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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GARY ALLEN CECIL, Defendant and Appellant.	B228850 (Los Angeles County Super. Ct. No. MA045717)

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

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

In a two-count information filed by the Los Angeles County District Attorney, appellant Gary Allen Cecil (defendant) was charged with criminal threats, a violation of Penal Code section 422, [1] and stalking, a violation of section 646.9, subdivision (a). As to both counts, it was alleged that defendant had suffered prior convictions pursuant to section 1170.12, subdivisions (a) through (d) and section 667, subdivisions (a)(1) and (b) through (i). Defendant pled not guilty and denied the special allegations.

Following trial, the jury found defendant guilty on both counts. In a bifurcated court trial, the trial court found the special allegations true.

Probation was denied, and defendant was sentenced to a term of 35 years to life in state prison, as follows: a base term of 25 years to life on count 1 under the Three Strikes Law, plus two five-year enhancements under section 667, subdivision (a)(1), on that count; and 25 years to life on count 2, which the trial court ordered stayed pursuant to section 654. Defendant was ordered to pay various fines and was awarded presentence custody credits.

Defendant appeals, raising three primary arguments: (1) The judgment of conviction is not supported by substantial evidence. (2) The trial court committed reversible error by admitting into evidence a statement by Kimberly Z., formerly Kimberly L. (Kimberly), that defendant threatened her during a rape trial 28 years ago. (3) The trial court erred in instructing the jury pursuant to CALJIC No. 2.71.7. As a catchall, defendant argues that the alleged cumulative errors violated his constitutional right to a fair trial, warranting reversal.

We affirm.

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

FACTUAL AND PROCEDURAL BACKGROUND

I. *Prosecution Evidence*

Approximately 30 years ago, Kimberly was working as a waitress at a Denny's restaurant in Northern California. At the time, her last name was "[L]." One night, Kimberly went out with one of her customers and was "date raped." During the trial for that crime, in the court hallway, Kimberly's rapist looked in her direction and mouthed, "'I'm going to kill you.'" She was terrified, but she told no one. Her rapist was ultimately convicted and sent to prison for six years. As a result of the rape, Kimberly suffered from nightmares and eventually blocked out many of the details of her rape, including her rapist's face.

Years later, on October 13, 2008, Kimberly received an "unusual" telephone call. The caller stated that he was from an "inheritance agency" and proceeded to ask Kimberly questions about whether she lived in Northern California and if she had ever used the name "[L]." He also asked whether she had ever worked at a Denny's restaurant and testified against someone in a rape case. When Kimberly responded "'yes,'" the caller said, "'I'm going to kill you, you fuckin' bitch.'" She felt like "that whole time frame came back all at once" and was really scared. Kimberly knew it was her rapist and was afraid that he was going to kill her or hurt her family. She called 911 and later changed her telephone number.

About five months later, in March 2009, Kimberly received a letter in the mail from defendant marked "'personal.'" She recognized his name as the man who raped her. Too afraid to open it, Kimberly took it to her psychologist, who read it to her. In the letter, defendant accused Kimberly of lying about the rape. He further wrote, "'The time is right at this moment for cash to be paid for all. But you <u>cannot mention to anyone</u> that we are talking or had contact.'" Kimberly was surprised by the letter and it "scared [her] even more" because it was delivered to her home.

Los Angeles County Sheriff's Detective Jeffrey Knittel subpoenaed telephone records and was able to determine that the October 2008 telephone call was made from a prepaid mobile phone purchased in Cheyenne, Wyoming. The telephone was registered

to defendant. Detective Knittel later determined that defendant was convicted of rape in Contra Costa County in 1980.

II. *Defense Evidence*

Defendant testified that he called Kimberly on October 13, 2008, because he was trying to write a book about his life and "screw ups." According to defendant, he had a short conversation with Kimberly, who hung up on him after he identified himself as the person she accused of raping her. He denied making any threats to Kimberly or calling her any names. Defendant mentioned an "estate" during the call because he had received some photographs from the night of the rape from the estate of a security guard. The photographs, however, were confiscated by Detective Knittel.

Defendant admitted to writing the letter to Kimberly. The purpose of the letter was to see if she wanted to "collaborate" with him on his book. When he wrote, "'the time is right at this moment for cash to be paid for all,'" he meant that he was hoping the pair could "make a dollar on the book." Defendant did not want Kimberly to mention the letter to anyone because he was afraid someone would steal his idea for the book.

Defendant never intended to "communicate any kind of threat" to Kimberly in either the telephone call or the letter. He further denied threatening to kill Kimberly during the rape trial. He felt that he was wrongly convicted of raping Kimberly, but "wasn't holding a grudge."

III. *Rebuttal Evidence*

Detective Knittel denied ever receiving any photographs from defendant.

DISCUSSION

I. *Substantial Evidence Supports the Conviction*

A. Standard of Review

We review the judgment for substantial evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) That is, to determine the sufficiency of the evidence to support a criminal conviction, "'an appellate court reviews 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 that the

defendant committed the offense beyond a reasonable doubt. (*People v. Davis* (2009) 46 Cal.4th 539, 606.)

"[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Even when there is a significant amount of countervailing evidence, the testimony of a single witness will suffice to support a criminal conviction. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052; *People v. Allen* (1985) 165 Cal.App.3d 616, 623.)

Thus, the reviewing court "presume[s] in support of the judgment the existence of every fact that could reasonably be deduced from the evidence." (*People v. Em* (2009) 171 Cal.App.4th 964, 970.) In so doing, "we do not judge the trustworthiness of witnesses, reweigh the evidence, or assess for ourselves which interpretation of the evidence is the 'right' one." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 166.) In other words, reversal for insufficient evidence is not warranted unless it appears that under no hypothesis whatsoever is there substantial evidence to support the trier of fact's verdict. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

B. Section 422

A defendant may be found guilty of making a criminal threat when there is substantial evidence that (1) the defendant willfully threatened to commit a crime that could result in another's death or great bodily injury; (2) the defendant specifically intended the statement to be taken as a threat (notwithstanding the fact that the defendant might not have intended to carry out the threat); (3) the threat, on its face and under the circumstances made, is so unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution; (4) the threat caused the victim to suffer sustained fear for his or her safety; and (5) the fear was reasonable under the circumstances. (§ 422; *People v. Toledo* (2001) 26 Cal.4th 221, 227–228; *People v. Bolin* (1998) 18 Cal.4th 297, 337–340; *In re George T.* (2004) 33 Cal.4th 620, 630.) We evaluate the totality of the circumstances, including the parties' prior contacts and the manner in which the communication was made, to determine

whether the communication conveyed to the victim a gravity of purpose and an immediate prospect of execution of the threat. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 859–863; *People v. Butler* (2000) 85 Cal.App.4th 745, 753–754; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1014.)

Defendant argues that the third element was lacking. We cannot agree. Defendant called Kimberly at her home and made misleading statements. Once convinced of her identity as the person that sent him to prison for rape, he said, "'I'm going to kill you, you fuckin' bitch.'" There is nothing ambiguous, equivocal, or conditional about defendant's threat. It was reasonable for Kimberly to think that defendant was upset that she sent him to prison for rape and that he was going to kill her for it. This is especially true given that defendant had threatened to kill Kimberly during his rape trial.

Relying upon *In re George T., supra*, 33 Cal.4th 620, defendant claims that his statement "'I'm going to'" did not mean that he would in fact kill Kimberly. *In re George T.* is readily distinguishable. In that case, the California Supreme Court held that a student's poem, which contained two lines that were arguably threatening, did not constitute a criminal threat. After all, there was no history of animosity or conflict between the students, there were no threatening gestures or mannerisms that accompanied the poem, and there was no conduct that suggested that there was an immediate prospect of execution of a threat to kill. (*Id*. at p. 637.) In contrast, as set forth above, there was a history between defendant and Kimberly, and evidence that defendant contacted Kimberly at her home, confirmed her identity, and then made his threat against her.

Defendant further argues that his statement could not have conveyed a gravity of purpose and immediate prospect that he would kill Kimberly given the fact that there had been no contact between him and Kimberly for over 28 years, the statement was made over the telephone, and, at the time, defendant was in Wyoming. We are not convinced. The word "'immediate'" in the context of section 422 must be understood "to mean that degree of seriousness and imminence which is understood by the victim to be attached to the *future prospect* of the threat being carried out." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1538; see also *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431–

1432 [rejecting defendant's claim that threats he made did not violate the statute because he was incarcerated when he made the threats and thus unable to carry them out].)

Here, defendant's words were intended to frighten Kimberly and convince her that he intended to kill her because she had sent him to prison for rape. Kimberly was no less frightened simply because the death threat was delivered over the phone as opposed to in person. Indeed, defendant found Kimberly, knew where she lived and how to find her. And, Kimberly did not know that defendant was out of state when the threat was made. Accordingly, defendant's threat conveyed an immediate prospect of execution, and substantial evidence supports the conviction.

C. Section 646.9

Section 646.9, subdivision (a), provides, in relevant part, that "[a]ny person who . . . willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety . . . is guilty of the crime of stalking . . . ." The statutory definition of "'harasses'" is "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose." (§ 646.9, subd. (e).) "'[C]ourse of conduct'" is defined as "two or more acts occurring over a period of time, however short, evidencing a continuity of purpose." (§ 646.9, subd. (f).) "'[C]redible threat'" includes a verbal threat or "a threat implied by a pattern of conduct" that is "made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety . . . and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety." (§ 646.9, subd. (g).) "It is not necessary to prove that the defendant had the intent to actually carry out the threat." (§ 646.9, subd. (g); see also *People v. Carron* (1995) 37 Cal.App.4th 1230, 1238–1240.)

"By its plain terms, all that is required for a conviction under section 646.9 is proof that the defendant, (1) with the apparent ability to carry out his threat, (2) has willfully, maliciously and repeatedly harassed his victim (3) with the intent to place the victim in reasonable fear for [her] safety and (4) has, in fact, caused his victim to

reasonably fear for [her] safety." (*People v. Norman* (1999) 75 Cal.App.4th 1234, 1239; accord, *People v. Ewing* (1999) 76 Cal.App.4th 199, 210.)

In determining whether a threat occurred, the entire factual context, including the surrounding events and the reaction of listeners, must be considered. (*People v. Falck* (1997) 52 Cal.App.4th 287, 297–298; accord, *People v. Uecker* (2009) 172 Cal.App.4th 583, 598, fn. 10.)

For the same reasons set forth above, we conclude that substantial evidence supports defendant's conviction of stalking.

Defendant argues that there is no evidence that he engaged in a course of conduct involving two or more acts against Kimberly. We disagree. Defendant contacted her twice—by telephone and by letter. As described above, defendant yelled obscenities at Kimberly and then told her that he was going to kill her. He followed up several months later in a letter, accusing her of lying about the rape charges that sent him to prison and then stating that "'the time [was] right . . . for cash to be paid for all.'" These two acts evidenced a continuity of purpose, namely to frighten Kimberly and punish her for sending him to prison for rape. This evidence is sufficient to sustain the stalking conviction.

Defendant claims that the March 9, 2009, letter was not threatening and that there was no apparent ability to carry out any alleged threat. Not so. Pursuant to section 646.9, subdivision (g), a credible threat may be verbal or "implied by a pattern of conduct," or a combination of the two. (*People v. McClelland* (1996) 42 Cal.App.4th 144, 153.) Viewing the "entire factual context" of this case (*People v. Falck*, *supra*, 52 Cal.App.4th at p. 298), defendant made a credible threat to Kimberly within the meaning of section 646.9. After raping her, evidence was presented that defendant threatened to kill her during his rape trial. Later, after spending several years in prison, his hostility escalated when he tracked Kimberly down, called her a "'fuckin' bitch,'" and threatened to kill her. Then, he wrote her a letter, accusing her of lying and appearing to ask for money. His telephone call and letter were made with the apparent ability to carry out his threat to kill Kimberly; not only did she not know that he was in Wyoming, there is no

reason to believe that defendant could not have followed through on his threat given that he knew how to find Kimberly. Thus, we conclude that these acts can reasonably be seen as an intent on defendant's part to place Kimberly in fear for her safety. (*People v. McClelland, supra,* at pp. 153–154.)

II. *Defendant's Prior Threat to Kimberly Was Properly Admitted*

A. Factual Background

Prior to the start of trial, defense counsel moved to exclude defendant's threat to Kimberly made during the rape trial. Counsel argued that the alleged threat was made 28 years ago and therefore "too remote to be relevant." The trial court disagreed, finding her testimony relevant as it pertained to defendant's motive, Kimberly's credibility, and the overall context of charges for criminal threats and stalking. The trial court noted that Kimberly's relationship with defendant was "based almost entirely on that rape trial."

B. Applicable Law

Evidence that a defendant committed misconduct other than that currently charged is inadmissible to prove that he has a bad character or a disposition to commit the charged crime. (Evid. Code, § 1101, subd. (a); *People v. Kipp* (1998) 18 Cal.4th 349, 369.) Such evidence is admissible, however, if it is relevant to prove, inter alia, intent, knowledge, identity, or the existence of a common design or plan. (Evid. Code, § 1101, subd. (b); *People v. Catlin* (2001) 26 Cal.4th 81, 145–146.) The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence. (*People v. Steele* (2002) 27 Cal.4th 1230, 1243.)

Though relevant, evidence offered under Evidence Code section 1101, subdivision (b), must also satisfy the admissibility requirements of Evidence Code section 352. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404, superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505–506.) Pursuant to Evidence Code section 352, relevant evidence may be excluded if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, confuse the issues, or mislead the jury. (Evid. Code, § 352; *People*

v. Callahan (1999) 74 Cal.App.4th 356, 366–367.) Evidence is unduly prejudicial only if it "'"'uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on issues.'"' [Citations.]" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118–1119.)

We review the trial court's admission of evidence of abuse of discretion. (*People v. Kipp*, *supra*, 18 Cal.4th at p. 371.) In other words, a trial court's decision to admit certain evidence will not be disturbed on appeal absent a showing that it exercised its discretion in an arbitrary manner resulting in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.)

C. No Error

The trial court did not abuse its discretion in admitting Kimberly's statement regarding how defendant threatened her years ago because it was relevant to how she reacted to his later threat. The evidence of the prior threat explained Kimberly's current fear. Thus, the jury needed to hear that defendant had previously threatened to kill Kimberly before he was sent to prison for raping her in order to understand and consider Kimberly's reaction to his threat over the telephone. Moreover, as noted by the trial court, evidence of the prior threat was relevant in assessing Kimberly's credibility regarding the later threat.

The fact that the first threat was made 28 years before the current one does not make it less relevant. And, we cannot ignore the fact that defendant spent a number of years in prison for raping Kimberly and was undoubtedly unable to track her down or contact her during that time.

Even assuming that the trial court erred in admitting the evidence of defendant's prior threat, any error was harmless because it is not reasonably probably that the absence of such evidence would have produced a more favorable outcome to defendant. (*People v. Welch* (1999) 20 Cal.4th 701, 749–750.) There was ample evidence that defendant made criminal threats and stalked Kimberly even without Kimberly's testimony regarding the prior threat.

Furthermore, following Kimberly's testimony regarding defendant's prior threat, the trial court instructed the jury on how to use such evidence: "Folks, I did want to give you just a brief limiting instruction before we proceed. [¶] You have obviously heard testimony about a past alleged rape incident and a trial related to that and then some custody time related to that. That evidence is admitted for the purpose of providing context to the current alleged crimes as well as possible motives. As far as you are concerned, it is not to be used for propensity evidence. You are not to say, well, just because someone may have done something in the past, they must have done it today, or not to use it for that purpose." Given that we presume that jurors understand and follow instructions (*People v. Smith* (2007) 40 Cal.4th 483, 517–518), we certainly can presume that the jurors evaluated Kimberly's testimony regarding the threat made 28 years ago appropriately.

III. *Jury Instructions*

Defendant argues that the trial court erred in instructing the jury with CALJIC No. 2.71.7.[2] Assuming, without deciding, that defendant did not forfeit this argument on appeal and that the instruction was erroneous, any error was not prejudicial under either the federal harmless-beyond-a-reasonable doubt standard (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Concha* (2010) 182 Cal.App.4th 1072, 1085–1090) or California's "reasonably probable" standard (*People v. Watson* (1956) 46 Cal.2d 818, 836). Here, it is not probable that the jury would have acquitted defendant had CALJIC No. 2.71.7 not been given. As summarized above, Kimberly gave compelling testimony about defendant's criminal threats and stalking. In addition, the instruction was actually for defendant's benefit, given that the jury was told that it had to "decide whether the statement was made" by defendant and that "[e]vidence of an oral statement ought to be

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[2] The trial court charged the jury, in part: "Evidence has been received from which you may find that an oral statement of intent, plan or motive was made by the defendant before the offense with which he is charged was committed. [¶] It is for you to decide whether the statement was made by the defendant. [¶] Evidence of an oral statement ought to be viewed with caution."

viewed with caution." It follows that, even if there were error, prejudicial error did not occur.

IV. *No Cumulative Error*

In light of the foregoing, we conclude that no error, let alone prejudicial error, occurred in defendant's trial. It follows that defendant's cumulative error claim fails. (*People v. Ochoa* (1998) 19 Cal.4th 353, 370 [defendant's claim of cumulative prejudice rejected because all claims rejected individually].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ