears.

For all of these reasons, the Court believes that the necessity defense is not available to defendants, and they are accordingly guilty of the crime of forgery.

II. Conspiracy

Both defendants are also charged with conspiracy, 17 PNC § 901, which is defined in pertinent part as follows:

> If two or more persons conspire . . . to commit any crime against the Republic, . . . and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be guilty of conspiracy, and upon conviction thereof shall be imprisoned for a period of not more than five years, or fined not more than $2,000.00, or both . . . .

"A criminal conspiracy is an agreement between two or more persons to accomplish together a criminal or on unlawful act, . . . accompanied by an overt act in furtherance of the agreement . . ." 16 Am. Jur. 2d *Conspiracy* § 2 (1998). Antonio Bells is charged with having "conspired with Marino Bells to prepare a false judicial order and assisted in its preparation . . ." Marino Bells is, in turn, charged with having "conspired with Antonio Bells to prepare a false

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that the Director had "authority to sanction conduct that would violate the laws."

[5] "[Defendant] claimed he had repeatedly reported to the police his concerns about Linton's drug dealing and Brenda's reversion to methamphetamine, without result. But he did not claim he had ever reported to the police that Brenda was missing, in Linton's company, and at risk of her life from methamphetamine supplied by him - the circumstances constituting the alleged emergency on July 4, 1999. The evidence did not show that that complaint, if made, would have been futile, or that defendant had reasonable grounds to think it would have been." *Id.*

judicial order and assisted in its preparation . . . ." Neither the government nor the defendants spent much, if any, time discussing the conspiracy charge in closing argument, and the court will be similarly brief.

The overt act requirement, as the Court understands it, is meant to ensure that only conspiracies that are not wholly inchoate, but are accompanied by some action, will be punished. Here, the Court's finding that each defendant actually committed the substantiative offense that was the object of the alleged conspiracy is obviously enough to satisfy this element of the offense. *Conspiracy, supra*, § 15 ("the overt act may be the substantive offense alleged to be the purpose of the conspiracy").

"[T]he unlawful agreement is the essential element which is the gist or essence of the crime of conspiracy ..." *Id.* § 10. Such an agreement "need not be formal or express, but may be a tacit understanding [and it] may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the alleged conspirators." *Id.* "The existence of a criminal conspiracy may be proven by circumstantial as well as by direct evidence if it affords a logical and reasonable inference as to the ultimate facts sought to be proved." *Id.* § 41. "Where it is shown that the defendants by their acts pursued the same object, one performing one part and the other performing another part with a view to its attainment, the jury will be justified in concluding that they were engaged in a conspiracy to effect that object." *Id.*

Here, it has been proven that each defendant prepared a forged court order, that the April 7 order prepared by Antonio Bells refers to the March 31 order prepared by Marino Bells, and that Antonio Bells provided those orders to the Director of the Bureau of Public Safety for delivery to their brother Robert. While there is little direct evidence of ⊥223 an agreement between the defendants, it is obvious that their actions were coordinated, and it is "logical and reasonable" to infer that such coordination could not have occurred absent some discussion and agreement between them to create and deliver the forged orders. They are accordingly both found guilty of the conspiracy charges against them.[6]

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Two concluding thoughts. First, as suggested above, the Court is uncertain what to make of the police inaction, [7] at least initially, [8] in this case. It would be inappropriate to say anything

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[6] The Court assumes that defendants intended that the defenses they asserted with respect to forgery should also be considered in connection with the conspiracy charges. Assuming that is so, they are rejected for the reasons set forth above. If there was no necessity to commit the crime of forgery, neither was there any necessity to conspire to do so.

[7] The Court should say police inaction and action, since it also questions the police's role in the distribution of the forged court orders. *See* n4. *supra.* Even assuming that this assistance was unwitting, as the Director testified, this is at least the second time that volunteer work by the Bureau of Public Safety has led to its involvement in the commission of a crime. *See Ongidobel v. ROP* , 9 ROP 63 (2002) (concerning the preparation of a false police report for insurance purposes).

[8] In fairness, the Court should note that, according to the testimony, just after the forged orders came to light, the police did finally take Robert into custody and he was committed for 72 hours. What prompted these actions at that point in time is not clear from the record.

about Robert Bells, who is not a party to this case, and who is entitled to a full hearing and/or trial concerning any allegations that may be made against him. But the Court is not going out on a limb to say that when the police receive a credible report that a person has pursued someone with a piece of rebar threatening to strike him (or chased someone else out of his house so that he could move in himself), there is at least a strong possibility that he has committed the crime of assault, 17 PNC § 501,[9] and is subject to arrest, either to be charged with a crime, [10] or for further investigation.[11] Where numerous such incidents have been reported, and there appears to be a need for "emergency action to help [a] mentally ill person[] who ha[s] become a danger to [himself] or others," *see* 34 PNC § 552, there may be "probable cause for the necessity of 72-hours detention for purposes of evaluation, care and treatment of mental illness." *See id.* § 554(b). These may not be easy judgments to make, and the police may well want to ask assistance from the Attorney General's officer or Behavioral Health, but any suggestion that there is ⊥224 nothing to be done until someone is actually hurt is simply wrong.

Second, the Court does not question defendants' frustration in dealing with an aggressive and possibly ill older brother, and does not doubt that insofar as their ultimate goal was to stop their brother from harassing other people, they acted with good intentions. Those are matters that may be raised at sentencing. *See esp. Criminal Law, supra* , § 5.4(a) at p.443 ("Where the [necessity] defense does not apply, and yet the defendants did act with [a] good motive . . ., his good motive, though not a defense, may be considered in mitigation of punishment for the crime committed."). But the question before the Court now is whether the means they chose to achieve their intentions violated the law. For all of the reasons set forth above, the Court concludes that they did, and finds them guilty of the crimes with which they have been charged.

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[9] "Every person who shall unlawfully offer or attempt, with force or violence, to strike, beat, wound, or to do bodily harm to another, shall be guilty of assault, and upon conviction thereof shall be imprisoned for a period of not more than six months, or fined not more than $100.00, or both.

[10] *See* 18 PNC § 211(c) ("When a criminal offense has been committed, and a policeman has reasonable ground to believe that the person to be arrested has committed it, such policeman may arrest the person without a warrant.").

[11] *See* 18 PNC § 211(d) ("Policemen, even in cases where it is not certain that a criminal offense has been committed, may, without a warrant, arrest and detain for examination persons who may be found under such circumstances as justify a reasonable suspicion that they have committed or intend to commit a felony.").