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

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS WALTER POLANCO,

Defendant and Appellant.

B290268

Los Angeles County
Super. Ct. No. GA102792

APPEAL from a judgment of the Superior Court of Los Angeles County, Dorthy L. Shubin, Judge. Conditionally reversed.

Stanley Dale Radtke, 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, Steven D. Matthews, Supervising Deputy Attorney General, Heidi Salerno, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Appellant and defendant Carlos Walter Polanco was convicted of two counts of making criminal threats and two misdemeanor counts of exhibiting a deadly weapon. The trial court sentenced him to three years in state prison. On appeal, he contends: (1) his case should be remanded for a mental health diversion hearing (2) the criminal threat convictions must be reversed because they are not supported by substantial evidence; (3) the trial court prejudicially erred by failing to instruct on the lesser included offense of attempted criminal threat; (4) the court prejudicially erred by failing to give a unanimity instruction; and (5) due process and equal protection require reversal of the court operations assessments, criminal conviction assessments, and restitution fine. We remand for a hearing on whether Polanco qualifies for mental health diversion. In all other respects we affirm.

PROCEDURAL BACKGROUND

An information charged Polanco with two counts of making criminal threats (Pen. Code,¹ § 422, subd. (a); counts one [victim Daniel Woods] and two [victim Roberto Martinez]) and two misdemeanor counts of exhibiting a deadly weapon (§ 417, subd. (a)(1); counts three and four). The information further alleged Polanco personally used a deadly and dangerous weapon (a boxcutter) during the commission of count one. (§ 12022, subd. (b)(1).) Polanco pleaded not guilty and denied the weapon use allegation.

¹ All undesignated statutory references are to the Penal Code.

The jury found Polanco guilty on all counts and found true the weapon use allegation. The court sentenced him to three years in state prison, consisting of a midterm of two years on count one and an additional year for the weapon enhancement.² Polanco timely appealed.

FACTUAL BACKGROUND

A. Count 1 – Victim Daniel Woods

On January 29, 2019, around 1:00 p.m., Polanco brought two plastic bags of recycling into the West Side Recycling Center in Glendale. He separated his recycling materials into two blue barrels to be weighed. Javier Flores, who was working at the scales, told Polanco he could not assist him. Flores explained his employer told him he could not provide services to Polanco because on the business day prior, Polanco had not followed the recycling center rules.³

After Flores told Polanco he could not accept his materials, Polanco reacted angrily and aggressively. The assistant manager, Daniel Woods heard the commotion and came out of the office. Polanco yelled various expletives. Flores went outside to help another customer. Polanco went outside and put his recycling

² The court sentenced Polanco to a concurrent two-year midterm on count two. The court imposed two 180-day terms in county jail for counts three and four but stayed sentencing under section 654.

³ On the prior business day, Polanco had brought in materials to be recycled. Flores told him to go outside, get bins, and separate his materials into the bins. Polanco got the bins but failed to separate the items. The manager, Mario Garcia, told Flores to accept the materials to avoid trouble, but instructed the employees to refuse Polanco service in the future.

from the barrels back into his plastic bags while yelling obscenities.

Polanco picked up one of the empty barrels and threw it into the street, almost striking one of the other customers. Woods stepped into the front doorway entrance and told Polanco that if he did that again, he would call the police. While continuing to yell profanity and names, Polanco threw a second barrel into the street. Woods stepped in Polanco's direction, and Polanco pulled a box cutter out of his pocket and held it toward Woods. Polanco moved the box cutter forward with his right hand in the direction of Woods several times with the razor exposed. With the box cutter in his hand, Polanco yelled: "Come on outside, [expletive]. I'll get you. I'll get you when you come outside." Polanco was approximately three feet from Woods in a defensive stance.

Woods stepped back, turned to Garcia and told him to call the police because Polanco had a weapon. Woods felt threatened and believed Polanco could follow through with his threat. Woods asked Garcia to call the police because he was afraid Polanco was going to stab him and was concerned he would stab a customer. Polanco grabbed his bags with box cutter in hand and yelled: "I'll get you. I'll get you outside." Polanco yelled obscenities at the employees and yelled, "I hope I catch you outside." Woods began filming Polanco. Polanco walked across the street yelling and walked down the street. The police arrived ten minutes later.

B. Count 2 – Victim Roberto Martinez

Two or three hours later, Flores saw Polanco walking down the sidewalk on the other side of the street yelling expletives in the direction of the recycling center. Garcia again called the police. Polanco crossed the street and turned onto the next street.

Flores lost sight of Polanco and went inside to put away some cables. While putting away cables he heard, “Hey [expletive].” Flores turned and saw Polanco.

Roberto Martinez was working inside the recycling center toward the back alley entrance. He saw Polanco suddenly come inside the center through the alleyway holding two drumsticks, one in each hand, one of which was sharpened to a point. Polanco walked toward Martinez aggressively and loudly said: “[Expletive], I’m going to stab you.” Polanco was repeatedly moving his hands forward toward Martinez and back, and was very angry and aggressive. Polanco yelled, “In the end [expletives] pay;” “You’re going to pay me in blood;” and “I’m going to kill you all.” Because Martinez was afraid Polanco was going to attack him with the drumsticks, he quickly left to the bathroom and closed the door. Martinez was scared for an hour to an hour and a half.

Polanco turned and walked toward Flores where he had been putting away the cables. Polanco pointed the drumsticks at him and yelled: “It was you, [expletive], who ratted on me.” Polanco yelled that the employees were going to pay with blood and he was going to kill them all while moving the drumsticks quickly up and down.

Polanco left and the police arrived soon after. Flores told them which way Polanco had gone. The officer approached Polanco in a parking lot; Polanco was holding two wooden sticks, one of which was sharpened to a point.

DISCUSSION

1. Mental Health Diversion

Polanco contends his convictions must be conditionally reversed because he is entitled to a hearing under recently enacted section 1001.36, which allows qualifying defendants to participate in pretrial diversion and receive mental health treatment in lieu of prosecution. (§ 1001.36, subd. (c).) Relying on *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), review granted Dec. 27, 2018, S252220, Polanco argues the Legislature intended the statute, which provides ameliorating benefits to defendants, to apply retroactively in cases like his, in which the judgment was not final at the time the statute was enacted. The Attorney General contends the language of subdivision (c) of section 1001.36 demonstrates the Legislature intended the enactment to operate prospectively, and therefore the diversion statute would not apply to cases such as this one in which there has already been an adjudication.

Our Supreme Court has granted review to decide whether section 1001.36 applies retroactively. (*Frahs, supra*, 27 Cal.App.5th at p. 791 [holding section 1001.36 applies retroactively].) Since our Supreme Court will soon resolve this issue, we will keep our discussion brief.

We agree with the outcome in *Frahs, supra*, 27 Cal.App.5th 784, which held section 1001.36 applies retroactively to defendants whose cases are not yet final. Polanco's case is not yet final, and the probation report discloses he is documented as being "mentally disturbed." We remand to allow the trial court to determine whether Polanco's mental disorder is one that qualifies

him for diversion.⁴ If the court determines Polanco suffers from a qualifying mental disorder, it must then decide whether to grant him pretrial mental health diversion.

2. Substantial Evidence Supports the Jury’s Findings That Both Victims Were in Sustained Fear

We reject Polanco’s argument that the record contains insufficient evidence Woods or Martinez experienced sustained fear as a result of Polanco’s threats. “In reviewing a sufficiency of evidence claim, the reviewing court’s role is a limited one. ““The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]”” (*People v. Smith* (2005) 37 Cal.4th 733, 738-739 (*Smith*).) Applying these principles, we conclude substantial evidence supports the jury’s findings that Woods and Martinez experienced sustained fear. We will discuss each victim in turn.

Polanco pulled a box cutter out of his pocket and held it toward Woods as he threatened him. Polanco was roughly three

⁴ Section 1001.36, subdivision (b)(1)(A) defines the qualifying mental disorders as any “mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia” We note that the Legislature wrote the statute broadly to include all mental disorders identified in the DSM-V except the three disorders the statute explicitly excludes.

feet away from Woods and the razor of the box cutter was exposed about an inch. Woods testified he was scared Polanco was going to stab him with the box cutter. He also testified he was scared from the time of the incident up until the trial of what Polanco would do to him if he was released.

Sustained fear means “a period of time that extends beyond what is momentary, fleeting, or transitory.” (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156; CALCRIM 1300.) The court instructed the jury to apply this definition. (See *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 821 [“We presume that jurors follow the instructions provided by the court in the absence of a showing to the contrary.”].) It was reasonable for the jury to conclude Woods experienced sustained fear while Polanco stood three feet from him and threatened him with a box cutter. (See e.g. *People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349 [“[T]he minute during which [the victim] heard the threat and saw appellant’s weapon qualifies as ‘sustained’ under [section 422].”].) It was also reasonable for the jury to believe Woods’ testimony that he experienced sustained fear from the time of the threat until the time of trial.

Substantial evidence also supported the jury’s finding that Martinez experienced sustained fear. After threatening Woods, later in the day Polanco returned and entered the recycling center through the back alley holding two drumsticks, one of which was sharpened to a point. He walked toward Martinez and threatened to stab and kill him. Martinez was afraid Polanco was going to attack him with the drumsticks, and quickly left to the bathroom and closed the door. Martinez was scared for an hour to an hour and a half.

On these facts, substantial evidence supports both criminal threats convictions.

3. The Trial Court Was Not Required to Instruct on Attempted Criminal Threat

We reject Polanco’s argument that the trial court prejudicially erred by not instructing *sua sponte* on attempted criminal threat. Attempted criminal threat is a lesser included crime of making a criminal threat. (*People v. Chandler* (2014) 60 Cal.4th 508, 513.) The crime of attempted criminal threat encompasses situations where a defendant intends to commit a criminal threat “but is thwarted from completing the crime by some fortuity or unanticipated event.” (*People v. Toledo* (2001) 26 Cal.4th 221, 232.) For example, a defendant may be properly found to have committed the offense of attempted criminal threat if the defendant, “acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety” (*Id.* at p. 231.)

Polanco contends the trial court erred by not instructing on attempted criminal threat because substantial evidence supported a finding that he committed the lesser crime but not the greater crime. (See *People v. Breverman* (1998) 19 Cal.4th 142, 162.) Specifically, he argues substantial evidence supported a finding that Woods and Martinez did not experience sustained fear because the “evidence concerning the nature and duration” of their fear “was so slight.” We disagree. As we have previously discussed, Polanco held a box cutter toward Woods and threatened him as he stood three feet from him. Woods testified he was afraid Polanco was going to stab him. He further testified

he remained in a state of fear up until trial of what Polanco would do to him if released. Polanco threatened Martinez with a sharpened drumstick, and Martinez testified he remained in a state of fear for an hour to an hour and a half. On these facts, there was no reasonable basis to find the victims' fear was not sustained, and consequently, the evidence did not support an attempted criminal threat instruction.

Even assuming the court erred by not instructing on attempted criminal threats, we find any error harmless because the evidence of sustained fear (lasting at least an hour for Martinez and all the way until trial for Woods) was so strong. It is not reasonably probable the outcome would have been different had an attempted criminal threat instruction been given. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

4. The Trial Court Was Not Required to Give A Unanimity Instruction

Polanco next argues the trial court prejudicially erred by not giving an unanimity instruction explaining which statement served as the basis for count two. The court considered giving the unanimity instruction, but ultimately decided not to because the prosecution elected to proceed specifically on the following statement Polanco made to Martinez: "I will stab you. I'm going to kill you."

"[C]ases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*People v. Covarrubias* (2016) 1 Cal.5th 838, 877-878.) Polanco argues that although the prosecution elected to proceed on count two using his statement to Martinez that he would stab and kill him, the court nonetheless erred by

not giving the unanimity instruction because the prosecutor did not clearly tell the jury during closing argument that she was relying on that statement. He argues some jurors might have believed Polanco's statement to Martinez that he was going to stab and kill him constituted the criminal threat underlying count two, while other jurors might have believed his statement to Flores that everyone would "pay in blood" constituted the act underlying the offense.

We disagree. During closing argument, the prosecutor, when discussing count two, relied solely on the one threatening statement Polanco made to Martinez. In addition to relying solely on that statement, the prosecutor clearly stated that the threats Polanco made to Flores had not been charged in this case. The prosecutor, by relying solely on the statement Polanco made to Martinez, eliminated any need by the court to give a unanimity instruction. For this reason, we reject Polanco's argument that we should find error under *People v. Melhado* (1998) 60 Cal.App.4th 1529. There, unlike here, the prosecution discussed several different threats that could have given rise to the conviction without informing the jury specifically which threat it was relying on. (*Id.* at pp. 1535-1536.)

Polanco's attorney argued in the opening brief that the unanimity instruction was required for count two. In the reply, he argued that the instruction was required for both counts one and two. Polanco has forfeited his argument concerning count one by failing to raise it in the opening brief. (*People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9.) Even assuming he had not forfeited the argument, we would find no error because the prosecutor, when discussing count one with the jury, relied only on one statement

Polanco made to Woods – Polanco’s statement telling Woods to come outside because he was going to get him.

Furthermore, even assuming error on both counts, we find no prejudice. There is a split of authority on whether the test for reversible error for failure to give a unanimity instruction is the one in *Chapman v. California* (1967) 386 U.S. 18, 24 or the one in *People v. Watson, supra*, 46 Cal.2d at p. 836. (*People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 647.) We find the lack of a unanimity instruction harmless under either standard. There is no possibility that any of the jurors could have based their verdicts on any statements other than the statement (to Woods) the prosecutor relied on for count one and the statement (to Martinez) the prosecutor relied on for count two.

5. Polanco Has Forfeited His Challenge to the Assessments and Restitution Fine

The trial court imposed four \$40 court security assessments (Pen. Code, § 1465.8, subd. (a)), four \$30 criminal conviction assessments (Gov. Code, § 70373), and a \$300 restitution fine (§ 1202.4, subd. (b)(1)). Polanco raises a *Dueñas* issue in supplemental briefing but concedes he did not object to the fees or fine in the trial court. Polanco has forfeited his *Dueñas* argument by failing to object. (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; see *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155.)

DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the trial court with directions to conduct a diversion eligibility hearing under section 1001.36. If the court determines Polanco qualifies for diversion under section 1001.36, then it may grant diversion. If Polanco successfully completes diversion, then the court shall dismiss the charges. If, however, the trial court determines Polanco is ineligible for diversion under section 1001.36, or he does not successfully complete diversion, then the court shall reinstate his convictions.

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CURREY, J.

WE CONCUR:

MANELLA, P. J.

WILLHITE, J.