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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RUI JUN SUN, Defendant and Appellant.	B280902 (Los Angeles County Super. Ct. No. GA 098323)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Villalobos, Judge. Affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Charles S. Lee and Abtin Amir, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Rui Jun Sun of one count of assault with a deadly weapon and one count of criminal threats. (Pen. Code, §§ 245, subd. (a)(1), 422.)[1] The jury also found that Sun used a deadly weapon in commission of the criminal threats offense. (§ 12022, subd. (b)(1).) Sun contends that the trial court erred by failing to instruct the jury sua sponte on the lesser included offense of attempted criminal threats. We reject this contention and affirm the judgment.

STATEMENT OF FACTS

This case arises from an incident on March 5, 2016, in which Sun attacked and threatened a woman named Y.W. in a home he shared with her. For almost nine years, Sun subleased a room in Y.W.'s home; for eight of those years, Y.W. was Sun's government-appointed caretaker. On March 5, Y.W. was renting rooms in her home to four other tenants in addition to Sun. Early in their relationship, Y.W. considered dating Sun, but nothing came of it.

Sun suffers from bipolar 1 disorder, a psychiatric condition with symptoms that include manic episodes. Prior to the incident, Sun had not taken his prescribed medication for at least one week and possibly as long as two and a half months. Y.W. was unaware that Sun had not been taking his medication.

Around 6:00 a.m. on March 5, Y.W. awoke in the living room of her home and heard Sun screaming and yelling from his bedroom. Sun wanted to know who had drawn the curtains and turned off the lights in the bathroom. Sun continued to yell and do odd things throughout the day. He spread rice throughout Y.W.'s backyard and flooded it using the sprinklers. In the early afternoon, Sun gave Y.W. $100 and asked her to purchase food for him.

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[1] All further statutory references are to the Penal Code unless noted otherwise.

Before Y.W. left home to buy food, she again heard Sun screaming and yelling about the lights. Y.W. was alone in the living room, and the other tenants were in their bedrooms. Sun yelled that anyone who left his or her room or turned off the lights in the kitchen or bathroom would be killed. He came into the living room where Y.W. was alone and said, "I will kill you first." Sun tried to push Y.W., but she evaded him by stepping back against a wall. Sun approached Y.W., raised his fist, and said, "Oh, you want to call the police, I will kill you first." Y.W. testified that, although she believed at that moment that Sun held a small fruit knife in his raised fist, she was mistaken about that. Y.W. acknowledged, however, that she had told the 911 operator and deputy sheriff who responded to the call that Sun had used a knife to threaten her life.

Y.W. feared that Sun would kill or hurt her, and she was afraid for the safety of the other tenants. Y.W. pleaded with Sun saying, "I won't call the police," and "I won't leave." Sun backed away, began pacing in the living room, and continued yelling. When Sun walked away from the front door, Y.W. left the house, got into her car, and sat there. She testified that she "was scared and [didn't] know what to do." After waiting about 30 minutes in the car, Y.W. dialed 911 because she was "afraid something might happen inside."

Henry Shue was among the Los Angeles County Sheriff's Department deputies who responded to the call. Shue spoke with Y.W. approximately 45 minutes after the incident and noticed that Y.W. was scared and that her hands were shaking. Shue testified that Y.W.'s voice became louder as she repeatedly described how Sun had held the knife and threatened to kill her.

Shue and other deputies then entered Y.W.'s home to arrest Sun. Just before deputies took him into custody, Sun was pacing back and forth in his bedroom, and he appeared "belligerent" and "very angry." Deputies recovered a folding knife with a two-inch

blade from the home. At trial, Y.W. confirmed that Sun owned the knife and often carried it with him.

Shue spoke with Y.W. again after Sun's arrest. Y.W. was still very upset, and she provided him with a written statement in her native Mandarin Chinese. Y.W. initially refused to write the statement; she explained that she "was in extreme fear" and did not "want to write anything wrong." In her statement, Y.W. wrote that Sun had pushed her up against the wall with a knife in his hand and prevented her from leaving. She also wrote that she had "begged [Sun] and promised him that [she] wouldn't leave the house."

At trial, Y.W. testified that, at the time Sun threatened to kill her, "I was in fear. . . . I took care of him for eight years and that was the only time that I was ever in fear of him, that was the only single time." "For eight years he never hurt anyone. He never struck anybody. Never hit anybody." When Sun approached Y.W. and said that he would kill her, she was afraid that he would hurt her and "even more afraid that he was going to hurt somebody else because I had several students over there, and I was in fear for them."

During her testimony, Y.W. repeatedly asserted that she must have been mistaken about Sun having the knife in his hand when he threatened her. She admitted that it was only after she had seen Sun getting arrested that she told the deputies that she was mistaken about Sun having a knife. She testified that she felt responsible for Sun's arrest because she had failed to ensure that Sun took his medication.

About four months after the incident, Dr. Catherine Scarf, a board-certified psychologist, conducted a psychological evaluation on Sun. She diagnosed him with bipolar 1 disorder and testified that his behavior on March 5, 2016, was consistent with a "manic episode" which could have affected his ability to form a specific intent to commit a crime.

DISCUSSION

I. Instruction on Lesser Included Offense

A trial court errs when it fails to instruct, sua sponte, on all lesser included offenses which find substantial support in the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162, abrogated on another ground by amendment of section 189.) " 'Such instructions are required only where there is "substantial evidence" from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense.' " (*People v. Whalen* (2013) 56 Cal.4th 1, 68, disapproved on another ground by *People v. Romero and Self* (2015) 62 Cal.4th 1, 44; *People v. Breverman, supra*, 19 Cal.4th at p. 162 [" 'Substantial evidence' . . . is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed."]; *People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8 [defining substantial evidence as "evidence that a reasonable jury could find persuasive"].) We review the trial court's alleged failure to charge a lesser-included offense under the "independent or de novo standard of review." (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

To convict a defendant of criminal threats, the prosecution must prove that the threat "cause[d the victim] reasonably to be in sustained fear for his or her own safety" or for the safety of "any other person who regularly resides in the household." (§ 422, subds. (a) & (b).) "A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1140.) Sustained fear means "a period of time that extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.)

An attempted criminal threat is a lesser-included offense of criminal threat. (See *People v. Toledo* (2001) 26 Cal.4th 221,

226, 230-232.) Unlike a criminal threat, an attempted criminal threat "does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear." (*Id.* at p. 231.)

Sun contends that the trial court erred by failing to instruct the jury on attempted criminal threats. He argues that there was substantial evidence from which a reasonable jury could conclude that Y.W. did not experience sustained fear for her safety as a consequence of his threats. We are not persuaded. The trial court was under no duty to instruct the jury on attempted criminal threats because there is not substantial evidence to establish that Y.W. felt only momentary or transitory fear for her safety and the safety of the other residents in her home.

Sun concedes that Y.W. briefly feared for her personal safety, but he contends that she felt no sustained fear because she did not believe that Sun would actually try to kill her. Sun does not support this argument with citation to the record, nor does our independent review reveal any evidence to support this conclusion. To the contrary, when asked at trial whether she believed that Sun "would kill [her] or hurt [her] with that knife," Sun responded, "Yes, that's what I thought." Y.W. repeatedly testified that, at the time of the threats, she believed Sun had a knife in his hand when he yelled, "I will kill you first," attempted to push her, and raised his fist at her.

Sun contends that Y.W. did not fear for her own safety, and "only had the police called because she was concerned for the safety of children who were in the house at the time." Even if this were true, it would not justify an instruction on attempted criminal threats. Under section 422, subdivisions (a) and (b), a defendant may be guilty of criminal threats not only if he puts the victim in "sustained fear for his or her own safety," but also the safety of "any other person who regularly resides in the

household." Nothing in the record would support a conclusion that Y.W. did not feel genuine fear for the safety of the other residents of the house. She testified that her fear did not dissipate when she left to go to her car; she called 911, at least in part, because of her continuing fear of "anything terrible happen[ing]."

Sun further argues that Y.W. was not in sustained fear because she knew Sun, knew of his psychiatric condition, and knew that he had not taken his psychiatric medication; therefore, she could control his outbursts. This is mere speculation and is not supported by the record. Y.W. testified that she was unaware at the time of the threats that Sun had not been taking his medication. In addition, after over eight years of living together, Y.W. had not seen Sun exhibit violent behavior. She testified that this "was the only time that I was ever in fear of him." "For eight years he never hurt anyone. He never struck anybody." Sun provides no reasoning or citation to the record to justify the assertion that Y.W. could control Sun's violent outbursts, or that this ability mitigated her fear. The psychiatric expert provided by Sun at trial gave no testimony regarding the ability of psychiatric medicine to immediately cure bipolar episodes, nor did the expert testify that familiarity with a patient would reduce that patient's violent tendencies. There is no other evidence that would have allowed a reasonable jury to find that Y.W. could have controlled the situation to lessen her fear.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.