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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. LOUIS GERALD MERRIKEN, Defendant and Appellant.	2d Crim. No.B288839 (Super. Ct. No. 2017005246) (Ventura County)

Piqued when his mother and stepfather served him with an eviction notice, Louis Gerald Merriken threatened to torch the family home, poured gasoline in the garage and battered his mother's car. He was convicted by a jury of making criminal threats; attempting to burn a structure; and vandalism with over $400 in damage. (Pen. Code, §§ 422, 455, 594, subd. (b)(1).)[1] Substantial evidence supports the verdict. The court properly imposed consecutive sentences, totaling four years and four

[1] Unlabeled statutory references are to the Penal Code.

months, for distinct offenses committed with multiple intents and victims. We affirm.

FACTS

In February 2017, 33-year-old appellant was living in the garage attached to the Camarillo home of his mother and stepfather, Pil and Cecil Dennis. Appellant described family dynamics as "rocky" and contentious. The Dennises gave him a 30-day notice to vacate.

Irate, appellant confronted Mr. Dennis in the garage, saying in a loud voice "it was going to cost [Mr. Dennis] a lot of money to get rid of him." He also said, "'I'm going to burn your fucking house down with you fucking in it.'" Appellant looked hostile when he made the threat.

Appellant had acted enraged before, but Mr. Dennis testified that this "was different. This time he had an eviction notice," so there was no reason for appellant to apologize for his behavior and hope to remain at home. It seemed possible that appellant could carry out the threat. Mr. Dennis drove away, to avoid having the situation "escalate any further or to any physical manner."

Soon afterward, Mrs. Dennis was discomfited to hear appellant cussing in the garage, a "click, click sound" in the vicinity of the water heater and banging noises. She demonstrated the "click" sound by raising her fist and moving her thumb up and down. When she peeped into the garage, she saw appellant on a ladder unplugging the garage door apparatus, with a gas can nearby. She smelled gasoline and felt scared and in danger.

Within five minutes after driving away, Mr. Dennis received a call from his wife asking him to return. She said that

appellant was making banging noises, and when she looked into the garage, she smelled gas and saw appellant pulling out electrical wiring. Mr. Dennis advised his wife, who was upset and crying, to lock the door and call the police.

Mr. Dennis hurried home in a state of fear and panic because "it seemed like [appellant] was acting out what he had threatened." He was "absolutely" afraid that appellant would burn down the house. On arrival, Mr. Dennis telephoned his wife, and had her leave the house and get into his car. Moments later, appellant walked out of the garage. He approached the car, with both fists clenched in front of his chest, looking straight at Mr. Dennis with a hostile expression. Mr. Dennis reversed out of the driveway and began backing down the street. He hoped police would come soon, fearing that appellant would hit his car or assault him and his wife.

Police arrived. Appellant was arrested and found to possess a lighter. Officers detected a strong odor from a puddle of gasoline next to the water heater in the garage; a gas can was nearby. They saw a damaged car in the garage. It had major dents, a scratch extending its entire length and a wrecked side mirror; the repairs cost $3,442.81.

Mr. Dennis keeps the gas can in a garden shed to fuel his lawn mower. A safety feature requires users to depress a nozzle before pouring, preventing gas from escaping if the can falls over or is kicked. After police arrived, Mr. Dennis found the can, missing about half a gallon, in the garage next to the hot water heater. Gas had been poured on the floor. Neither the can nor the gas puddle was in the garage when he drove away after his confrontation with appellant. He saw a ladder where he usually parks his car, and the garage door wiring was pulled down. A

crescent wrench from his toolbox was lying in the garage. A Ventura County fire investigator testified that electrical devices can cause a parting arc when unplugged. Appellant was carrying a lighter when he was arrested and gas vapors are readily ignitable.

Appellant testified. He was "disappointed" when served with the eviction notice. He told Mr. Dennis, "Fuck you, you enslaving asshole," and went back to sleep. He later decided to "do a good deed" and repair the lawn mower. After taking the mower apart, he realized it needed gas and poured some in. He cut his hand. In anger, he kicked the gas can from the garden shed through the side door of the garage and all the way across, spilling when it hit the wall. Concerned about the risk of fire from the spilled gasoline, he unplugged the water heater and the garage door opener. He used a metal bar to "beat" and damage his mother's car.

Appellant denied trying to burn the house. He had a lighter but denied clicking it to try and light the gasoline. He claimed his mother heard him yelling at and kicking the lawn mower, but "it could have been me hitting the car, too." As he left the house he said, "I should have lit the fire," but it was an empty threat. He walked down the street and was promptly arrested.

In rebuttal, the investigating officer testified that the fully assembled lawn mower was in the garden shed. The gas can appellant claimed to have kicked 15-20 yards was not dented or scuffed. When detained, appellant denied being evicted or damaging his mother's car. He did not say anything about fixing the lawn mower, hurting his hand or kicking the gas can.

DISCUSSION

1. Sufficiency of the Evidence

Appellant contends that his conviction for attempting to burn a structure is not supported by substantial evidence. Our role in this inquiry is limited to determining whether, on the entire record, a rational jury could find appellant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We view the evidence in the light most favorable to the judgment, presume the existence of every fact the jury could reasonably deduce from the evidence, and do not reweigh witness credibility. (*Ibid.*)

Appellant was charged with "[t]he placing or distributing of any flammable, explosive or combustible material or substance, or any device in or about any structure . . . in an arrangement or preparation with intent to eventually willfully and maliciously set fire to or burn same . . . [which] shall, for the purposes of this act constitute an attempt to burn such structure . . . ." (§ 455, subd. (b).) This Court has described section 455 as prohibiting "acts preliminary to and in furtherance of" an attempted arson. (*People v. Flores* (1995) 39 Cal.App.4th 1811, 1814.) The specific conduct proscribed by section 455 governs over the general attempt statute, section 664. (*People v. Alberts* (1995) 32 Cal.App.4th 1424, 1428.)

We are guided by a case from Division Eight of this District, *People v. Carrasco* (2008) 163 Cal.App.4th 978. In *Carrasco*, the defendant walked into a sheriff's station and made hostile statements. He put his hand inside his duffle bag and was tackled by deputies, who thought he might be reaching for a weapon. The bag contained a gas can and gas soaked cloth, and Carrasco had a lighter. He said, "'I should have done it.'" The

court found substantial evidence to support Carrasco's conviction for violating section 455. Carrasco had "'the means and the components necessary to initiate a fire'" and did a direct and unequivocal act toward willfully and maliciously attempting to burn a structure. (*Carrasco* at pp. 981-984.)

Carrasco applies here. Appellant does not dispute that he had the components to start a fire. Pouring gas in the garage was a direct and unequivocal act toward burning a structure. He voiced his intent before and after pouring gasoline in the garage.

The record shows that appellant threatened to burn the house after being served with an eviction notice, and vandalized his mother's car in a show of ill will. He then retrieved a gas can from the garden shed, overrode the safety feature by depressing the nozzle and poured half a gallon of gas in the garage near the water heater, knowing that gas vapors can ignite a pilot light or electrical devices. Pouring gas near sources of ignition was preliminary to and in furtherance of an attempted arson.

Mrs. Dennis heard a "click click sound" coming from the garage. Appellant admittedly had a cigarette lighter. The jury could reasonably infer that "click click" was the sound of appellant flicking the lighter, as shown by Mrs. Dennis's in-court gesture of a fist with her thumb moving up and down. Appellant's intent is evidenced by his own words. Before pouring gasoline he said, "I'm going to burn your . . . house down" and after pouring gasoline he said, "I should have lit the fire."

Appellant's animosity toward the victims, coupled with his acts, prove an appreciable fragment of the crime. (*People v. Archibald* (1958) 164 Cal.App.2d 629, 631-633 [defendant's animosity toward his former employer, coupled with putting a gasoline-soaked cloth and crumpled paper at the business, while

carrying matches, supported an inference that he acted with an intent to burn the business].) It is immaterial that appellant did not actually light the fire. "The hazards of fire are considered so great that it is necessary to deter not only the crime itself but attempts accompanied by the use of flammable, explosive or combustible materials whether successful or not." (*People v. Cecil* (1982) 127 Cal.App.3d 769, 777.) Substantial evidence supports the jury's verdict that appellant poured gasoline in preparation for eventually willfully and maliciously burning a structure. (§ 455.)

2. Appellant's Sentence

Appellant was sentenced consecutively for his crimes. He asserts that his sentence for making criminal threats should be stayed pursuant to section 654 because it is based on the same conduct as his conviction for attempting to burn a structure, i.e., "pouring gasoline on the garage floor."

Section 654 bars multiple punishment if the defendant engages in an indivisible course of conduct and harbored a single intent. (*People v. Mesa* (2012) 54 Cal.4th 191, 199.) Multiple criminal objectives are a predicate for multiple punishment if they involve, even arguably, multiple acts, but not if "the multiple convictions at issue were indisputably based upon a single act." (*Ibid.*) The court must determine if "some action the defendant is charged with having taken separately completes the actus reus for each of the relevant criminal offenses." (*People v. Corpening* (2016) 2 Cal.5th 307, 313.)

Appellant's crimes are not based on a single act. His first crime was saying to Mr. Dennis, in a hostile manner, "I'm going to burn your fucking house down with you fucking in it." A criminal threat is completed when a person threatens to commit

a crime that will result in death or great bodily injury, with the intent that the statement be taken as a threat, under circumstances that convey a gravity of purpose and prospect of immediate execution endangering the victim or his immediate family. (§ 422, subd. (a).) After Mr. Dennis departed, appellant carried a gas can from a shed to the garage, unlatched the safety nozzle, poured gas on the floor, meddled with the water heater and electrical devices and flicked a lighter, in preparation to burn a structure. (§ 455.) "[M]ultiple crimes are not one transaction where the defendant had a chance to reflect between offenses and each offense created a new risk of harm." (*People v. Felix* (2001) 92 Cal.App.4th 905, 915.)

The intent required for appellant's crimes is distinct: the first was to instill fear in a listener, the other was placing a flammable substance with the intent to burn a structure. The crimes had different victims. Mr. Dennis was the intended victim of the criminal threat. Mrs. Dennis did not hear the criminal threat, but was the intended victim of the second crime because she was at home when appellant poured the gas and prepared to ignite it, creating a new risk of harm. Appellant had time to reflect (and vandalize his mother's car) between offenses.

The issue was addressed in *People v. Solis* (2001) 90 Cal.App.4th 1002. Solis left messages on the victims' answering machine saying, "'I'm going to kill you. I'm going to kill fucking everybody. Your whole place is going to burn to hell. Die.'" The victims feared for their safety and left home; when they returned, their home was on fire. (*Id.* at p. 1009.) Convicted of making terrorist threats and arson, Solis argued that he could not receive consecutive sentences for both crimes because he had one objective. The court found no merit to the claim. The crimes

were divisible in time and "had distinct objectives: in making the terrorist threats, the defendant intended to frighten whereas in committing arson an hour later the defendant intended to burn." (*Id.* at pp. 1021-1022.) The reasoning in *Solis* applies here.

DISPOSITION

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Michael S. Lief, Judge

Superior Court County of Ventura

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