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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

BEN GARCIA,

Defendant and Appellant.

B278245

(Los Angeles County
Super. Ct. No. KA111147)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stacy Wiese, Judge. Affirmed as modified.

Law Offices of Pamela J. Voich and Pamela J. Voich, 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, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Michael J. Wise, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Ben Garcia (defendant) of driving under the influence of alcohol, making criminal threats, and resisting an executive officer. The charges arose from an incident one evening when a police officer approached defendant's car after he had been observed running red lights and stop signs. In a confrontation that ensued, the officer tased defendant, and the officer later testified at trial that he feared for his safety "when . . . defendant continued to refuse to comply with my requests, when he continued to threaten to kill me, to harm me, and when he advanced towards me and reached towards his waistband area." We consider whether there is substantial evidence defendant formed the requisite specific intent (notwithstanding his intoxication) to be convicted of making criminal threats and resisting an executive officer. We also consider whether there is substantial evidence the officer was in actual and reasonable sustained fear, as required to support the criminal threats conviction.

I. BACKGROUND

Sergeant Johnny Patino was sitting in his patrol car in a Walmart parking lot on August 3, 2015, when a green Honda Accord pulled up alongside the patrol car. The man in the Honda told Sergeant Patino that he had seen a white Pontiac run several red lights and stop signs, and the man thought the Pontiac had probably been in an accident because its front passenger tire was flat. The man in the Honda then pointed toward the northwest entrance to the parking lot and indicated where the white Pontiac was pulling into a parking spot.

Sergeant Patino drove his patrol car past the front of the Pontiac and determined defendant (then age 56) was the only

person seated inside. The Pontiac's radio was blaring at a loud volume. Sergeant Patino parked his car behind the Pontiac, activated the patrol car's camera system, and called for backup. Before a backup officer arrived, Sergeant Patino used his car's loudspeaker to ask defendant to turn the car radio off. Defendant did not comply, instead extending both his middle fingers out the car window and saying, "fuck you." Sergeant Patino repeated the request that defendant turn off his radio. Defendant replied, "Fuck you, I don't have to do shit."

At about the time Officer Wener arrived as backup, defendant exited the Pontiac without being asked to do so. Defendant opened the door of the Pontiac quickly, and it bounced back and hit him as he exited. After he got out of the Pontiac, defendant took several steps toward Patino while swaying from side to side, which led Sergeant Patino to conclude defendant might be impaired. Sergeant Patino called out "taser, taser, taser" to tell Officer Wener that Sergeant Patino would be responsible for non-lethal force in dealing with defendant, and that Officer Wener would be responsible for lethal force, if necessary.

Defendant told Sergeant Patino, "you don't have shit on me." Sergeant Patino responded by saying "hello," telling defendant to "relax," and explaining he was only attempting to check on defendant's welfare. Defendant replied that Sergeant Patino "didn't need to know shit," adding that he was going to "kick [Sergeant Patino's] ass." Sergeant Patino asked defendant if he had any weapons on him and defendant responded, "Fuck you. I'm going to kill you." Sergeant Patino asked defendant to clarify what he said and defendant responded, "You heard me mother fucker." Defendant's demeanor at the time, as observed

by Sergeant Patino, was “argumentative and disruptive like he wanted to hurt [Sergeant Patino].” Defendant’s speech was “slick and slurred,” and his eyes were bloodshot and watery.

Defendant continued to approach Sergeant Patino and the sergeant pointed his taser at defendant and ordered him to stop. Defendant complied. Sergeant Patino then told defendant that he needed to put his hands behind his head so that Sergeant Patino could search him for weapons. Sergeant Patino warned defendant that he would tase defendant if he did not comply. Defendant did not comply and instead told Sergeant Patino to tase him “because [defendant was] going to kill [Sergeant Patino] any[way].” Defendant then made a sudden jerking movement with his arms, which Sergeant Patino saw as defendant “reaching towards his lower back portion and [then] his hands immediately came up very quickly.” Believing that defendant could be reaching for a weapon, Sergeant Patino fired his taser at defendant, hitting him with the probes.

Despite being tased, defendant remained standing and started swinging his arms around. Sergeant Patino told defendant to get down on the ground, but defendant refused and Sergeant Patino activated his taser a second time. Defendant fell to the ground, was handcuffed, and taken into custody. In searching the Pontiac, Sergeant Patino found an empty 750 milliliter bottle of Zinfandel and a half empty bottle of “Smirnoff Ice.” Sergeant Patino did not administer a field sobriety test in the parking lot because of defendant’s “combative nature and the fact that [defendant] refused to listen to [Sergeant Patino] and threaten[ed] to kill [Sergeant Patino] several times.”

After they arrived at the station, defendant was calmer, but still argumentative. Sergeant Patino asked defendant to take a

field sobriety test, but defendant declined and chose to take a breath test. Officer Juan Serrato administered the breath test. Defendant was instructed to blow into the mouthpiece of the breathalyzer, but defendant instead blew out of his nose and Officer Serrato was unable to get the necessary sample. When Officer Serrato asked defendant to repeat the test so it could be done properly, defendant refused.

Defendant was thereafter charged in a first amended information with (1) driving under the influence of alcohol within 10 years of a felony DUI or vehicular manslaughter, in violation of Vehicle Code sections 23152, subdivision (a) and 23550.5, subdivision (a); (2) resisting an executive officer, in violation of Penal Code section 69;¹ and (3) making criminal threats, in violation of section 422, subdivision (a). At trial, the prosecution's evidence included, among other things, testimony from Sergeant Patino and the video footage from his patrol car's camera.

During his testimony, Sergeant Patino explained he initially did not fear for his safety in interacting with defendant. Sergeant Patino testified, however, that his feelings changed during the course of his interaction with defendant based on defendant's threats and the associated context: "Initially, I seen him get out of the car. I thought I was just dealing with a drunk old man and when he approached me, he advance[d] towards me and threatened to kill me. He continued to be aggressive. All the red flag indicators that he wasn't in his right mind. I felt sustained fear that he was going to eventually take action to

¹ Undesignated statutory references that follow are to the Penal Code.

harm[] me. When he refused to comply with my orders to put his hands behind his head, to turn around because I was not sure if he was armed because I haven't searched him and his fast quick movement that he made to his waistband and up, that indicated to me that he was going to reach for a weapon. I made a decision to activate the taser both in fear and the fact that I didn't want him to injure myself or my partner."

A jury found defendant guilty on all three counts and found the associated alleged enhancements true. The trial court sentenced defendant to a total of 9 years and 4 months and gave him credit for 625 days in custody, consisting of 313 days actual custody and 312 days for good time/work time.

II. DISCUSSION

For reasons we will describe, we reject defendant's challenges to the evidence supporting his convictions. It is undisputed defendant was drunk at the time of the incident, but there is substantial evidence he was not so intoxicated as to be unable to form the specific intent necessary to convict him of making criminal threats and resisting an officer. In addition, there is substantial evidence that defendant's threats put Sergeant Patino in actual and reasonable fear for his safety, as required to convict him for making criminal threats. Specifically, Sergeant Patino testified to having been in sustained fear for his safety during the incident, and the risks associated with apprehending a drunk, belligerent man who makes death threats and refuses to confirm he is unarmed or to submit to a search for weapons establish such a fear is reasonable. We will therefore affirm defendant's convictions, but we will modify the judgment

to correct defendant's pre-sentence custody credits—as the parties agree we should.

A. Standard of Review

When assessing 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.” [Citation.] We determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” [Citation.]” (*People v. Williams* (2015) 61 Cal.4th 1244, 1281.) If the evidence reasonably justifies the jury's findings, reversal is not appropriate simply because the evidence might reasonably be found to support a contrary finding. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215; *People v. Riley* (2015) 240 Cal.App.4th 1152, 1165-1166 [“If our review of the record shows that there is substantial evidence to support the judgment, we must affirm, even if there is also substantial evidence to support a contrary conclusion and the jury might have reached a different result if it had believed other evidence”].) “It is well settled that, under the prevailing standard of review for a sufficiency claim, we defer to the trier of fact's evaluation of credibility.” (*People v. Richardson* (2008) 43 Cal.4th 959, 1030 (*Richardson*).)

*B. Substantial Evidence Supports Defendant's
Conviction for Making Criminal Threats*

To convict a defendant of making criminal threats in violation of section 422, the prosecution must establish: “(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—which may be ‘made verbally, in writing, or by means of an electronic communication device’—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 (*Toledo*)). Defendant contends substantial evidence of the third, fourth, and fifth of these elements is lacking, but we hold to the contrary.

*1. Sufficient evidence establishes defendant
intended his statements to be taken as true
threats*

“[E]vidence of voluntary intoxication is relevant to the extent it bears upon the question whether the defendant *actually* had the requisite specific mental state required for commission of the crimes at issue.” (*People v. Horton* (1995) 11 Cal.4th 1068,

1119; see also § 29.4, subd. (b) [“Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent”].) Defendant contends the prosecution did not prove he made a statement “with the specific intent that the statement . . . is to be taken as a threat” (§ 422, subd. (a)) because he was so inebriated that he was “physically incapable of” forming an intent that his statements be taken by Officer Patino as threats.

As *Toledo* explains, in assessing whether the requisite intent has been proven, a court considers whether the words spoken are unequivocal, unconditional, immediate, and specific so as to convey a gravity of purpose and an immediate prospect of execution of the threat. (*Toledo, supra*, 26 Cal.4th at p. 228; accord, *In re George T.* (2004) 33 Cal.4th 620, 634-635 (*George T.*).) “[U]nequivocality, unconditionality, immediacy and specificity are not absolutely mandated, [however,] but must be sufficiently present in the threat and surrounding circumstances” [Citation.] ‘The four qualities are simply the factors to be considered in determining whether a threat, considered together with its surrounding circumstances, conveys those impressions to the victim.’ [Citation.]” (*George T., supra*, at p. 635.)

Apart from defendant’s claim of intoxication, there is no disputing section 422’s specific intent element was satisfied. Expletive-laced statements directed at a single individual standing just feet away that declare an intention to kick that person’s ass and kill that person are unconditional, immediate, and specific. Considering the evidence of intoxication, in our view, does not change the calculus. That defendant was drunk does not mean he was so incapacitated as to prevent him from

conveying a true threat to Sergeant Patino. (*People v. Chandler* (2014) 60 Cal.4th 508, 519 [“true threats” encompass statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group].) In fact, substantial evidence indicates the opposite.

Throughout the interaction between the two men, defendant’s statements were directly responsive to the statements made and actions taken by Sergeant Patino. When Sergeant Patino asked defendant to turn off his car radio, defendant replied he did not have to and accompanied his refusal with a roughly synonymous hand gesture. When Sergeant Patino tried to assure defendant that he was just there to check on defendant’s welfare, defendant responded that Sergeant Patino did not need to know anything about how he (defendant) was doing. When Sergeant Patino ordered defendant to halt as he was taking steps in Sergeant Patino’s direction, defendant understood the command and complied (although he continued to be verbally insubordinate and aggressive with his arm movements). When defendant threatened to kill Sergeant Patino and Sergeant Patino asked defendant for “clarification,” defendant obviously understood the import of the query and responded, “You heard me mother fucker.” The evidence at trial also established defendant was well aware he was dealing with a law enforcement officer because defendant said something along the lines of “you don’t have shit on me” toward the beginning of his interaction with Sergeant Patino. In addition, defendant’s aggressive statements were consistent with the argumentative and angry demeanor Sergeant Patino observed.

These facts demonstrate defendant was aware of his surroundings, understood what Sergeant Patino was asking of him, and was capable of responding according to his own predilections—which indicates a level of mental awareness consistent with the ability to form the specific intent to convey a true threat. This is not a case involving the mere idle mumblings of a drunk or, as in *George T.*, *supra*, 33 Cal.4th at p. 635, ambiguous poetry with an uncertain intimidating effect. The jury was fully justified in concluding defendant made the statements about harming Sergeant Patino precisely because he intended Sergeant Patino to believe defendant would follow through on the threats if he were not let alone.

2. *Substantial evidence indicates Sergeant Patino actually and reasonably feared for his safety*

Defendant also disputes there was sufficient evidence for the jury to find defendant's threats caused Sergeant Patino to "be in sustained fear for his . . . own safety." (§ 422, subd. (a).) Defendant writes: "According to [Sergeant] Patino, he was not in any fear for his safety. He accurately thought he and [his backup officer] were just dealing with a drunk old man." Defendant further contends Sergeant Patino had no reasonable basis to be in sustained fear because he was an experienced law enforcement officer in control of the situation and he was relying on his experiences with other drunks, not the particular actions and statements of defendant.

a. subjectively felt fear

Contrary to defendant's assertion, Sergeant Patino did testify defendant's threats caused him (Sergeant Patino) to fear for his safety. He did so on direct examination and again on redirect examination when he stated, "I felt sustained fear that [defendant] was going to eventually take action to harm[] me." True, Sergeant Patino did also testify he thought he was dealing with a drunk old man "initially," but he explained that changed "when . . . defendant continued to refuse to comply with my requests, when he continued to threaten to kill me, to harm me, and when he advanced towards me and reached towards his waistband area."

Sergeant Patino's testimony that he was in sustained fear following defendant's threats to kill him, plus the corroborating circumstances, constitute substantial evidence that defendant's threats put Sergeant Patino in actual sustained fear for his safety. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052 ["A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question. Once such evidence is found, the substantial evidence test is satisfied. . . . Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the standard is sufficient to uphold the finding"]; see also Evid. Code, § 411 ["Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"].) Although defendant appears to question whether Sergeant Patino was credible in testifying he did feel fear, the

jury must have found the testimony credible and we see no reason not to defer to the jury's assessment. (*Richardson, supra*, 43 Cal.4th at p. 1030.)

b. objectively reasonable fear

Considering the statements defendant made and the circumstances in which he made them—which includes the movements that accompanied his statements and his observed demeanor—there is ample evidence that Sergeant Patino's expressed fear was reasonable. Defendant was confrontational and belligerent from the very outset of his interaction with Sergeant Patino, and Sergeant Patino also understood there were "red flag indicators that [defendant] wasn't in his right mind." Defendant also threatened to kill Sergeant Patino, and when Sergeant Patino made efforts to determine whether defendant was armed, defendant rebuffed those efforts. Ultimately, Sergeant Patino used his taser against defendant when he made jerking movements with his arms that led Sergeant Patino to believe defendant could be reaching for a weapon.

These circumstances are sufficient to instill reasonable fear even in a trained law enforcement officer who is accompanied by backup. Defendant was just feet away from both Sergeant Patino and his fellow officer, it was unclear whether defendant was armed, and it was abundantly clear that defendant was acting erratically. The officers of course approached the situation in an effort to ensure they would retain the upper hand, but there were still serious risks associated with taking into custody a drunk, belligerent suspect who made repeated threats against Sergeant Patino's life, refused to comply with Sergeant Patino's directions, and refused to confirm, or to allow the officers to confirm, that he

was unarmed. There is accordingly no basis to hold the jury erred in concluding Sergeant Patino's fear was reasonable under the circumstances.

That defendant at one point told Sergeant Patino to "go ahead and shoot [defendant] because I'll kill you any[way]" does not, as defendant appears to contend, undermine the reasonableness of Sergeant Patino's fear. If anything, the taunt tended to reinforce the reasonableness of Sergeant Patino's fear by conveying defendant had no fear of provoking a confrontation and was committed to seeing his threats through. Moreover, and contrary to defendant's suggestion, Sergeant Patino's testimony does not establish he felt fear only because he was relying on his experiences interacting with intoxicated suspects in the past. Rather, Sergeant Patino described these prior experiences primarily to explain why he believed deploying his taser was appropriate, and Sergeant Patino was clear that it was defendant's own actions that triggered the fear he felt.

*C. Substantial Evidence Supports Defendant's
Conviction for Resisting an Executive Officer*

Section 69, subdivision (a) provides: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law, or who knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty" commits a crime punishable by imprisonment, a fine, or both. Section 69 sets forth two separate ways in which an offense can be committed: either by making a threat or by the use of violence. (See *People v. Smith* (2013) 57 Cal.4th 232, 240 ["The actual use of force or violence is not required"].) Here, the People asked the

jury to convict defendant on the basis of a threat, not on the use of violence.

In contrast to a violation of section 422, “a violation of section 69 does not require a showing of state of mind of the recipient of the threat.” (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153.) Rather, the “central requirement” of resisting an officer “is an attempt to deter an executive officer from performing his or her duties imposed by law; unlawful violence, or a threat of unlawful violence, is merely the means by which the attempt is made.’ [Citation.] Accordingly, a violation of section 69 through a threat ‘requires a specific intent to interfere with the executive officer’s performance of his duties.’ [Citation.]” (*People v. Sivongxxay* (2017) 3 Cal.5th 151, 195.)

As with his challenge to the count for making criminal threats, defendant contends he was too drunk to form the required intent. Defendant was unquestionably inebriated but, for the reasons discussed *ante*, there was sufficient evidence before the jury for it to conclude defendant was fully capable of forming specific intentions notwithstanding his intoxication. There was also substantial evidence that defendant’s intention was to deter or prevent Sergeant Patino from carrying out a duty imposed on him by law, namely to investigate defendant’s welfare and whether he was driving under the influence. Defendant’s “you don’t have shit on me” statement at the outset of the interaction with Sergeant Patino is evidence defendant was at least generally aware of Sergeant Patino’s law enforcement responsibilities. And defendant’s threats to kill or harm Sergeant Patino, coupled with his repeated refusal to comply with Sergeant Patino’s commands—particularly the commands that would have allowed Sergeant Patino to determine whether

defendant was armed— is sufficient evidence of the requisite purpose to use the threats made as a means of deterring or preventing Sergeant Patino from carrying out those duties.

D. Presentencing Credits

At sentencing, the trial court gave defendant credit for 625 days in presentencing custody, specifically, 313 days actual custody and 312 days for good time/work time. Defendant contends he served a total of 432 days in custody before sentencing and had therefore earned 432 days of actual custody and 432 days of good time/work time for a total of 864 days of presentence custody credit. The Attorney General agrees with defendant's calculation. We concur defendant is entitled to a total of 864 days of custody credit.

DISPOSITION

The judgment is modified to give defendant credit for 432 days of actual custody and 432 days of good time/work time, for a total of 864 days of presentence custody credit. So modified, the judgment is affirmed. The clerk of the superior court shall prepare an amended abstract of judgment reflecting the modified presentence credit calculation and deliver a copy of the amended abstract to the Department of Corrections and Rehabilitation.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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