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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN FUENTES, Defendant and Appellant.	B270593 (Los Angeles County Super. Ct. No. NA102188)

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

A. William Bartz, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, John Yang, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant Jonathan Fuentes guilty of possession of a firearm by a felon; receiving a large-capacity magazine; unlawful possession of ammunition; possession of a controlled substance with a firearm; and making criminal threats. On appeal, Fuentes contends the trial court erred in admitting evidence that he belonged to a gang. Fuentes also argues substantial evidence did not support the criminal threats conviction. We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the facts in accordance with the usual rules on appeal. (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1427.) For three months in 2013, defendant, Isaac Rodriguez (defendant's brother), and Alexandra Fuentes (Rodriguez's girlfriend), lived with defendant and Isaac's mother, Porfiria Fuentes, in Torrance. Isaac and Alexandra have a son together, "Little Isaac."[1] Alexandra knew that defendant was in a gang, he had been in prison for a long time, and he was a drug addict. Isaac had told her that defendant had been in fights with people and that defendant had shot someone. While they all lived in the same house, Alexandra was afraid of defendant because of his drug use; defendant was also violent, aggressive, and short-tempered. Defendant told Alexandra about instances when "his intentions were to go hurt somebody." At one point, defendant showed Isaac a pistol and a shotgun he had in his room. Defendant told Isaac he was trying to make a "stash box" for the guns. Defendant had previously told Isaac he was a gang member. At some point, defendant accused Alexandra and Isaac of stealing some of Porfiria's jewelry. After the accusation, Isaac and defendant did not speak for an entire year. Alexandra and

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1 At the time of trial, Little Isaac was two years old.

Isaac moved out of the house because Alexandra "didn't like how [defendant] was acting."

On June 20, 2015, Alexandra was admitted to the hospital. Isaac asked Porfiria to pick up Little Isaac from the hospital. When Porfiria arrived, Alexandra asked her to take care of Little Isaac and to be responsible for him. She did not like it when Porfiria left Little Isaac with other people. Defendant, in particular did not have her permission to watch Little Isaac. Thus, when Alexandra found out later that day that Porfiria had left Little Isaac with defendant, she had herself discharged and left the hospital with Isaac to retrieve Little Isaac. At Porfiria's house, Alexandra and defendant argued about Little Isaac's stroller, which was not at the house. Alexandra and Isaac left with Little Isaac.

Soon after Alexandra and Isaac arrived at their apartment, Isaac received a message from Porfiria indicating the stroller was outside. When Isaac and Alexandra went outside they saw the stroller, then defendant approached. Defendant got close to Alexandra and "in [her] face." Alexandra saw that defendant was holding what appeared to be a gun, loosely wrapped in a bandana. Alexandra saw a little bit of metal sticking out from the bandana; she could tell it was a gun by the way he was holding it and "how he was acting." Defendant pointed the gun at Alexandra's stomach. Defendant said: " 'You want me to show you how serious I can get?' "[2] She understood this to be a threat.

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[2] Isaac testified that Alexandra said something like, "Are you really serious right now? Like, really? Like, you're getting mad?" Defendant responded: "Do you want me to show you how serious I am?" Then he reached into his pocket. Isaac saw something chrome wrapped in a blue bandana which "could have been a

Isaac saw that Alexandra turned "pale white" and looked scared. Alexandra and Isaac went inside. Isaac called 911 three times. Police arrived four hours later but said there was nothing they could do.

Alexandra was scared the day of the incident and after. She was afraid to leave her house. Isaac testified he had to miss a week of work because Alexandra was "that scared." According to Isaac, Alexandra was afraid of stepping outside of their building and she thought people were following her when she did leave. She remained afraid at the time of trial.

On June 23, 2015, police went to Alexandra and Isaac's home in response to a report of child abuse concerning Little Isaac. At the police station, Alexandra told police officers about the June 20th incident. She believed Porfiria and defendant had made a false child abuse report.

On July 8, 2015, police officers and a parole agent from the Department of Corrections searched defendant's car. They found a gun magazine containing live rounds, a handgun with a gun magazine that also contained live rounds, 0.023 grams of cocaine, 0.29 grams of concentrated cannabis, and 4.23 grams of marijuana. During a search of Porfiria's house, police found a .45 caliber bullet in defendant's bedroom.

At trial, defendant testified on his own behalf. He admitted saying to Alexandra, "You think I can't get serious," or words to that effect. He denied holding a weapon when he made the statement and denied having any weapons of any kind with him during the incident. He denied owning a red or blue bandana.

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gun." Isaac said he could not completely tell what was in defendant's hand because defendant "kind of covered himself from [Isaac's] line of vision."

Defendant said when he got out of the car in front of Alexandra and Isaac's house, he had only his phone and the stroller. He did not intend to suggest or make Alexandra think he would inflict bodily harm on her. Defendant testified he had seen scratches on Little Isaac and was concerned. His "serious" statement was intended to convey that he would report his concerns to the authorities, which he later did. According to defendant, Alexandra and Isaac had a motive to lie about him because of the incident involving the missing jewelry, their feelings about no longer living in Porfiria's house, and a disagreement that occurred when defendant wanted to take Little Isaac on a family outing without Alexandra and Isaac.

Defendant also denied having any knowledge of a bullet at his mother's house or the pistol and gun magazines found in his car. He only knew about the marijuana and concentrated cannabis. The cocaine found in the car was not his; defendant testified he had "company" in the car and the cocaine fell out of that person's pocket. Defendant put it below the car radio when he found it. Isaac, in the past, frequently drove the car. Defendant admitted he had been convicted of a robbery and that he had an "18" tattoo on his body, referring to the 18th Street gang.

Defendant's mother also testified on his behalf. According to Porfiria, she never saw defendant in her house with guns or bullets.

The jury found defendant guilty of possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1); count 2); manufacturing, importing, keeping for sale, giving, or receiving a large-capacity magazine (Pen. Code, § 32310, subd. (a); count 3); unlawful possession of ammunition (Pen. Code, § 30305, subd.

(a)(1); count 4); possession of a controlled substance with firearm (Health & Saf. Code § 11370.1, subd. (a); count 5), and criminal threats (Pen. Code, § 422, subd. (a); count 6). The jury found defendant not guilty of assault with a semi-automatic firearm. (Pen. Code, § 245, subd. (b); count 1.) The jury also found not true the allegation that as to count 6 (criminal threats), defendant personally used a firearm. (Pen. Code, §§ 12022.5, 1192.7, subd. (c) & 667.5, subd. (c).) Defendant admitted suffering a prior strike and serious felony conviction within the meaning of Penal Code section 667, subdivisions (a)(1) and (b) through (j). The trial court sentenced defendant to a total prison term of 14 years and 4 months.

DISCUSSION

I. The Trial Court Did Not Abuse its Discretion By Admitting Limited Evidence of Defendant's Membership in a Gang

Defendant contends the trial court abused its discretion by admitting evidence he was in a gang. He asserts the gang evidence was inadmissible because it was irrelevant and the prejudice resulting from the admission of the evidence was not outweighed by its probative value. We find no abuse of discretion.

A. Background

Before trial, the prosecutor asserted the evidence of defendant's gang membership was relevant because it related to Alexandra and Isaac's state of mind and fear of defendant. Defense counsel objected that neither witness mentioned defendant's gang membership at the preliminary hearing, and asserted the evidence should be excluded under Evidence Code section 352. The trial court asked if there was a police report

indicating Alexandra or Isaac stated the fear they experienced after defendant threatened Alexandra was based on their knowledge of defendant's gang membership. When the prosecutor admitted she had no such report, the trial court ruled the evidence of defendant's gang membership would be excluded. However, at the beginning of the trial, the prosecutor produced a police report stating Alexandra and Isaac said defendant's gang membership contributed to their fear of him. The defense again objected, arguing the evidence was unduly prejudicial and the People wished to introduce it to show bad character. The court indicated it would admit the evidence, with a limiting instruction, and concluded the evidence was not inadmissible under Evidence Code section 352.

Alexandra testified one of the things she knew about defendant that made her take his threat seriously was that he was in a gang. When asked why this was the case she explained: "Because people like that don't really care about what they do or how they hurt people." The prosecutor asked: "You said people like that, but do you know anything specific about this defendant that makes you think he doesn't care if he hurts people? . . . Instead of saying in general why you might be scared of gang members, what about this defendant specifically?" Alexandra explained that defendant had told her he had gone to "handle people . . . his intentions were to go hurt somebody when he would tell me about those situations." During this line of questioning, the court instructed the jury: "The witness's testimony about the defendant's alleged gang membership, other activities, alleged violence, that's admitted not for the truth of that but to show the witness's state of mind when she says the

gun was pointed at her and the threat was made, only for that purpose."

When asked why he thought defendant was holding a gun during the June 20th incident, Isaac testified: "Because he's a gang member." He explained: "Like, I just know that it was a gun. Like, how he tells us the stories that he's always doing certain things. And then he's my brother. He has shown me and told me about guns that he's had at the house even before we lived in Torrance." Isaac testified that before 2013, defendant told him he was a member of the 18th Street gang, and defendant had tattoos. At the conclusion of Isaac's testimony on direct examination, the trial court again instructed: "The witness's testimony about the defendant's alleged gang affiliation and prior violence not charged in this case is admitted only for the state of mind of the witness, and if related to Miss Fuentes, her state of mind."

On cross-examination, defendant's mother testified she knew he is a gang member and that he has tattoos on his body indicating his gang affiliation. On cross-examination, the prosecutor asked defendant about his tattoo which referred to the 18th Street gang; the trial court interjected with the following instruction: "Again, this is not character evidence. It's admitted only for the reasons previously given by the court when the other witnesses for the prosecution testified as to their state of mind. Only for, in particular, the alleged victim's state of mind, for that purpose only."

In her closing argument, the prosecutor referred to defendant's gang membership in connection with the criminal threats charge. When describing defendant's threat as "clear, immediate, and unconditional and specific," she argued that in

addition to knowing defendant was violent and aggressive, Alexandra also knew defendant had gang ties, "and that is the only reason why that information is relevant here." The prosecutor also mentioned Alexandra's knowledge of defendant's tattoo, adding: "Again, the only reason that was brought up is because it supports what Alex knows about him. We're not making this up, and we're not in any way trying to make him out to be worse than I think what the facts already show." The court instructed the jury with CALCRIM No. 303: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."

B. Discussion

The California Supreme Court has held that in cases not involving a gang enhancement, evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) " 'Gang evidence should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense.' [Citation.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) However, "as [a] general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative. [Citation.] Consequently, gang evidence may be relevant to establish the defendant's motive, intent or some fact concerning the charged offenses other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect. . . . Nonetheless, even if the evidence is found to be relevant, the trial court must carefully scrutinize gang-related

evidence before admitting it because of its potentially inflammatory impact on the jury. . . ." (*Id.* at pp. 223-224.)

"[T]he decision on whether evidence, including gang evidence, is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court. [Citation.] 'Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" [Citation.]' [Citations.] It is appellant's burden on appeal to establish an abuse of discretion and prejudice. [Citation.]" (*People v. Albarran, supra*, 149 Cal.App.4th at pp. 224-225.)

To establish a violation of Penal Code section 422, the People were required to prove the defendant's 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 . . . that the threatened person's fear was 'reasonabl[e]' under the circumstances." [Citation.]' [Citation.]" (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1348; Pen. Code, § 422.) Evidence of a defendant's prior conduct and the parties' history may be relevant to establish the reasonableness of a victim's fear. (*People v. Mosley* (2007) 155 Cal.App.4th 313, 316 [victim knew incarcerated defendant was a gang member; defendant referred to his gang affiliation and displayed gang tattoos; victim understood defendant's threat that his "homies" would harm victim to mean gang members would follow him home and kill him]; *People v. Gaut, supra,* 95 Cal.App.4th at p. 1431; *People v. Butler* (2000) 85 Cal.App.4th 745, 754-755 [evidence supporting Penal Code section 422 conviction included that defendant

bragged his gang "owned" the apartments where the victim lived and defendant and others surrounded her while she was alone].)

In this case, the evidence admitted regarding defendant's gang membership was connected to his prior conduct, specifically his statements to Alexandra about hurting people, or his prior possession of weapons. The evidence that Alexandra and Isaac knew defendant was in a gang was relevant to establish the totality of the circumstances surrounding defendant's statement about being "serious," and the context and reasonableness of Alexandra's fear of defendant. As such, the evidence of defendant's gang membership was logically relevant to a material issue in the case, other than character evidence.

The trial court did not abuse its discretion in concluding the evidence was not unduly prejudicial. The testimony was limited to Alexandra's and Isaac's knowledge of defendant's membership in a gang. No details were elicited from either witness about the gang and neither witness elaborated about defendant's gang activities. Further, the prosecutor asked each witness to provide more concrete testimony about why defendant's gang membership was relevant, securing further testimony that Alexandra had heard from defendant about occasions in which he personally expressed an intent to harm other people, and testimony from Isaac that, aside from knowing defendant was a gang member, defendant had shown him guns in the past. The trial court also repeatedly instructed the jury of the limited purpose for which it was to consider evidence that defendant was in a gang—immediately after Alexandra's and Isaac's brief testimony on the subject, and with the jury instructions at the end of the case.

Moreover, despite the admission of the gang evidence, the jury found defendant not guilty of assault with a semi-automatic firearm and it found not true the allegation that defendant personally used a firearm in the commission of the criminal threats charge. This suggests the gang evidence was not unduly prejudicial and the jury was able to follow the trial court's instruction to consider the evidence only with respect to Alexandra's fear, rather than using the evidence to simply conclude defendant had a criminal disposition. (*People v. Garcia* (2008) 168 Cal.App.4th 261, 278.)

In sum, the gang evidence was of more than minimal probative value and was limited. (*People v. Gonzalez* (2012) 210 Cal.App.4th 724, 737-738.) The jury's acquittal on count one and the firearm use allegation as to count six supports the conclusion that the trial court did not abuse its discretion in concluding the probative value of the gang evidence outweighed any prejudicial effect. (*People v. Garcia, supra,* 168 Cal.App.4th at p. 278.) Under all of the circumstances of this case, we cannot find the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.[3]

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[3] In his reply brief, defendant suggests the initial lack of a police report reflecting a connection between Alexandra's fear of defendant's threat and his gang membership significantly undermined the evidence. The lack of an initial report or earlier testimony in which Alexandra or Isaac mentioned defendant's gang membership may have raised questions about the reliability or truthfulness of their testimony at trial. But we disagree that such questions rendered the evidence less probative or more prejudicial for purposes of an Evidence Code section 352 analysis.

II. Substantial Evidence Supported the Conviction for Criminal Threats

Defendant also contends there was insufficient evidence to support the criminal threats conviction. We disagree.

When evaluating a claim of insufficiency of the evidence we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is " 'reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Smith* (2014) 60 Cal.4th 603, 617.) We do not reevaluate witness credibility on appeal, but instead defer to the trier of fact because " ' "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 on which that determination depends." ' " (*People v. White* (2014) 230 Cal.App.4th 305, 315.) " ' " ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" [Citation.]' [Citations.] The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." ' [Citation.]" (*People v. Cravens* (2012) 53 Cal.4th 500, 508.)

To establish a violation of section 422, " '[t]he prosecution must prove "(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—which may be 'made verbally'—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.]' [Citations.]" (*People v. Fierro, supra*, 180 Cal.App.4th at pp. 1347-1348.)

As we understand his argument, defendant contends that since the jury found him not guilty of assault with a firearm, and also found not true the personal gun use allegation, the jury did not believe defendant had a gun. Defendant further argues there was no evidence that his words alone placed Alexandra in sustained fear for her or her immediate family's safety. However, as defendant acknowledges, "[a]s a general rule, inherently inconsistent verdicts are allowed to stand. [Citations.] For example, 'if an acquittal of one count is factually irreconcilable with a conviction on another, or if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense, effect is given to both.' [Citation.] . . . It is possible that the jury arrived at an inconsistent conclusion through 'mistake, compromise, or lenity.' [Citation.] Thus, if a defendant is given the benefit of an acquittal on the count on which he was acquitted, 'it is neither irrational nor illogical' to require him to accept the burden of conviction on the count on which the jury convicted." (*People v. Avila* (2006) 38 Cal.4th 491, 600.) Here, there was evidence defendant was armed when he confronted Alexandra—Alexandra's testimony—and defendant

concedes that if defendant was pointing a gun the "serious" statement "could be taken as a criminal threat."

Moreover, even if the jury did not believe defendant used a gun when he spoke to Alexandra, there was still substantial evidence to support a finding that he violated Penal Code section 422. There was evidence that defendant had already placed the stroller on Alexandra and Isaac's porch by the time they got outside, yet instead of leaving, defendant approached Alexandra and got "in her face." Defendant admitted saying, "you think I can't get serious," and that he intended to respond to what he understood as Alexandra "blackmailing" or "threatening" his mother. (*People v. Wilson* (2010) 186 Cal.App.4th 789 [to determine whether conditional, vague, or ambiguous language constitutes a violation of section 422, trier of fact may consider defendant's mannerisms, affect, and actions involved in making the threat].)

Defendant had told Alexandra about going to "handle people" in the past, he had been aggressive and violent when they all lived in the same house, and he had in the past shown Isaac weapons in his possession. The jury could reasonably infer from this evidence that defendant made the "serious" statement with the specific intent that it be taken as a threat, and that the threat was so unequivocal, unconditional, immediate, and specific as to convey to Alexandra a gravity of purpose and an immediate prospect of execution of the threat.[4] (*People v. Gaut, supra*, 95 Cal.App.4th at p. 1431 [parties' history can be considered as one

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[4] On the evidence presented, the jury may also have concluded that although defendant did not have a gun, he pointed a different item at Alexandra, partially obscuring it with a bandana, so that she would believe he had a weapon.

of the relevant circumstances regarding whether defendant intended his statement to be taken as a threat].) The jury could further reject defendant's testimony that he only intended to suggest that he would call child protective services.

There was also substantial evidence that Alexandra was in sustained fear for her safety. She testified she was afraid after the day of the incident and did not want to leave her house. Isaac also testified that Alexandra did not want to leave the house, she was afraid of stepping outside of their building, she felt that people were following her when she did leave, and she was so scared that Isaac had to miss a week of work presumably no one could stay home with her. (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 [sustained fear means a period of time that extends beyond what is momentary, fleeting, or transitory].) It was not necessary for Alexandra to specifically say that she was scared because of the words defendant used. The jury could reasonably interpret the evidence as indicating the source of her fear was defendant's threating statement, "you want me to show you how serious I can get?"

Finally, there was substantial evidence supporting the jury's finding that Alexandra's fear was reasonable under the circumstances. Defendant sought out a confrontation with Alexandra rather than simply leaving the stroller; he had in the past made it known to Alexandra and Isaac that he was willing to be violent and was armed; and he approached Alexandra in a menacing way, indicating he would *show* her how serious he was. Substantial evidence supported the criminal threats conviction.

DISPOSITION

The trial court judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

FLIER, J.