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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. SOMCHIT LEANG, Defendant and Appellant.	B280031 (Los Angeles County Super. Ct. No. NA104150)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed as modified.

Kevin Smith, 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, and Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Somchit Leang appeals from his judgment of conviction on multiple counts, including making criminal threats (Pen. Code,[1] § 422, subd. (a)), possession of flammable material (§ 453, subd. (a)), and attempted arson (§ 455, subd. (a)). Leang raises the following arguments on appeal: (1) the evidence was insufficient to support his conviction for criminal threats; (2) the trial court erred in failing to instruct the jury on attempted criminal threats as a lesser included offense of criminal threats; and (3) the trial court violated section 654 in imposing multiple punishment on the counts for possession of flammable material and attempted arson. We modify the judgment to accurately reflect the trial court's imposition of a sentencing fee, but otherwise affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[2]

I. The Charges

In an information filed on September 15, 2016, the Los Angeles County District Attorney charged Leang with three counts of attempted willful, deliberate, and premeditated murder [counts 1-3] (§§ 664, 187, subd. (a)), one count of possession of flammable material [count 4] (§ 453, subd. (a)), one count of attempted arson [count 5] (§ 455), one count of criminal threats [count 6] (§ 422, subd. (a)), one count of false imprisonment by violence [count 7] (§ 236), four counts of disobeying a domestic relations court order [counts 8-11] (§ 273.6, subd. (a)), one count

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[1] Unless otherwise stated, all further statutory references are to the Penal Code.

[2] Where necessary, we include a more detailed discussion of the facts in our legal analysis of the issues raised on appeal.

of battery [count 12] (§ 243, subd. (e)), and one count of exhibiting a deadly weapon [count 13] (§ 417, subd. (a)).

II. The People's Evidence

In 2015, Leang lived in a house in Long Beach, California with his wife, Farra R., their daughter, K.L., who was then 17 years old, and their son, J.L., who was then 10 years old. Over the course of the marriage, Farra had been the primary income provider for the family. Leang rarely had worked in the prior 10 years, which caused marital problems. Leang also had developed a substance abuse problem and admitted to Farra he was using methamphetamine.

In October 2015, Farra told Leang that she was filing for divorce. The following month, Leang repeatedly called Farra at her office and left her messages in which he called her derogatory names like "bitch, slut, [and] cunt." Leang also sent Farra harassing text messages. In December 2015, Farra obtained a three-year protective order against Leang, which prohibited him from harassing, assaulting, or threatening Farra in any way. Leang continued to reside in the family's home, but he began staying in a separate bedroom.

On the morning of May 8, 2016, Leang and Farra had an argument in which he accused her of cheating on him. At one point, Leang pulled out a box cutter, pointed it at Farra, and angrily said, "I should cut your throat, bitch." Later that afternoon, Leang confronted Farra at his parents' house. In the presence of the children, Leang grabbed Farra's throat with both hands and squeezed it for a few seconds. After Leang left, Farra called the police.

The following morning, on May 9, 2016, Leang came into Farra's bedroom and started to spray hairspray on the walls of

the room. When Farra asked Leang what he was doing, he told her, "Don't worry about it." A short time later, Leang came downstairs and continued spraying other areas of the house with hairspray. Leang also began arguing with Farra and said he was going to call the police. Farra responded that she would call the police herself. Both Farra and Leang then dialed 911 on their separate phones.

As Farra was talking to the 911 dispatcher, she went to exit the house through the garage door to await the arrival of the police. Leang told Farra that the garage door was bobby-trapped. Farra then changed her plan and took J.L. with her into the bathroom. From the bathroom, Farra could hear Leang talking on his phone and yelling that he was going to burn down the house. Farra later tried to open the bathroom door, but could not do so because Leang had tied a wire to the doorknob and connected it to another closed door across the hallway. While Farra and J.L. were locked inside the bathroom, K.L. went downstairs to leave the house. K.L. saw Leang spraying hairspray on the staircase. Leang told her to stay upstairs and said he was going to burn down the house. K.L. ignored Leang's command and exited the house through the garage door as the police were arriving.

After the police entered the house, Leang locked himself inside his bedroom. As the officers stood outside the bedroom, a smoke detector went off and smoke began coming out from underneath the door. At that point, the officers forced entry into the room and ordered Leang to the ground. A pillow, pillowcase, and t-shirt inside the room were partially burned. The officers found several lighters in Leang's pockets and on the bedroom

floor. A number of wet pieces of cloth that smelled of hairspray were found in various locations throughout the house.

Long Beach Arson Investigator Joshua Johnson testified that hairspray is a flammable material. Accordingly, when an aerosol can of hairspray is sprayed near an open flame, it can cause "a little flash, a little fireball." Investigator Johnson also testified that the pillow, pillow case, and t-shirt that were found in the bedroom were burned by an open flame device such as a lighter or a match, but there was no evidence that hairspray had been sprayed on these items. Investigator Johnson opined that the fire had been intentionally set.

III. The Defense Evidence

Leang testified on his own behalf. In 2014, Leang was diagnosed with depression. He could not afford to pay for his prescription medication so he began using methamphetamine on a regular basis to comfort himself. The drug caused him to have hallucinations and sleeplessness. Leang admitted he had accused Farra of cheating on him because he was depressed and under the influence of drugs. He also admitted he had sent Farra text messages in violation of the restraining order that had been issued against him.

On May 9, 2016, Leang called the police because he believed Farra had arranged for someone to kill him. Leang locked Farra and J.L. inside the bathroom because he did not want Farra to let anyone inside the house. Leang sprayed various pieces of cloth with hairspray and placed them around the house as a form of protection. Leang did not intend to burn down the house with his family inside. Instead, he believed his family would leave the house that morning to go to work and school, and he would need to have protection in place while he

was alone. Once the police arrived, Leang ran to his bedroom. He decided to commit suicide by lighting himself on fire. He doused his clothes with hairspray and set fire to the pillowcase, but the police forced their way into the room before he could finish.

IV. Verdict and Sentencing

At the conclusion of the trial, the jury found Leang not guilty on count 3 for the attempted murder of K.L. The jury deadlocked on counts 1 and 2 for the attempted murders of Farra and J.L., and those two counts were subsequently dismissed. The jury found Leang guilty as charged on all other counts. The trial court sentenced Leang to a total term of eight years, consisting of three years on count 4, consecutive terms of eight months on each of counts 5 through 7, and consecutive terms of 364 days on each of counts 8 through 10. The court stayed the sentences on counts 11 through 13 pursuant to section 654. Leang appeals.

DISCUSSION

I. Sufficiency of the Evidence on Criminal Threats

The jury found Leang guilty in count 6 of making a criminal threat against Farra on May 9, 2016 in violation of section 422. On appeal, Leang challenges the sufficiency of the evidence supporting his conviction. He specifically contends the evidence was insufficient to support a finding that his statements that he was going to burn down the house satisfied the required elements for the offense of criminal threats.

A. Relevant Law

In assessing a claim of insufficient evidence, "we review the whole record to determine whether *any* rational trier of fact

could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict - i.e., evidence that is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it 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. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Section 422 prohibits a person from threatening to commit a crime that will result in death or great bodily injury to another person. (§ 422, subd. (a).) To prove that a defendant made a criminal threat 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 … 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.)

With respect to the requirement that a threat be "'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,'" our Supreme Court has explained that "'"unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, 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.'" (*In re George T.* (2004) 33 Cal.4th 620, 635.) "A communication that is ambiguous on its face may nonetheless be found to be a criminal threat if the surrounding circumstances clarify the communication's meaning. [Citation.]" (*Ibid.*; see also *People v. Butler* (2000) 85 Cal.App.4th 745, 753 ["it is the circumstances under which the threat is made that give meaning to the actual words used"]; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218 ["the meaning of the threat by defendant must be gleaned from the words and all of the surrounding circumstances"].) In determining whether a communication constitutes a violation of section 422, "the trier of fact may consider 'the defendant's mannerisms, affect, and actions

involved in making the threat as well as subsequent actions taken by the defendant. [Citation.]" (*People v. Wilson* (2010) 186 Cal.App.4th 789, 808.) "The parties' history can also be considered as one of the relevant circumstances. [Citations.]'" (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340.)

With respect to the requirement that the victim "'reasonably . . . be in sustained fear' for his or her own safety or the safety of his or her family,'" the term "'sustained' has been defined to mean 'a period of time that extends beyond what is momentary, fleeting, or transitory. …' [Citation]" (*People v. Wilson*, *supra*, 186 Cal.App.4th at p. 808.) Accordingly, "[a] violation of section 422 is not complete upon the issuance of a threat; it depends on the recipient of the threat suffering 'sustained fear' as a result of the communication." (*People v. Wilson* (2015) 234 Cal.App.4th 193, 201.) In addition, "'the phrase to 'cause[] that person reasonably to be in sustained fear for his or her own safety' 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.) "'The victim's knowledge of defendant's prior conduct is relevant in establishing that the victim was in a state of sustained fear. [Citation.]' [Citation.]" (*People v. Wilson*, *supra*, 186 Cal.App.4th at p. 808.)

B. Substantial Evidence Supported Leang's Conviction for Criminal Threats

Viewed in the light most favorable to the jury's verdict, the evidence in this case was sufficient to support a finding that Leang made a criminal threat against Farra on May 9, 2016 when he locked Farra and J.L. inside the bathroom and

repeatedly threatened to burn down the family's home. The evidence showed that, shortly before Leang threatened to burn down the house, he sprayed a flammable material throughout the house in front of Farra and the children. Leang then began arguing with Farra. When Farra tried to exit the house through the garage door to get away from Leang, he falsely told her that the door had been booby-trapped. Farra was afraid, and took J.L. into the bathroom with her as she spoke with the 911 dispatcher. Leang then locked Farra and J.L. inside the bathroom. Before Farra and J.L. went into the bathroom, Leang made statements that he was going to burn down the house. Once Farra and J.L. were trapped inside the bathroom, Leang continued to yell that he was going to burn down the house. Leang also yelled that it was a hostage situation. Farra testified that the tone of Leang's voice when he made these statements was serious and angry, and that she felt scared for herself and her children. Based on such evidence, the jury reasonably could have concluded that Leang's repeated statements that he was going to burn down the house constituted a criminal threat within the meaning of section 422.

Leang argues there was insufficient evidence that he intended his statements about burning down the house be taken as a threat because these statements were not directed at Farra or the children. Leang asserts the evidence showed that he instead directed the statements to the 911 dispatcher while Farra and J.L. were in the bathroom. Farra testified, however, that she clearly heard Leang threaten to burn down the house, and that Leang angrily made the statements both before and after Farra and J.L. took refuge in the bathroom to get away from Leang. Both J.L. and K.L. also confirmed that Leang made threats about burning down the house in their presence. J.L. testified that he

heard Leang make this statement immediately before his mother took him into the bathroom. K.L. testified that Leang told her he was going to burn down the house when she ignored his instruction to stay upstairs and walked past him to leave. Farra and the children also testified that, immediately prior to making these statements, Leang sprayed hairspray all over the house in their presence. Such evidence was sufficient to support a finding that Leang intended for his repeated statements that he was going to burn down the house to be heard by Farra and the children, and to be understood as a real and genuine threat.

Leang suggests that a question posed by the jury showed it was uncertain whether his statements about burning down the house were intended to be taken as a threat against Farra. During deliberations, the jury submitted the following question to the trial court: "Can line 1 on count 6 be an implied threat? Can the term 'burn the house down' without directly stating that the burning is to cause great bodily injury or death, can it be implied that is what is meant?" The jury's question referred to the first element in the criminal threats instruction, which required the prosecution to prove that Leang "willfully threatened to unlawfully kill or unlawfully cause great bodily injury to Farra R."[3] Contrary to Leang's characterization, the jury's question did not reflect confusion about whether Leang's threat

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[3] In response to the jury's question, the trial court explained that an implied threat can satisfy this element of the offense if proven beyond a reasonable doubt, but the jury had "to decide whether it is a threat under [section] 422." The court also told the jury it was "for you to decide" whether the words "burn down the house" were meant to convey a threat to cause great bodily injury or death.

was directed at Farra. Rather, the jury was seeking clarification as to whether the threat to burn down the house could imply a threat to inflict death or great bodily injury if Leang did not expressly threaten to kill or injure anyone in making the statement. Given that Leang made the threat to burn down the house while Farra and J.L. were locked inside the bathroom and unable to flee, the evidence reasonably supported an inference that Leang's statements were intended to be a threat against the persons present in the house who could hear and understand the threat, and not the 911 dispatcher.

Leang also contends the prosecution failed to prove that his statements were so unequivocal, unconditional, immediate, and specific as to convey a gravity of purpose and immediate prospect of execution. In support of this contention, Leang claims that his statements about burning down the house were not focused on causing harm to Farra or the children, but rather were related to his plan to kill himself. The jury reasonably could have found, however, that Leang threatened to burn down the house because he was angry at Farra about their pending divorce and wanted to convey to her a gravity and immediacy of purpose in his threat. The evidence showed that, in the year preceding the May 9, 2016 incident, Leang's marriage to Farra had unraveled due to his methamphetamine abuse and failure to help provide for the family. Leang's conduct toward Farra during that time included repeatedly calling her at work, leaving her harassing voicemail and text messages, and falsely accusing her of cheating on him. On one occasion, Leang destroyed the interior of the house. On other occasions, he threatened to burn down the house. The day before the May 9, 2016 incident, Leang's violent conduct toward Farra escalated to the point that he threatened her with a box

cutter, and later grabbed her by her throat in the presence of the children. On the day of the incident, Leang prevented Farra from leaving the house by falsely claiming the garage door was booby-trapped and then locking her and J.L. in the bathroom. Leang also made sure that Farra saw he was spraying a flammable material around the house before he began making his threat to burn the house down. Given the totality of these circumstances, there was substantial evidence to support a finding that Leang's statements were sufficiently unequivocal, unconditional, immediate and specific so as to convey to Farra that he was serious about his threat and intended to immediately execute it.

Leang further argues the evidence was insufficient to show that his threats placed Farra in a state of sustained fear. Leang asserts that, while Farra testified she was "pretty scared" when he made his threat to burn down the house, she never stated she feared for the safety of herself or her family. Contrary to Leang's contention, however, there was substantial evidence to support a finding that his threats caused Farra to be in sustained fear for her and her children's safety. At trial, Farra testified that she felt "scared" when Leang told her the garage door was booby-trapped; was "shocked" and "scared for [J.L.'s] safety" when she took J.L. into the bathroom with her because she "didn't know what . . . [Leang] was gonna do"; was "pretty scared" when Leang told her the family's two large dogs were "part of his plan"; was "scared" when Leang locked her and J.L. in the bathroom and said he was going to burn down the house; and was "scared for [her] kids" when she heard Leang yell at someone on the phone that "it was a hostage situation." When the prosecutor asked Farra specifically if she was scared for herself and her children as the events in the house were unfolding, Farra answered, "Yes."

The officer who later freed Farra and J.L. from the bathroom likewise testified that Farra was crying and had a "scared look on her face" when he unlocked the door. In addition to this testimony, the jury heard the audio recording of Farra's 911 call in which she was crying as she explained to the dispatcher that Leang had sprayed hairspray everywhere and was threatening to burn down the house. On this record, Leang's conviction for criminal threats was supported by substantial evidence.

II. Failure to Instruct on Attempted Criminal Threats

Leang next asserts the trial court prejudicially erred in failing to instruct the jury sua sponte on attempted criminal threats as a lesser included offense of criminal threats. Leang argues that a lesser-offense instruction was warranted "given the closeness of the evidence in this case as to whether [his] actions amounted to criminal threats."

A. Relevant Law

"[I]t is the [trial] 'court's duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed.' [Citation.]" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826.) "Conversely, even on request, the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) Substantial evidence "is not merely '*any* evidence … no matter how weak' [citation], but rather '"evidence from which a jury composed of reasonable [persons] could … conclude[]"' that the lesser offense, but not the greater, was committed." (*People v.*

Cruz (2008) 44 Cal.4th 636, 664; see also *People v. Burney* (2009) 47 Cal.4th 203, 250 ["'[t]o justify a lesser included offense instruction, the evidence supporting the instruction must be substantial — that is, it must be evidence from which a jury . . . could conclude that the facts underlying the particular instruction exist'"].) "[W]e review independently whether the trial court erred in failing to instruct on a lesser included offense. [Citation.]" (*People v. Booker* (2011) 51 Cal.4th 141, 181.)

In a noncapital case, error in failing to instruct on a lesser included offense is reviewed for prejudice under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Thomas* (2012) 53 Cal.4th 771, 814; *People v. Breverman* (1998) 19 Cal.4th 142, 178.) Reversal is not required "'unless an examination of the entire record establishes a reasonable probability that the error affected the outcome. [Citation.] 'Such posttrial review focuses not on what a reasonable jury could do, but what such a jury is likely to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so relatively strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability the error of which the defendant complains affected the result.' [Citation.]" (*People v. Thomas*, *supra*, at p. 814, italics omitted.)

The crime of attempted criminal threat is a lesser included offense of making a criminal threat. (*People v. Chandler* (2014) 60 Cal.4th 508, 515; *People v. Toledo*, *supra*, 26 Cal.4th at p. 230.) A defendant properly may be found guilty of attempted criminal threat whenever he or she intends to make a criminal threat "'but is thwarted from completing the crime by some fortuity or

unanticipated event.' [Citation.] 'For example, if a defendant takes all steps necessary to perpetrate the completed criminal threat by means of a written threat, but the crime is not completed only because the written threat is intercepted before delivery to the threatened person, the defendant properly may be found guilty of attempted criminal threat. Similarly, if a defendant, with the requisite intent, orally makes a sufficient threat directly to the threatened person, but for some reason the threatened person does not understand the threat, an attempted criminal threat also would occur. Further, if a defendant, again 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 even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat.' [Citation.]" (*People v. Chandler*, *supra*, at p. 515.)

B. The Trial Court Did Not Commit Prejudicial Error in Failing to Instruct on Attempted Criminal Threats

Leang contends the evidence was sufficient to support an instruction on attempted criminal threats because there was conflicting evidence as to (1) whether his statements that he was going to burn down the house were intended to be taken as a threat to Farra; (2) whether the statements were sufficiently unconditional, unequivocal, and immediate, and specific so as to convey a gravity of purpose and immediate prospect of execution of the threat; and (3) whether Farra was actually in a state of sustained fear based on the statements. Leang asserts that,

if given the choice between criminal threats and attempted criminal threats, the jury might have concluded that he committed only the lesser offense.

With respect to the first two elements regarding whether Leang acted with the requisite intent and whether his statements had the defining characteristics of a criminal threat, Leang has not shown that any of the evidence presented on these elements could have supported a finding that he was guilty only of the lesser offense. Attempted criminal threats "require[s] proof the defendant 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." (*People v. Chandler*, *supra*, 60 Cal.4th at p. 525, italics omitted.) If, as Leang claims, the evidence showed nothing more than an emotional outburst that was not intended to be taken as an actual threat, then he would not have been acting with the requisite specific intent. Likewise, if Leang's statements about burning down the house lacked the qualities necessary to convey a gravity of purpose and immediate prospect of execution, then such statements would not have been sufficient to cause a reasonable person to be in a state of sustained fear. In that case, the evidence would have been insufficient to support a conviction for either making a criminal threat or attempting to make a criminal threat. Such evidence could not have supported a finding by the jury that only the lesser offense, but not greater, was committed.

With respect to the third element regarding the effect of Leang's statements on Farra, the trial court was required to instruct on attempted criminal threats if there was evidence from which the jury reasonably could have concluded that Leang's threat to burn down the house did not actually cause Farra to

experience sustained fear. (*People v. Toledo*, *supra*, 26 Cal.4th at p. 231.) As discussed, Farra described feeling "scared," "pretty scared," and "scared for [her] kids" during the course of the May 9, 2016 incident. If the jury disbelieved Farra's testimony about her state of fear or inferred from such testimony that her fear was only fleeting, then it arguably could have found that Leang was guilty of the lesser offense, but not the greater. However, any error in failing to instruct the jury on attempted criminal threats was harmless in this case based on the totality of the evidence presented. In addition to Farra's testimony about her emotional state, J.L. recounted that he saw his mother crying while she was on the phone with the 911 dispatcher. The police officer who released Farra and J.L. from the bathroom similarly recalled that Farra had been crying, and he specifically described her demeanor as "scared." Another officer who observed Farra and J.L. as they were exiting the bathroom testified that they both "appeared to be frightened." None of the witnesses ever suggested that Farra seemed to be unafraid. Farra's actions also were consistent with someone who was in a state of sustained fear. Farra initially tried to leave the house as she was dialing 911, and only retreated to the bathroom when Leang made the claim about the booby-trapped door. Farra remained on the phone with the 911 dispatcher until the police arrived, and she could be heard crying on the audio recording of her call. On this record, there is no reasonable probability that Leang would have achieved a more favorable result if the jury had been instructed on attempted criminal threats.

III. Multiple Punishment for Possession of Flammable Material [Count 4] and Attempted Arson [Count 5]

In count 4, Leang was convicted of possession of flammable material in violation of section 453. In count 5, he was convicted of attempt to burn a structure or property in violation of section 455. The trial court sentenced Leang to three years on count 4 and a consecutive term of eight months on count 5. On appeal, Leang argues the trial court should have stayed the sentence on count 5 under section 654 because the two offenses arose from the same course of conduct pursuant to a single criminal intent.

A. Relevant Law

Section 453, which defines the crime of possession of flammable material, provides that "[e]very person who possesses, manufactures, or disposes of any flammable, or combustible material or substance, or any incendiary device in an arrangement or preparation, with intent to willfully and maliciously use this material, substance, or device to set fire to or burn any structure, forest land, or property, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170, or in a county jail, not exceeding one year." (§ 453, subd. (a).) Section 455, which defines the crime of attempted arson, states that "[a]ny person who willfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any structure, forest land or property, or who commits any act preliminary thereto, or in furtherance thereof, is punishable by imprisonment in the state prison for 16 months, two or three years." (§ 455, subd. (a).)

Section 654 provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall

be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) The statute therefore "bars multiple punishment for separate offenses arising out of a single occurrence when all of the offenses were incident to one objective." (*People v. Cowan* (2010) 50 Cal.4th 401, 498.) "'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507, italics omitted.)

Generally, "[i]t is [the] defendant's intent and objective, not temporal proximity of his offenses, which determine whether the transaction is indivisible." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) "'The defendant's intent and objective are factual questions for the trial court; . . . there must be evidence to support [the] finding the defendant formed a separate intent and objective for each offense for which he was sentenced.' [Citation.]" (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) However, "[u]nder section 654, 'a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment . [Citations.]' [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. [Citation.]" (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) A trial court's express or implied

determination that two crimes are subject to multiple punishment must be upheld on appeal if supported by substantial evidence. (*People v. Brents* (2012) 53 Cal.4th 599, 618.)

B. Substantial Evidence Supported Multiple Punishment for Counts 4 and 5

At the sentencing hearing, defense counsel asked the trial court to stay the sentence on the attempted arson conviction in count 5 pursuant to section 654. Defense counsel argued that, for purposes of section 654, "counts 4 and 5 do merge" because count 5 "included the actual use of the flammable material that was in [Leang's] possession." The prosecution, on the other hand, asserted that counts 4 and 5 were separate and distinct crimes because "one is the possession of those items" and "the other is the actual burning of objects." In denying Leang's request to stay the sentence on count 5, the trial court stated: "I do intend to sentence the five years [on counts 4 through 7] as suggested by the D.A. I independently believe that is appropriate."

On appeal, Leang asserts the consecutive eight-month term imposed on count 5 for attempted arson should have been stayed because counts 4 and 5 "arose from precisely the same course of conduct: spraying hairspray on the walls and assorted personal property – including a pillow, pillowcase, clothing, and tied cloths – then trying to light a fire." Leang reasons that his objective in committing both offenses would have been the same – to set fire to the items he had sprayed with hairspray. Leang's argument would have merit if evidence solely showed that he sprayed the various items in his house with a flammable material and then attempted to light those items on fire. In this case, however, there was sufficient evidence to support a finding that Leang's

possession of the hairspray and subsequent attempt to start a fire were not part of an indivisible course of conduct, but rather were separated by a series of events during which Leang had time to reflect on his actions and renew his criminal intent.

With respect to count 4 for possession of flammable material, the evidence showed that, on the morning of May 9, 2016, Leang began spraying a can of hairspray on walls and objects throughout the house. Farra first noticed Leang spraying hairspray on the walls of her bedroom. A short time later, Leang came downstairs where Farra and J.L. were having breakfast, and continued spraying hairspray in other areas, including the living room, kitchen, and staircase. Leang then began making the threats to burn down the house as Farra and J.L. retreated to the bathroom. While Farra and J.L. were in the bathroom, Leang placed various pieces of cloth doused in hairspray at different locations around the house. On the first floor of the house, hairspray-covered cloths were found tucked into a couch in the living room, tied to a wooden cabinet in the kitchen, and tied along the handrails of the staircase. Leang also tied a hairspray-covered cloth to the water heater located on the second floor. Leang never attempted to set fire to any of these items. All of these actions took place before the police arrived on the scene, entered the house, and freed Farra and J.L. from the bathroom. Once Leang sprayed hairspray all around the house with the intent to burn the house down, he completed his commission of the crime of possession of a flammable material in count 4.

After the police entered the house, Leang ran upstairs. He stopped at the top of the staircase while holding the can of hairspray in one hand and a lighter in the other hand. Leang repeatedly refused the officers' orders to drop the can and come

downstairs. Leang also made a motion to spray the can at an officer while holding the lighter near his chest. When the officer warned Leang not to spray at him, Leang ran down the hallway and locked himself in his bedroom. At some point, Leang also placed a piece of paper over the smoke alarm in that room. As the officers were standing outside Leang's bedroom and ordering him to open the door, Leang used a lighter to set fire to a pillow, pillowcase, and t-shirt. According to Leang, he also tried to use the hairspray as an accelerant in burning these items with the intent to "catch [himself] on fire somehow some way." Leang's efforts were thwarted when the officers forced entry into the room and arrested him. At the point in time when Leang tried to set fire to the items in his bedroom, he committed the crime of attempted arson in count 5.

From this evidence, the trial court reasonably could have found that counts 4 and 5 did not arise out of a single, indivisible course of conduct within the meaning of section 654. Although both crimes involved an intent to set fire to a structure or property, Leang had the opportunity to reflect on his actions after he deliberately sprayed hairspray on the walls of the house and on the pieces of cloth that he placed in various rooms as part of his plan to burn down the house. Leang had such an opportunity for reflection while he was on the phone with the 911 dispatcher, while he was standing on the staircase talking to the officers, and while he was locked inside his bedroom refusing the officers' commands. Instead of surrendering to the police, Leang renewed his intent to set fire to a structure or property by using a lighter to burn the items in his bedroom in what he described as a plan to commit suicide by "catching" his clothes on fire. Given this unique sequence of events, the evidence was sufficient to support

a conclusion that Leang committed separate and distinct acts in possessing a flammable material by spraying it around the house and in attempting to set fire to certain items once he had locked himself in his bedroom. The trial court therefore did not violate section 654 in imposing multiple punishment on counts 4 and 5.

IV. Court Operations Assessment

Section 1465.8 provides, in relevant part, that "[t]o assist in funding court operations, an assessment of forty dollars ($40) shall be imposed on every conviction for a criminal offense. . . ." (§ 1465.8, subd. (a)(1).) At the sentencing hearing, the trial court stated that it was imposing a "$40 security fee," but it did not specify that such fee applied to each of Leang's 10 convictions. Although the clerk's minute order lists a separate fee of $40 for each conviction pursuant to section 1465.8, the abstract of judgment simply reflects a court operation assessment of "$40.00 per PC § 1465.8." The Attorney General thus asserts that the abstract of judgment should be amended to reflect a court operations assessment of $400, or $40 per conviction, pursuant section 1465.8. We agree. Because section 1465.8 requires that a court operations fee be imposed for each of Leang's 10 convictions, including those stayed pursuant to section 654, the abstract of judgment must be modified accordingly. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 369-370, *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.)

DISPOSITION

The abstract of judgment is modified to reflect a court operations assessment of $40 per conviction for a total of $400 pursuant to section 1465.8. As modified, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment, and to forward a certified copy to the Department of Corrections and Rehabilitation.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.*

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