Filed 5/31/18 P. v. Croaker CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LESLIE CROAKER, Defendant and Appellant.	B283086 (Los Angeles County Super. Ct. No. GA092231)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stan Blumenfeld, Judge. Affirmed.

Gideon Margolis, 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, Zee Rodriguez and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Leslie Croaker appeals his conviction for making criminal threats. He contends the trial court erred by failing to instruct the jury on the lesser included offense of attempted criminal threats. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

On January 22, 2014, Mike Santana was working as the security supervisor at Union Station Homeless Services (USHS) in Pasadena. Croaker arrived at USHS at approximately 9:50 a.m., as the facility's breakfast program was winding down. Santana informed him that he was too late and no more meals were available. Croaker became upset and cursed at Santana, telling him to " 'shut the fuck up, that he was going to eat.' " When Santana reiterated that no more meals were available, Croaker told him to " 'shut the fuck up" before Croaker "fuck[ed Santana] up." Santana asked Croaker to leave. Instead, Croaker continued to threaten Santana, saying, " 'I'm going to fuck you up.' " Croaker began walking out of the facility, but then turned and attempted to punch Santana in the face. The punch grazed Santana's chin. Several of the facility's clients intervened and coaxed Croaker into leaving.

One of Santana's coworkers called 911, but Santana cancelled the call when Croaker left the facility. Santana had seen Croaker at USHS on a daily or weekly basis for several years, and he had not previously behaved violently or displayed his temper. Santana had not received complaints about Croaker, whom he thought was quiet and a "very nice guy." However, after the incident other persons in the facility told Santana to "be careful," because Croaker would "come back and act upon his threats."

Later that day, at approximately 3:00 p.m., Croaker returned to USHS. The facility was closed and Croaker rang the buzzer. Santana spoke with Croaker via the electronic security system, and asked what he needed. Croaker stated he had left personal items inside the building, and Santana agreed to look for them. Santana briefly watched Croaker on a video monitor to evaluate his demeanor. Croaker was wearing black gloves with the fingers cut off, like those typically worn for hitting a punching bag. Croaker paced back and forth, looked "very tense," and kept looking inside the facility. Santana determined that it would be unsafe to allow Croaker inside.

Unable to find Croaker's belongings, and concerned for his own safety, Santana asked USHS employee Albert Murillo and a second coworker to accompany him to meet Croaker at the facility's wrought iron gate, which separated Croaker from Santana and the other employees. Santana told Croaker his items were not inside and denied Croaker's request to enter the facility. Croaker appeared angry. Croaker told the other USHS employees, "fuck you, then." He pointed at Santana and said, " 'especially fuck you.' " Croaker said to Santana, " 'I'm going to fuck you up, I'm going to fuck your truck up. If I see you, you better watch it.' " Croaker jumped up and tried to punch Santana, grazing the top of Santana's head and knocking off his glasses. When Santana reached over for his glasses, Croaker spit at him, hitting Santana and Murillo with spit. Croaker then named other homeless shelters, homeless events, and churches where Santana worked and threatened to "fuck [Santana] up" at those locations. He stated he would "pull [Santana] out of [Santana's] truck and fuck" him up. Croaker then left, still threatening that Santana "better watch [his] back," and "I'm

going to fuck you up, you better watch it, I'm going to fuckin' get you." The afternoon incident was captured on the facility's video surveillance system, and the video was shown to the jury.

Santana understood the expression "I'm going to fuck you up" to mean Croaker would approach him unexpectedly and cause him bodily harm, or require him to defend himself; the expression did not refer to "something minor." Murillo likewise understood the phrase to mean Croaker was going to beat Santana up. Santana found Croaker's demeanor threatening. The threats caused both Santana and Murillo to be concerned about Santana's safety. Santana was particularly concerned because Croaker had named other places where Santana worked.

Approximately 15 minutes after the afternoon incident, Santana reported Croaker's actions to the police. At that time, he was still concerned for his safety. Santana explained he was concerned "[b]ecause [Croaker] was threatening. That he was going through all his threats, . . . and stating that he was going to damage my truck, that he was going to pull me out of the truck, . . . he'll catch me after work . . . I felt unsafe." Moreover, as part of his job with USHS, Santana performed neighborhood patrols on a bicycle, alone; Santana felt that "now when . . . I do my patrols . . . I have to watch over my back." Santana still had these concerns when he testified in September 2015.

Croaker presented no evidence.

2. *Procedure*

A jury convicted Croaker of making criminal threats[1] against Santana (Pen. Code, § 422)[2] and misdemeanor battery upon Murillo (§ 242). In a bifurcated proceeding, the trial court found Croaker had suffered a prior conviction for attempted residential burglary, a serious felony (§§ 667, subds. (a)(1), (d), 1170.12, subd. (b)). The court granted Croaker's *Romero* motion[3] and struck his prior conviction. It sentenced him to six years four months in prison, and imposed a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, and a criminal conviction assessment. Croaker appeals.

DISCUSSION

The trial court did not err by failing to instruct on attempted criminal threats; omission of the instruction was harmless

When discussing the jury instructions, the trial court advised that it had determined no instruction on any lesser included offense was appropriate. The court explained there was no evidence Santana was not in sustained fear. Defense counsel did not object or request an instruction on attempted criminal threats. Croaker now argues that because there was evidence sufficient to permit the jury to find Santana's fear was not reasonable, the trial court prejudicially erred by failing to sua

---

[1] The criminal threats conviction was based on the threats Croaker made during the afternoon incident. The trial court properly gave a unanimity instruction.

[2] All further undesignated statutory references are to the Penal Code.

[3] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

sponte instruct on the lesser included offense of attempted criminal threats. We disagree.

1. *Applicable legal principles*

A trial court must instruct the jury on all general principles of law relevant to the issues raised by the evidence, including lesser included offenses, even absent a request. (*People v. Smith* (2013) 57 Cal.4th 232, 239.) Instruction on a lesser included offense is required when there is evidence the defendant is guilty of the lesser offense, but not the greater. (*People v. Whalen* (2013) 56 Cal.4th 1, 68.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*People v. Williams* (2015) 61 Cal.4th 1244, 1263.) The existence of *any* evidence, no matter how weak, will not justify instructions on a lesser included offense. (*People v. Whalen*, at p. 68.) In determining whether substantial evidence existed, we do not evaluate the credibility of the witnesses, a task for the jury. (*People v. Wyatt* (2012) 55 Cal.4th 694, 698.) We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Trujeque* (2015) 61 Cal.4th 227, 271; *People v. Brothers* (2015) 236 Cal.App.4th 24, 30.)

To prove a violation of section 422, the prosecution must establish that: (1) the defendant willfully threatened to commit a crime which would result in death or great bodily injury to another person; (2) the defendant made the threat with the specific intent that the statement would be taken as a threat, even if he or she did not intend to carry it out; (3) on its face and under the circumstances, the threat was so unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution; (4) the threat actually caused the victim to be in sustained fear for his or

her own safety; and (5) the victim's fear was reasonable under the circumstances. (*People v. Toledo* (2001) 26 Cal.4th 221, 227–228; *In re George T.* (2004) 33 Cal.4th 620, 630; *People v. Orloff* (2016) 2 Cal.App.5th 947, 953.) Thus, the "sustained fear" element "has a subjective and an objective component. 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; *People v. Jackson* (2009) 178 Cal.App.4th 590, 596.) "Sustained fear" is defined as that continuing over "a period of time 'that extends beyond what is momentary, fleeting, or transitory.' " (*In re Ricky T.*, at p. 1140; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1015–1016.) Fifteen minutes has been held to be a sustained period for purposes of section 422. (*People v. Wilson* (2015) 234 Cal.App.4th 193, 201; *People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) The totality of the circumstances, including the parties' prior relationship, the defendant's prior and subsequent conduct, and the manner in which the communication was made, are relevant to prove the elements of the offense. (*People v. Wilson* (2010) 186 Cal.App.4th 789, 808; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 860; *People v. Butler* (2000) 85 Cal.App.4th 745, 753–754; *People v. Solis*, at p. 1013.)

Attempted criminal threats is a lesser included offense of making criminal threats. (*People v. Chandler* (2014) 60 Cal.4th 508, 513; *People v. Toledo*, *supra*, 26 Cal.4th at pp. 226, 230; *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 607.) It occurs when, for example, a written threat is intercepted before it reaches the intended victim, or the victim does not understand the threat, or for some reason is not placed in sustained fear. (See *People v.*

Chandler, at p. 515; *People v. Toledo*, at p. 231.) To prove attempted criminal threats, the People must prove the defendant harbored a subjective intent to threaten, and that the intended threat, under the circumstances, was objectively threatening, that is, was sufficient to cause a reasonable person to be in sustained fear. (*People v. Chandler*, at pp. 511, 525.)

2. *Application here*

We discern no prejudicial instructional error in the instant matter. We doubt that there was substantial evidence to support an attempted criminal threats instruction. There was ample evidence Santana's fear was reasonable. (See generally *People v. Orloff*, *supra*, 2 Cal.App.5th at p. 953 [victim's fear was reasonable although threat was made over the phone, by a defendant who was confined to a wheelchair].) The evidence showed more than an impulsive, passing remark. Croaker threatened Santana in the morning. Approximately five hours later he returned, still angry at Santana despite the passage of time. Croaker twice attempted to punch Santana, once in the morning and once in the afternoon, demonstrating he intended to carry out his threats. Croaker knew what type of vehicle Santana drove, and had contemplated attacking Santana in that vehicle. Croaker named several other places where Santana worked, and threatened to attack him at each one. The specificity and knowledge displayed in Croaker's threats showed a troubling gravity of purpose. Other persons in the facility warned Santana to be careful because Croaker would carry out his threats. After witnessing the afternoon incident, Murillo was also worried about Santana's safety. Thus, there was strong evidence Santana was not simply overreacting, or unreasonably interpreting Croaker's threats and behavior.

Croaker nonetheless contends the jury could have found Santana's fear was unreasonable in light of the evidence regarding their past interactions. Croaker points out that Santana was familiar with him, having seen him on a daily or weekly basis for several years; had experienced no prior problems with him; had not known him to be violent; and had not received complaints about him. Indeed, Santana testified he was shocked by Croaker's behavior. But, given the circumstances here, the absence of prior violent behavior does not provide sufficient evidence Santana's fear was unreasonable. To the contrary, the most reasonable inference from the evidence was that Croaker's sudden, uncharacteristic change in behavior was cause for alarm. Given Croaker's repeated threats, the content of his statements, his repeated attempts to punch Santana, and the impressions of other persons who witnessed the incidents, a jury would have been hard pressed to find Santana's fear was unreasonable. In light of the strong evidence showing Santana's fear was reasonable and the dearth of contrary evidence, the trial court did not err by omitting the attempted criminal threats instruction.

In any event, even assuming arguendo the trial court erred, reversal is not required. The failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and reversal is required only if an examination of the entire record establishes a reasonable probability the error affected the outcome. (*People v. Wyatt*, *supra*, 55 Cal.4th at p. 698; *People v. Brown* (2016) 245 Cal.App.4th 140, 155; *People v. Cady* (2016) 7 Cal.App.5th 134, 149.) In this context, a reasonable probability does not mean more likely than not, but merely a reasonable chance, more than

an abstract possibility. (*People v. Brown*, at p. 155; *People v. Sandoval* (2015) 62 Cal.4th 394, 422.)

For the reasons we have discussed, no such probability exists here. As we have explained, there was compelling evidence Santana's fear was reasonable. There was minimal evidence to the contrary, comprised only of evidence Croaker had not behaved in an alarming fashion previously. At trial Croaker argued Santana was not actually afraid, but did not contend Santana *was* afraid but his fear was unreasonable, as he now contends. To find Croaker guilty of attempted criminal threats on an unreasonable fear theory, the jury would have had to believe Croaker made the threats, intended them to be taken as threats, Santana understood them as such, and Santana was actually in sustained fear, but that fear was nevertheless unreasonable. Given the evidence, for the reasons we have discussed, there was no reasonable probability the jury would have made such a finding.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.