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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL CARL HELM, Defendant and Appellant.	B229076 (Los Angeles County Super. Ct. No. KA091337)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert M. Martinez, Judge. Affirmed.

Elizabeth H. Lopez, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Daniel C. Chang and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Michael Carl Helm was charged with criminal threats (Pen. Code, § 422); attempt to burn (Pen. Code, § 455); misdemeanor resisting, obstructing, or delaying a peace officer (Pen. Code, § 148, subd. (a)(1)); and misdemeanor illegal conduct at a burning building (Pen. Code, § 148.2).

A jury found appellant not guilty of criminal threats, but guilty of attempted criminal threats, a lesser included offense of criminal threats. He was convicted on all other counts. The trial court sentenced appellant to the low term of 16 months on the attempted burning count and concurrent terms on the remaining counts.

Appellant appeals only from the conviction for attempted criminal threats. He contends that the jury instructions were inadequate, that there was insufficient evidence to support the conviction, and that he was improperly punished twice for the same act.

Finding no reversible error, we affirm.

FACTS

Prosecution Evidence

Laura Austin was the manager at an Azusa trailer park, where she lived. The park held 18 trailers, and a total of about 40 people lived there. Appellant's trailer was directly across from Austin's front door. They had known each other for about 12 years and considered themselves friends.

On the night of May 23, 2010, Austin was inside her home when she heard shouts of "fire." She opened her front door to see smoke and flames coming out of appellant's trailer. Appellant was standing beside the trailer, spraying water into an open window from a garden hose. Austin and others rushed to help appellant try to extinguish the fire.

When firefighters arrived, everyone backed away from the trailer except for appellant. The fire captain and other firefighters ordered appellant to move out of the way, but he continued to stand there, spraying the garden hose. Eventually, the police grabbed appellant and moved him away.

Appellant told police that the fire started when he grew frustrated from looking at financial papers and lit them on fire with a cigarette. The flames burst up bigger than expected and he dropped the burning papers on his bedding, which in turn caught fire and

engulfed the trailer. Austin testified that after the fire was extinguished, she overheard appellant talking with his brother about the fire and telling him, "Haven't you heard that's my favorite pastime?"

About two months later, on July 17, 2010, Austin was gardening in the front of her home when she saw appellant's car pull into the main driveway and heard some loud crashing and booming sounds. She walked over to appellant, who was sitting in his car, and asked what was happening. He responded with, "I am going to blow up the trailer park and everybody in it." She asked him what was wrong, and he said that he was upset because someone had taken his driver's license and bank card from his fanny pack, cleaned out his bank accounts, and then put the cards back in the fanny pack. Austin mocked appellant because he had made similar wild accusations in the past, but appellant replied, "You'll see. You'll see." He then drove out of the trailer park.

Austin initially did not take appellant's threat to blow up the trailer park seriously. As she walked into her home, however, she saw that a window had been broken. She called the police to report the broken window and noticed that another neighbor's car window had also been smashed. Minutes later, while still on the phone with the police dispatcher, she saw appellant drive back into the trailer park, get out of the car, grab a red gas can and pour the contents onto her rose bushes. Austin could smell the gasoline. She told the dispatcher about appellant's threat to blow up the trailer park. She felt scared and "absolutely" believed he would follow through on his threat. Appellant finished pouring gasoline onto the rose bushes and then poured it onto the rear of a broken-down car parked near his trailer. He saw and heard Austin talking to the police dispatcher and said "Good, that's just what I wanted." As he got back into his car and pulled out, a police car pulled up right behind him.

Officer Lauren Ferrari of the Azusa Police Department was the first officer to respond. She followed appellant's car out to a main street and tried to pull him over. Appellant did not stop, but instead led Officer Ferrari on a low-speed pursuit through the surrounding area, eventually stopping back at the trailer park. As other police officers arrived, appellant refused to get out of his parked car. An armored truck was brought in

to block appellant's path and other police cars boxed him in. A SWAT team arrived, but appellant still stayed in his car. A K-9 unit was called in and appellant taunted the police dog by opening and closing his door. Finally, the dog managed to bite and latch onto appellant's arm, allowing officers to remove him from the car and place him under arrest.

Cigarette lighters were found in appellant's pocket, and scissors, a hammer, and a bayonet were found in his car. The red gas can was found next to the bushes. It smelled of gasoline.

Defense Evidence

Appellant testified on his own behalf, denying that he interfered with firefighters on May 23, 2010. He said the fire started when he left a cigarette in an ashtray by his bed while he went to the toilet, and the bedspread caught on fire. He ran outside and grabbed the garden hose to spray the fire. When firefighters arrived he stepped away from the trailer. The fire captain came over to question him, and as they finished talking police officers grabbed appellant, threw him to the ground, and handcuffed him.

Appellant testified that on July 17, 2010, he told Austin he had been victimized by identity theft, but she laughed and made a sarcastic remark. They argued with each other, and appellant complained that Austin did not do enough to maintain security at the trailer park. After Austin made another condescending remark, appellant got in his car to leave. He denied ever saying that he was going to blow up the trailer park and the people in it.

After he got in his car, appellant noticed that he was low on gas, so he got out and walked over to grab the gas can by his trailer. The gas can was not in its usual location and it felt a lot heavier than he expected, so he opened it up to smell it and to look inside. He discovered that there was water in the can, and he poured the liquid out into the dirt.

Appellant got back in his car and drove out of the trailer park. When he noticed a police car behind him he returned to the trailer park, where he stayed in his car. At one point, the police ordered him to get out of his car, but he did not immediately comply because the police dog was standing nearby, and he was scared of dogs from being bitten as a child. When he eventually opened the door to go talk with the police, the dog bit his arm, breaking it in three places.

Appellant claimed that Austin lied in her testimony because she was trying to save her job as manager of the trailer park. According to appellant, Austin had committed numerous violations as manager and she was now "covering [her] behind."

DISCUSSION

I. Any error in the jury instruction on attempted criminal threat was harmless.

The jury was instructed with CALCRIM No. 1300 for the criminal threats charge. The instruction stated: "The defendant is charged in Count 1 with having made a criminal threat in violation of Penal Code section 422. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to Laura Austin; [¶] 2. The defendant made the threat orally; [¶] 3. The defendant intended that his statement be understood as a threat; [¶] 4. The threat was so clear, immediate, unconditional, and specific that it communicated to Laura Austin a serious intention and the immediate prospect that the threat would be carried out; [¶] 5. The threat actually caused Laura Austin to be in sustained fear for her own safety; [¶] AND [¶] 6. Laura Austin's fear was reasonable under the circumstances." Thereafter, the jury was instructed with CALCRIM No. 460 for attempted criminal threat: "The crime of attempted criminal threat in violation of Penal Code sections 664/422 is a lesser crime of making a criminal threat as charged in Count 1. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took a direct but ineffective step toward committing the crime of making a criminal threat; [¶] AND [¶] 2. The defendant intended to commit the crime of making a criminal threat."

Appellant contends that these instructions were insufficient. He argues that the trial court failed to instruct the jury on a necessary element of attempted criminal threats. Relying on *People v. Jackson* (2009) 178 Cal.App.4th 590 (*Jackson*), appellant asserts that the jury should have been instructed that in order to find appellant guilty of attempted criminal threats, it had to find that any fear felt by Austin was reasonable. According to appellant, the jury may have found that fear was an unreasonable reaction

to appellant's statements, and the court committed reversible error by failing to give an instruction requiring the jury to determine if fear was reasonable.

The trial court has a sua sponte duty to instruct the jury on all elements of a criminal charge. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) Failure to do so violates the defendant's rights under both the federal and California Constitutions. (*People v. Flood* (1998) 18 Cal. 4th 470, 479-480.)

The crime of attempted criminal threat was examined by our Supreme Court in *People v. Toledo* (2001) 26 Cal.4th 221. That decision explained: "Under the provisions of [Penal Code] section 21a, a defendant properly may be found guilty of attempted criminal threat whenever, acting with the specific intent to commit the offense of criminal threat, the defendant performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action. Furthermore, in view of the elements of the offense of criminal threat, a defendant acts with the specific intent to commit the offense of criminal threat only if he or she specifically intends to threaten to commit a crime resulting in death or great bodily injury with the further intent that the threat be taken as a threat, under circumstances sufficient to convey to the person threatened a gravity of purpose and an immediate prospect of execution so as to reasonably cause the person to be in sustained fear for his or her own safety or for his or her family's safety." (*Id.* at pp. 230-231.)

The court in *People v. Toledo*, *supra*, 26 Cal.4th 221, listed examples of potential attempted criminal threats: "[I]f a defendant takes all steps necessary to perpetrate the completed crime of 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. In each of these situations, only a fortuity, not intended by the defendant, has prevented the defendant from perpetrating the completed offense of criminal threat itself." (*Id.* at p. 231.)

Jackson expanded on this holding by affirmatively requiring the trial court to instruct the jury that it must decide on a charge of attempted criminal threat whether the "intended threat reasonably could have caused sustained fear under the circumstances." (178 Cal.App.4th at pp. 598-599.) The court in *Jackson* reversed the appellant's conviction because no such instruction was given, and it found that the jury may have concluded that the appellant's statement could not have reasonably caused the victims to suffer sustained fear. (*Id.* at p. 600.)

We will assume for present purposes that *Jackson* was correctly decided. Nevertheless, given the evidence in this case, we find that reversal is not warranted, since any error was harmless.

Appellant argues that the jury could have found that Austin's fear was unreasonable. In *Jackson*, the appellate court found that the jury may have decided that statements made by the defendant to the victims that he would "blow your head off" did not reasonably cause them fear under the circumstances. (178 Cal.App.4th at p. 600.) The court noted that the victims were "safely inside the house with a telephone to call the police while defendant sat out front," and it characterized defendant's statements as "outlandish." (*Ibid.*)

The evidence present in this case does not support such a conclusion. Austin was never ensconced in a location safe from the reach of appellant's threatened act. Austin was standing near appellant when he said he would blow up the trailer park and the people in it, and when he made his further statement, "You'll see. You'll see." And, even though she soon after went inside her house, she was still in the trailer park.

Austin's house (which was in the trailer park) would not have been safe if appellant's threatened act was successfully completed.

Furthermore, under the circumstances, it could only have been reasonable for a person in Austin's position to feel fear. In determining whether a statement can be considered a criminal threat "all of the surrounding circumstances should be taken into account." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013.) Austin testified that just before she encountered appellant on July 17, 2010, she heard loud crashing sounds. When she talked to appellant, he appeared upset. Austin's testimony that she did not initially take appellant's statement seriously was not pivotal, since the jury could properly consider "the defendant's mannerisms, affect, and actions involved in making the threat as well as subsequent actions taken by the defendant." (*Ibid.*) Just after appellant made the statement, Austin noticed the broken windows. Then, within minutes, she saw appellant pouring gasoline on her rose bushes and on an inoperative car. Unlike the "outlandish" threats made by the defendant in *Jackson*, Austin had a reasonable basis to believe that appellant would follow through, and indeed she testified that she "absolutely" believed he would blow up the trailer park. There is no question that any reasonable person would feel sustained fear when presented with appellant's statement under these circumstances.

In light of the evidence, appellant's conviction cannot be attributed to the omission of a jury instruction requiring the jury to find that the victim's fear was reasonable. We therefore find that any error was harmless. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *People v. Flood, supra,* 18 Cal.4th at pp. 502-503.)

II. <u>The attempted criminal threat conviction was supported by sufficient evidence</u>.

Appellant characterizes his statement to Austin about blowing up the trailer park as a "cavalier reaction" to her mockery. He contends that the statement was not intended to be a threat and it did not convey the gravity of purpose required to support the conviction for attempted criminal threat.

In reviewing a challenge of the sufficiency of evidence, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier

could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted; *People v. Hayes* (1990) 52 Cal.3d 577, 631.) Our function is to determine if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

We do not independently judge a witness's credibility. "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

We find that there was substantial evidence to support appellant's conviction for attempted criminal threat. Appellant contends that, as in *In re Ricky T.* (2001) 87 Cal.App.4th 1132 (*Ricky T.*), the statement here did not convey the gravity of purpose sufficient to justify a conviction. In *Ricky T.*, the 16-year-old minor left class to use the restroom and found the classroom door locked when he returned. He pounded on the door, and when his teacher opened it, the door hit the minor. The minor became angry, cursed the teacher, and stated, "'I'm going to get you.'" The teacher felt threatened and sent the minor to the school office, and the police were called the next day. A week later, the minor stated to a police officer that he told the teacher that he was going to "'kick your ass.'" He was subsequently charged with violating Penal Code section 422. (*Ricky T.*, at pp. 1135-1136.)

The Court of Appeal reversed the juvenile court's finding that the minor violated section 422. It held that his alleged threats "lack[ed] credibility as indications of serious, deliberate statements of purpose." (*Ricky T., supra,* 87 Cal.App.4th at p. 1137.) The decision stated: "Appellant's intemperate, rude, and insolent remarks hardly suggest any

gravity of purpose . . . . [¶] If surrounding circumstances within the meaning of section 422 can show whether a terrorist threat was made, absence of circumstances can also show that a terrorist threat was not made within the meaning of section 422." (*Id.* at pp. 1138-1139.)

The differing circumstances between *Ricky T.* and the instant case are obvious. The minor in *Ricky T.* made a comment in a fit of temper that circumstances showed contained no immediacy. (87 Cal.App.4th at p. 1137.) His alleged threat was either "I'm going to get you," or he would "kick your ass." (*Id.* at pp. 1135-1136.) Neither of these statements portended the infliction of great bodily injury or death. In this case, appellant's statement was unequivocal, unconditional, and specific, and, if it was carried out, the act would have (at a minimum) caused great bodily harm. The statement also conveyed an immediate prospect of execution; an immediate ability to actually commit the threat was not necessary. (See *People v. Wilson* (2010) 186 Cal.App.4th 789, 807.)

Furthermore, unlike in *Ricky T.*, the circumstances surrounding the statement supported a finding of gravity of purpose. In *Ricky T.*, the appellant was sent to the school office after making "insolent remarks." (87 Cal.App.4th at pp. 1135, 1138.) The Court of Appeal explained that "there was no evidence of any circumstances occurring *after* appellant's 'threats' which would further a finding of a terrorist threat." (*Id.* at p. 1139.) In contrast, in this case, just after appellant said that he would blow up the trailer park and the people in it, Austin discovered that windows were broken, and appellant poured gasoline over the rose bushes and the car. The surrounding circumstances clearly provided further gravity to appellant's statement, which itself was specific and unequivocal.

Since substantial evidence supported appellant's conviction for attempted criminal threat, reversal on this basis would be improper.

III. <u>The trial court properly imposed separate sentences for attempted criminal threat and attempt to burn</u>.

The trial court imposed the low term of 16 months on count 2 (attempt to burn). The court imposed a concurrent term of one year on count 1 (attempted criminal threat),

and concurrent terms on counts 3 and 4. Appellant contends the trial court violated Penal Code section 654 by imposing multiple punishments for attempted criminal threat and attempt to burn. He argues that the sentence for attempted criminal threat should have been stayed.

Penal Code section 654, subdivision (a) provides, in pertinent part: "An 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." When multiple offenses are committed during an indivisible course of conduct, section 654 bars multiple punishments. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

"It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible." (*People v. Harrison*, *supra*, 48 Cal.3d at p. 335.) "[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." (*Ibid.*) However, acts that occurred closely together in time may be divided by multiple criminal objectives. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1565.) If the defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)

Penal Code section 654, subdivision (a) multiple sentencing issues are reviewed for substantial evidence. (*People v. Garcia*, *supra*, 167 Cal.App.4th at p. 1564.) The trial court is given broad latitude to determine whether section 654 is factually applicable to a series of offenses. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

Here, substantial evidence supports the trial court's implied finding that appellant's objective in making the attempted criminal threat was independent of and not incidental to his objective in attempting to start a fire. There is substantial evidence to

support the conclusion that in his attempt to burn, appellant had the intent to start a fire in the trailer park. As for his statement to Austin that he was going to blow up the trailer park and everybody there, substantial evidence supports the implied conclusion that it was intended to cause Austin to fear for her own safety. These were separate intents and objectives, and therefore there was no violation of Penal Code section 654.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.