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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO CARLOS CORTEZ,

Defendant and Appellant.

B269505

Los Angeles County
Super. Ct. No. BA424075-
01

APPEAL from a judgment of the Superior Court of
Los Angeles County, Leslie A. Swain, Judge. Affirmed.

Erica Gambale, under appointment by the Court of Appeal,
for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters, Senior
Assistant Attorney General, Blythe J. Leszkay and David W.
Williams, Deputy Attorneys General, for Plaintiff and
Respondent.

INTRODUCTION

A jury convicted defendant Roberto Cortez of criminal threats, possession of a firearm by a felon, and simple assault. On appeal, defendant contends his criminal threats did not cause the victim to be in sustained fear for his safety, and the court erred by failing to instruct on the lesser-included offense of attempted criminal threats. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Charges

In a second amended information, the People charged defendant with assault with a firearm (Pen. Code,¹ § 245, subd. (a)(2) [count 1]), criminal threats (§ 422, subd. (a) [count 2]), and possession of a firearm by a felon (§ 29800, subd. (a)(1) [count 3]). As to counts 1 and 2, the People alleged defendant personally used a firearm during the commission of the offenses (§ 12022.5). The People also alleged defendant had suffered three prior serious or violent felony convictions—two convictions for assault with a firearm and one conviction for robbery (§§ 667, 667.5, 1170.12, & 1192.7).

2. The Trial

On April 24, 2014, Jose Torres was standing outside of the garage to his apartment in the Silver Lake neighborhood of Los Angeles when he saw defendant ride by on a bicycle. After defendant passed the apartment, he jumped off of his bicycle and started walking toward Torres. As defendant approached, he

¹ All undesignated statutory references are to the Penal Code.

pulled a handgun from a bag and pointed it at Torres.² When Torres reached for his cell phone, defendant said, “If you use your telephone, I’m going to kill you” or “you want to die today?” Torres was scared for his life when defendant drew the gun and threatened him; Torres yelled out for help to his landlord. According to the landlord, Torres’s voice was “breaking” and it sounded like he was “in a panic.” When defendant heard the landlord approaching, he became distracted, looked away from Torres, and put the gun inside his bag.

After defendant became distracted, Torres punched defendant in the head and tried to gain control of the bag containing the gun. As Torres and defendant started to struggle with each other, they fell to the ground and defendant tried to hit Torres with the bag. The landlord then started hitting defendant on the head with her cellphone, causing defendant to drop his bag. The landlord kicked the bag away from defendant to prevent him from grabbing the gun. Torres testified that he was still scared during the struggle with defendant—Torres believed he was fighting for his life. Torres’ landlord testified that Torres looked panicked during the altercation.

After struggling with Torres for several minutes, defendant broke free and started to run away. Torres chased defendant to an intersection near Torres’ apartment, where he and defendant were stopped by a bystander. The bystander called the police, who arrested defendant. Although he could not recall how long the confrontation with defendant lasted, Torres testified that he was scared for his life the entire time, including while he chased

² Although the police later determined that the gun was not loaded, there is no evidence that Torres was aware of that fact when defendant confronted him.

after and tried to apprehend defendant. Torres also testified that he was still scared when he was speaking to the police.

While defendant was in custody awaiting trial, the Los Angeles Sheriff's Department recorded a conversation between him and a jailhouse informant. Defendant told the informant about his plans to prevent Torres from cooperating with the prosecution. Defendant intended to have his friend "Chito" talk to Torres to persuade him to change his story about his encounter with defendant. If Torres did not cooperate with Chito, defendant intended to have someone hold Torres in a basement for "like a month" to prevent him from testifying against defendant.

3. Verdict and Sentencing

The jury found defendant guilty of criminal threats (count 2) and possession of a firearm by a felon (count 3), and it found true the allegation that defendant personally used a firearm during the commission of those offenses. As to count 1, the jury found defendant guilty of simple assault, a lesser-included offense of assault with a firearm.

Prior to sentencing, defendant waived a jury trial on the prior serious or violent felony conviction allegations. At the sentencing hearing, defendant admitted his three prior strike convictions, two of which the court struck. The court then sentenced defendant to a total term of 22 years and four months in prison.

Defendant filed a timely appeal.

DISCUSSION

1. Sufficient evidence supports defendant's criminal threats conviction.

Defendant contends insufficient evidence supports his criminal threats conviction. He argues the People failed to prove

Torres was in sustained fear for his safety when defendant threatened him. Specifically, defendant argues there was no evidence that Torres was actually placed in sustained fear because, after defendant made his threat, Torres struck defendant in the head, struggled with defendant for several minutes, and chased after defendant when defendant tried to escape.

1.1. Standard of Review and Governing Law

When reviewing the sufficiency of the evidence to support a conviction, “ ‘we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ ” (*People v. Avila* (2009) 46 Cal.4th 680, 701.) We do not reweigh the evidence or reevaluate the credibility of witnesses. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

“ ‘If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.’ ” [Citations.]” (*People v. Cravens* (2012) 53 Cal.4th 500, 508.) Therefore, before we may set aside the judgment, it must be clear that “ ‘upon no hypothesis whatever is there sufficient evidence to support’ ” the jury’s verdict.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

To support a conviction under section 422, the People must prove: (1) the defendant willfully threatened to commit a crime which would result in death or great bodily injury to another person; (2) the defendant intended for the statement to be viewed as a threat, even if the defendant did not actually intend to carry out the threat; (3) the threat, on its face and under the

circumstances in which it was made, was “ ‘ “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) 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) the threatened person’s fear was reasonable under the circumstances. (*In re George T.* (2004) 33 Cal.4th 620, 630, citations omitted.)

Here, defendant challenges only the fourth element of the criminal threats conviction—i.e., that his threat actually caused Torres to be in sustained fear for his safety. That element looks to the victim’s state of mind in response to the defendant’s threat. (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349 (*Fierro*).) The term “sustained” as it is used in section 422 means “ ‘a period of time that extends beyond what is momentary, fleeting, or transitory.’ [Citation.]” (*Ibid.*) No specific amount of time is required to render the victim’s fear “sustained.” (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156, fn. 6 (*Allen*).) Some cases have recognized that fear that lasts anywhere between one and 15 minutes may be sufficient to qualify as “sustained fear” under section 422. (See *Fierro, supra*, 180 Cal.App.4th at p. 1349 [one minute sufficient to qualify as “sustained fear” where the defendant uttered threat and the victim saw the defendant draw a weapon]; *Allen, supra*, 33 Cal.App.4th at p. 1156 [15 minutes is sufficient to qualify as “sustained fear”].)

1.2. Torres was in sustained fear for his safety.

Substantial evidence supports the jury’s finding that Torres was in sustained fear for his safety as a result of defendant’s threats. Torres testified that he became “very scared” and believed he was facing the last seconds of his life after defendant drew the gun and threatened to kill him. Torres also testified

that he remained in fear throughout the entire encounter with defendant, even while Torres tried to physically subdue defendant. Although none of the witnesses could describe exactly how long the entire encounter between defendant and Torres lasted, there was testimony that the physical struggle in front of Torres' apartment alone lasted several minutes, a sufficient amount of time to constitute "sustained fear" for purposes of section 422. (See *Fierro, supra*, 180 Cal.App.4th at p. 1349.)

The landlord's testimony about Torres' behavior during the incident also supports a finding that Torres was in sustained fear. She described Torres' voice as "breaking" and "in a panic" when he called out to her for help immediately after defendant drew his gun and threatened Torres. Further, she testified that Torres continued to appear panicked while he fought with defendant on the ground.

We disagree with defendant's claim that Torres' behavior in initiating the physical struggle and pursuing defendant after he tried to flee is inconsistent with a finding that Torres was in sustained fear for his safety. The jury reasonably could have determined Torres acted out of a sense of self-preservation when he tried to subdue defendant. Such conduct is entirely consistent with Torres' testimony that he believed he was facing the last moments of his life when defendant drew the gun and threatened to kill him.

Defendant relies on *In re Ricky T.* (2001) 87 Cal.App.4th 1132 (*Ricky T.*) to argue the evidence could not establish Torres was in sustained fear for his safety. In *Ricky T.*, the Court of Appeal reversed a high school student's conviction for criminal threats. (*Id.* at pp. 1136–1141.) In that case, the student yelled at his teacher, " 'I'm going to get you' " or " 'I'm going to kick your ass' " after the teacher accidentally hit the student with a classroom door. (*Id.* at pp. 1135–1136.) Although the teacher felt

physically threatened by the student, he admitted that the student did not make a specific threat or engage in any other aggressive behavior. (*Id.* at p. 1135.) The Court of Appeal held the student's outburst did not constitute a criminal threat because his statements were ambiguous and there was no evidence that a physical confrontation was imminent. (*Id.* at p. 1138, 1141.) Instead, the student's statements were a rash, emotional reaction to the teacher accidentally hitting him with the classroom door. (*Ibid.*)

Defendant's actions in this case were far more serious than those in *Ricky T.* Here, the incident began after defendant threatened to kill Torres while pointing a gun at him. Further, unlike the teacher in *Ricky T.*, Torres testified that he viewed defendant's statement and conduct as an immediate threat to his safety, and he believed that defendant would carry out that threat.

Defendant also relies on *Allen* to support his contention that Torres could not have been in sustained fear because Torres never had any interaction with defendant before the incident. In *Allen*, this Division upheld a defendant's conviction for criminal threats based in part on the defendant's and the victim's shared history. (*Allen, supra*, 33 Cal.App.4th at pp. 1155–1156.) The victim knew the defendant because he used to date the victim's daughter, and the victim had called the police on the defendant on prior occasions. (*Id.* at p. 1155.)

In *Allen*, however, the victim's knowledge of the defendant's prior conduct was simply a factor that weighed in favor of finding the victim was in sustained fear after the defendant threatened her. (See *Allen, supra*, 33 Cal.App.4th at p. 1156.) We did not hold, and defendant cites no cases that have held, that it is necessary for a victim to have a shared history with a defendant that involves violent or threatening behavior or

be aware that a defendant has engaged in such behavior in order to support a criminal threats conviction.

2. The trial court was not required to instruct on attempted criminal threats.

Defendant also contends the court committed reversible error when it did not instruct the jury on the lesser-included offense of attempted criminal threats. He argues that had the court given such an instruction, it is reasonably probable the jury would have convicted him of attempted criminal threats based on the fact that Torres tried to subdue him.

A trial court must instruct on a lesser offense that is included within the charged crime if there is substantial evidence which, if accepted, would absolve the defendant from guilt of the greater offense but not the lesser. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) Attempted criminal threats is a lesser-included offense of criminal threats. (*People v. Toledo* (2001) 26 Cal.4th 221, 231.) A defendant commits an attempted criminal threat if he “had a subjective intent to threaten *and* that the intended threat under the circumstances was sufficient to cause a reasonable person to be in sustained fear,” but for whatever reason the threat did not reach the intended victim or the intended victim was not placed in sustained fear by the threat. (*People v. Chandler* (2014) 60 Cal.4th 508, 525.) We independently review a trial court's failure to instruct on a lesser included offense. (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

There was no evidence to support giving the attempted criminal threat instruction in this case. Specifically, there was no evidence from which the jury reasonably could have found Torres was not placed in sustained fear by defendant's threat. Defendant drew a gun on and threatened to kill Torres, who was unarmed. Torres testified he was frightened and scared for his life throughout the entire encounter with defendant, even after

the police arrived at the scene. Torres' testimony was corroborated by his landlord's account of the incident in which she described Torres as appearing scared and panicked even while Torres was trying to subdue defendant. There is also no evidence in the record that contradicts Torres' and the landlord's testimony.

Even if there was substantial evidence upon which the jury could decide that defendant's threats did not cause Torres to be in sustained fear for his safety, it is not reasonably probable that defendant would have achieved a more favorable result if the jury had been instructed on attempted criminal threats. The evidence of defendant's guilt was overwhelming. (See *People v. Breverman* (1998) 19 Cal.4th 142, 165; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

JOHNSON (MICHAEL), J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.