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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. JOSE S. RODRIGUEZ, Defendant and Appellant.	2d Crim. No. B254654 (Super. Ct. No. KA101918) (Los Angeles County)

Jose S. Rodriguez appeals from the judgment following his conviction by jury of making criminal threats (Pen. Code,[1] § 422, subd. (a)); felony vandalism (§ 594, subd. (a)); and evading an officer with willful or wanton disregard (Veh. Code, § 2800.2, subd. (a)). Before trial, appellant pleaded no contest to driving with a blood alcohol level of 0.08% or higher (Veh. Code, § 23152, subd. (b)). In bifurcated proceedings, the trial court found true allegations that appellant had a prior third strike conviction and served a prior prison term (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(8); 667, subd. (a)(1) and (667.5, subd. (b)). The court sentenced him to state prison for nine years.

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

Appellant's focus is on the charge of criminal threats. He contends that the court erred in admitting hearsay statements made by the victim to investigating police officers. We conclude that since the victim did not testify, despite her availability, the admission of her statements recounting appellant's conduct violated his Sixth Amendment rights to confrontation and cross-examination. The court's error in doing so was, however, harmless. We also reject appellant's challenge to the sufficiency of the evidence to support the criminal threats, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2013, John Padilla (Padilla) lived in an apartment at 801 South Antonio Avenue. He testified that on Saturday evening, May 15, his son, Joey, and Darlene Fregoso were at the apartment watching television. Padilla heard "windows getting smashed" outside his apartment. Padilla further testified about his conversation with the man smashing the windows. Padilla asked the man why he was "busting those windows out." The man said something like, "you want some heat, G," or "Get back, G, or I'll light you up." Understanding that "heat" meant gun, and "G" meant somebody older, Padilla was concerned that bullets would start flying into his apartment, and he backed away.

While testifying at trial, Padilla did not remember everything about the May 15 incident. He testified that he spoke to Officer Ramirez after the incident, and told him everything he recalled. Ramirez testified that Padilla said he was asleep on May 15 until just before midnight, when he was awakened by someone yelling at Fregoso from the apartment courtyard. Padilla heard a man threaten to kill her and yell, "Bitch come out here, I know you're somewhere here."

Marc Vivas testified that he was in his apartment on Saturday evening, May 15. He went outside to check his truck and heard a crash. Right

after hearing it, Vivas saw a person walking toward a Camaro, while holding something like a pipe or a bat. The person, later identified as appellant, got into the Camaro and sped away.

Pomona Police Department Officer Alexander Slowikowski, who was patrolling the area, saw the Camaro speeding, with its lights off. Slowikowski activated the red lights on his patrol car and tried to stop the Camaro. Appellant kept speeding, and drove away hazardously. Slowikowski continued the pursuit, which ended with appellant's losing control of the Camaro. Appellant got out and Slowikowski arrested him. Slowikowski found a steel rod or pipe on the Camaro's passenger floorboard; it was about two feet long and weighed approximately five pounds. The pipe, the center console, and the passenger seat appeared to have blood on them.

Otto Gordillo, an employee of the Los Angeles County Homicide Bureau, testified that the Bureau's Inmate Telephone Monitoring System (ITMS), tracks, records, and preserves telephone conversations of county jail inmates. An inmate must enter his booking number to use the jail phone. On May 21, 2013, appellant called a man on a jail phone. Relevant portions of their conversation follow:

"[Friend]: She [Fregoso] told me that you were looking for her.

"[Appellant]: I know I fucked up fool, but yeah.

"[Friend]: I was looking at some messages you sent her where you said 'I'm looking for you, bitch. I'm gonna kill you.' [¶] . . . [¶]

"[Appellant]: I know. I fucked up fool, fuck."

Ramirez testified that he interviewed Padilla several months after appellant's arrest and played the tape of the above May 21 telephone conversation. Padilla identified appellant's voice as that of the suspect he confronted outside his apartment on May 15. When the prosecutor played the

tape at trial, Padilla testified that he did not recognize the voice. The court admitted a translated transcript of the tape at trial which identifies the caller (appellant) as "MV1" and the other speaker as "MV2." (Appellant and the other man used both Spanish and English during the call.)

Fregoso did not testify at trial. *Nonetheless, her* hearsay statement to Pomona Police Department Officer Zane Holmes *was* admitted over defense objection. At trial, when asked about Fregoso's statements, Padilla answered that he could not recall, or was not sure, or he denied that she made them. The foregoing factual background does not exclude Fregoso's statements.

DISCUSSION

Substantial Evidence Supports the Criminal Threats Conviction

Appellant contends that there is not substantial evidence that Fregoso suffered the sustained fear requisite to support the criminal threats conviction. Relying upon the evidence presented by the witnesses, and excluding Fregoso's statements, we conclude that substantial evidence supports the threats conviction.

On appeal, we review "'the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find [the elements of the crime beyond a reasonable doubt.'" (*People v. Bolden* (2002) 29 Cal.4th 515, 553.)

To prove a criminal threat in violation of section 422, the prosecution must prove "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat . . . was 'on its face and under the circumstances in which it [was]

made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]" (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) The "sustained fear" element of this offense is satisfied "where there is evidence that the victim's fear is more than fleeting, momentary or transitory. . . ." (*People v. Culbert* (2013) 218 Cal.App.4th 184, 190-191.) Fear may be "sustained," even if it lasts for a relatively brief period of time. When one believes he is about to die, a minute is longer than "momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.)

Appellant repeatedly yelled at Fregoso, loud enough to awaken Padilla. He smashed Fregoso's car windows with a long, heavy metal pipe and threatened to kill her. He threatened to direct some heat (a gun) at Padilla, and "light [him] up." Padilla feared that appellant would start shooting bullets into his apartment. After appellant drove away, and after the police stopped him, Holmes interviewed Fregoso. She was "visibly shaken, crying," and "up and down emotionally." Substantial evidence supports the jury's finding that Fregoso was in sustained fear for her safety, and that her fear was reasonable.

Fregoso's Statements

Fregoso testified at the preliminary hearing. When questioned about the events which occurred at Padilla's apartment on May 15, she claimed to remember "Nothing." She did not testify at trial. The prosecution conceded that her absence did not "satisfy the requirements for a witness to be declared unavailable as set forth in Evidence Code [section] 240." Over defense objection, the trial court admitted Fregoso's statements to Padilla and a police

officer. Appellant argues that her statements constituted inadmissible hearsay, as well as testimonial evidence that should have been excluded to protect his Sixth Amendment rights to confront and cross-examine witnesses. (*Crawford v. Washington* (2004) 541 U.S. 36.)

Pomona Police Department Officer Zane Holmes testified that he arrived at Padilla's apartment at 11:57 p.m. on May 15, after another police unit contacted appellant. Fregoso told him appellant had been to her friends' homes searching for her; he showed up at Padilla's building, and was phoning her throughout the day. Fregoso also told Holmes she heard appellant "walking around [the] apartment complex looking for her"; yelling, "Come outside, bitch"; and saying he would "smoke her ass." She said she "was scared, and [wanted] to go down, but [appellant] was known to carry a firearm [and that she feared] he [would] either harm her or kill her." She heard him smashing her car windows and saying, "you fuckin' bitch, I found you, come outside. I'm gonna fuck you up and your car." She told Holmes she heard appellant drive away, and explained that his car had "a very distinct muffler sound."

At trial, Padilla denied that Fregoso made statements to him regarding text messages or phone calls; or Padilla testified he could not recall or was unsure if she had done so. Officer Ramirez testified that he interviewed Padilla after the incident, and Padilla told him that on May 15, Fregoso told Padilla that appellant had sent her threatening text messages and phone calls.

The Trial Court Committed Harmless Error

by Admitting Testimonial Statements

Appellant contends that Fregoso's statements were testimonial, and the trial court violated his Sixth Amendment rights to confrontation and cross-examination by admitting them. We agree but conclude that their admission was harmless error.

The Sixth Amendment to the United States Constitution gives a criminal defendant the right to confront and cross-examine adverse witnesses. (*People v. Lopez* (2012) 55 Cal.4th 569, 573, 576.) The Sixth Amendment generally bars admission at trial of a testimonial out-of-court statement offered for its truth against a criminal defendant, unless the maker of the statement is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68; *Davis v. Washington* (2006) 547 U.S. 813, 821; *People v. Livingston* (2012) 53 Cal.4th 1145, 1158.) Here, Fregoso did not testify at trial, and the prosecution did not claim she was unavailable. Therefore, Officer Holmes' testimony regarding her statements was admissible only if the statements were nontestimonial. We independently review the question of whether that evidence was admitted in violation of the confrontation clause. (*People v. Seijas* (2005) 36 Cal.4th 291, 304.)

To be subject to the confrontation clause, the statements at issue must be "testimonial." (*People v. Cage* (2007) 40 Cal.4th 965, 969; *Davis v. Washington*, *supra*, 547 U.S. at p. 821.) "'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' [Citations.]" (*People v. Livingston*, *supra*, 53 Cal.4th at pp. 1158-1159; *Michigan v. Bryant* (2011) 362 U.S. 344, 356; *Davis v. Washington*, *supra*, at p. 822.)

In *Michigan v. Bryant*, *supra*, 562 U.S 344, 348, police found the mortally-wounded victim in a parking lot. His statements identifying the shooter

and describing the shooting location to police were not testimonial, because their primary purpose was to enable police to respond to an ongoing emergency. The *Bryant* court explained that such statements were also not sufficiently formal: they were made in an exposed, public area, in a disorganized fashion, before emergency medical services arrived. (*Id*. at pp. 366, 376.)

Our Supreme Court has identified six factors to consider when determining whether statements made in the course of police questioning were for the primary purpose of creating an out-of-court substitute for trial testimony that implicates the confrontation clause. Those factors are: "(1) an objective evaluation of the circumstances of the encounter and the statements and actions of the individuals involved in the encounter; (2) whether the statements were made during an ongoing emergency or under circumstances that reasonably appeared to present an emergency, or were obtained for purposes other than for use by the prosecution at trial; (3) whether any actual or perceived emergency presented an ongoing threat to first responders or the public; (4) the declarant's medical condition; (5) whether the focus of the interrogation had shifted from addressing an ongoing emergency to obtaining evidence for trial; and (6) the informality of the statement and the circumstances under which it was obtained." (*People v. Chism* (2014) 58 Cal.4th 1266, 1289, citing *People v. Blacksher* (2011) 52 Cal.4th 769, 813-814.)

In *People v. Chism*, *supra*, 58 Cal.4th 1266, the declarant, Miller, was sitting near a liquor store when he heard a gunshot and saw men run from the building. Miller entered the store and found the clerk unconscious and bleeding. When police officers arrived minutes later, Miller described the men to them. (*Id*. at pp. 1281, 1287-1288.) Miller was unavailable to testify at trial. The *Chism* court concluded that the admission of Miller's statements to police did not violate the confrontation clause. The court explained: "Miller appeared to be

very nervous and 'shaken up.' The circumstances of the encounter, which took place outside a store where a shooting had recently occurred, reveal that Miller and Officer Romero spoke to each other in order to deal with an ongoing emergency. *It was objectively reasonable for Officer Romero to believe the suspects, one of whom presumably was still armed with a gun, remained at large and posed an immediate threat to officers responding to the shooting and the public. . . . Miller's additional statements concerning his observations and descriptions of the suspects were made for the primary purpose of meeting an ongoing emergency* and not to produce evidence for use at a later trial. [Citations.]" (*Id.* at p. 1289, italics added.)

Unlike the nontestimonial statements in *People v. Chism*, *supra*, 58 Cal.4th 1266, Fregoso's statements were not made during an ongoing emergency. Rather, appellant had fled the scene, and before he questioned Fregoso, Officer Holmes knew appellant was with another police unit, at a separate location. Nor were Fregoso's statements necessary to obtain medical care, or protect her from appellant, while she was with Holmes at the apartment. Further, the record does not suggest the police needed her statements to stop an ongoing threat to first responders or the public. Her statements were primarily relevant to obtain evidence for a subsequent criminal prosecution. Under such circumstances, her statements were testimonial, and their admission violated appellant's Sixth Amendment rights. (*People v. Livingston*, *supra*, 53 Cal.4th at pp. 1158-1159.)

Although the trial court erred by admitting Fregoso's statements, its error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. (See *People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661 [*Chapman* harmless error standard applies to *Crawford* claims].) The jury would have convicted appellant absent the challenged statements, based upon other

evidence previously described, including appellant's taped telephone conversation in which he threatened to kill her.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Bruce F. Marrs, Judge

Superior Court County of Los Angeles

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