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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Appellant, v. JOHNNY CURTHUS MURRAY, Defendant and Appellant.	2d Crim. No. B283394 (Super. Ct. No. 2016006409) (Ventura County)

Both parties appeal from the judgment after a jury convicted Johnny Curthus Murray of making criminal threats (Pen. Code,[1] § 422). The trial court found true allegations that Murray suffered two prior strike convictions (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)) and two prior serious felony convictions (§ 667, subd. (a)(1)). It sentenced him to 16 months for making criminal threats, and a consecutive five years for one of the prior serious felony convictions.

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

Murray contends the judgment should be reversed because: (1) the trial court erroneously instructed the jury on voluntary intoxication, and (2) his threat did not convey a gravity of purpose or immediate prospect of execution. The People contend the court erred when it did not impose a second five-year prior serious felony enhancement. We affirm Murray's conviction, and remand for resentencing.

FACTUAL AND PROCEDURAL HISTORY

G.H. was at home with his wife, J.H., and their son. Murray was playing loud music at his house across the street. G.H. walked over and asked Murray to turn down his music. Murray refused. G.H. threatened to call the sheriff. Murray said he could do what he wanted in his own home.

G.H. went home, waited 10 to 20 minutes, and called the sheriff's department. A patrol car arrived 30 minutes later. A deputy spoke to Murray, and he turned down the music.

About 45 minutes later, Murray rang the doorbell at G.H.'s home. When G.H. answered, Murray said, "I'm going to burn this motherfucker down with all of you in it." Murray then leaned in and repeated what he had said. His tone was "stern and convincing."

When G.H. called 911, Murray said, "You're going to call the cops? Now you really got it coming." He then left. G.H. was scared.

J.H. also heard the doorbell ring. She saw Murray at the front door and heard him say, "I'm going to burn your motherfucking house down with you and your family in it." She heard her husband tell Murray that he was going to call 911.

J.H. followed Murray outside to the driveway when he left. She asked, "Why are you doing this? This is over music."

Murray replied that he was on his property and that G.H. was crazy.

Sheriff's deputies responded and arrested Murray. Murray denied that he ever left his house. He had red, watery eyes and smelled strongly of alcohol. During the drive to the station, Murray's demeanor changed frequently: "He was sometimes angry, sometimes uncaring. It was up and down, peaks and valleys."

G.H. obtained a weapon and installed security cameras and motion sensors after his confrontation with Murray. J.H. learned how to use a gun. She said her family is moving as a result of the incident.

At the conclusion of trial, the court instructed the jury that the People had to prove Murray's guilt beyond a reasonable doubt. (See CALCRIM No. 220.) It said that the criminal threats charge required the People to prove that Murray "intended that his statement be understood as a threat." (See CALCRIM No. 1300.)

The trial court also instructed the jury on voluntary intoxication: "You may consider evidence, if any, of [Murray's] voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether [he] acted with the intent to do the act required." The court then explained that the "intent to do the act required" for the criminal threats charge was that Murray "acted with the intent that his statement be understood as a threat." (See CALCRIM No. 3426.)

During closing arguments, the prosecutor told the jury that it had to find that Murray intended his words "be taken as a threat" to convict him. He said that voluntary intoxication pertained only to Murray's "intent to convey a threat." Defense

counsel said that "voluntary intoxication . . . negates specific intent."

The jury convicted Murray. He waived jury trial on the two prior strike and two prior serious felony allegations. The trial court found true all four allegations.

At sentencing, the trial court said that the case was a "neighborhood dispute" and "a result of an over-reactive criminal justice system and . . . the government being unwilling to do perhaps what ought to be done in consideration of the Eighth Amendment." It struck the two prior strike enhancements pursuant to section 1385, subdivision (a) (see *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529-530), but denied Murray's motion to reduce his conviction to a misdemeanor pursuant to section 17, subdivision (b). It sentenced him to the low term of 16 months on his criminal threats conviction, and imposed a consecutive five-year enhancement on one of the prior serious felony convictions (§ 667, subd. (a)(1)). The court declined to impose an additional five-year enhancement on the second prior serious felony conviction.

DISCUSSION

Voluntary intoxication instruction

Murray contends the trial court erred when it instructed the jury on voluntary intoxication because its instruction suggested that "the act required" was the mere act of making a statement. We disagree.

Initially, we reject the People's claim that Murray forfeited his contention because he did not object to the court's instruction at trial. We may review a claim of instructional error, absent an objection, to the extent it affects a defendant's substantial rights. (*People v. Townsel* (2016) 63 Cal.4th 25, 59-

60; see § 1259.) An instruction that prevents the jury from determining whether the specific intent required to commit a crime exists affects the defendant's substantial rights. (*Townsel*, at p. 60; see also *People v. Dunkle* (2005) 36 Cal.4th 861, 913, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Murray's contention fails on the merits. To establish a violation of section 422, the People must prove that the defendant made a statement with the specific intent that it be taken as a threat. (*People v. Toledo* (2001) 26 Cal.4th 221, 228 (*Toledo*).) The defendant's voluntary intoxication may negate that intent. (§ 29.4.) We independently review whether the trial court correctly instructed the jury on voluntary intoxication. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) We review "'the specific language challenged, the instructions as a whole, the jury's findings' [citation], and counsel's closing arguments to determine whether the instructional error 'would have misled a reasonable jury' [citation]." (*People v. Eid* (2010) 187 Cal.App.4th 859, 883, alterations omitted.) An instruction would have misled the jury if there is a reasonable probability the defendant would have obtained a more favorable result in its absence. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 214; see *People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

That was not the case here. Even if the initial portion of the trial court's instruction on voluntary intoxication—that the jury could consider evidence of intoxication only to decide whether Murray "acted with the intent to do the act required"—was incorrect, the instruction as a whole was not misleading. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) After it read the initial portion of the instruction, the court explained that the

"intent to do the act required" meant that Murray had to "inten[d] that his statement be understood as a threat." The entire instruction thus correctly conveyed how Murray's intoxication could negate his specific intent. (*Ibid.*)

Even if it did not, there is no reasonable probability Murray would have obtained a more favorable result without the alleged error. The trial court explained that voluntary intoxication was relevant to Murray's intent to make a criminal threat. It defined the specific intent the People had to prove: that Murray "intended his statement be understood as a threat." And it told the jury that the People had to prove beyond a reasonable doubt that Murray acted with that intent. These instructions cured any harm the initial portion of the instruction on voluntary intoxication may have caused. (*People v. Kelly* (1992) 1 Cal.4th 495, 526 (*Kelly*).)

"The arguments of counsel also correctly explained the relevant law." (*Kelly*, *supra*, at 1 Cal.4th at p. 526.) During his closing argument, the prosecutor told the jury that Murray's intoxication was relevant to his "intent to convey a threat." Defense counsel said that "voluntary intoxication . . . negates specific intent." Considered alongside the jury instructions as a whole, the attorneys' correct statements of law demonstrate that any error would not have misled a reasonable jury. (*Ibid.*; see also *People v. Lee* (1987) 43 Cal.3d 666, 677-678.)

Gravity of purpose and immediate prospect of execution

Murray contends his threat did not convey a gravity of purpose or immediate prospect of execution. We disagree.

Section 422 does not punish "emotional outbursts" (*People v. Felix* (2001) 92 Cal.App.4th 905, 913), "mere angry utterances[,] or ranting soliloquies, however violent" (*People v.*

Teal (1998) 61 Cal.App.4th 277, 281). Rather, "it targets only those who try to instill fear in others." (*Felix*, at p. 913.) Accordingly, a section 422 conviction requires proof that the defendant's threat was "'so unequivocal, unconditional, immediate, and specific [that it] convey[ed] . . . a gravity of purpose and an immediate prospect of execution.'" (*Toledo*, *supra*, 26 Cal.4th at p. 228.)

To make this determination, we examine the totality of the circumstances. (*People v. Smith* (2009) 178 Cal.App.4th 475, 479-480.) This presents a mixed question of law and fact. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 862.) We view the evidence in a light most favorable to the jury's verdict, and independently determine whether that evidence meets the statutory requirements. (*Ibid.*)

The totality of the circumstances demonstrates that Murray's threat conveyed a gravity of purpose and immediate prospect of execution. Murray threatened to burn down G.H.'s house immediately after the two had a confrontation and G.H. called the police. Prior disagreements between a defendant and victim tend to show a gravity of purpose. (*People v. Wilson* (2010) 186 Cal.App.4th 789, 814-815.) Murray was angry, and his tone was stern and convincing. A defendant's hostile demeanor tends to show an immediate prospect of execution. (*People v. Franz* (2001) 88 Cal.App.4th 1426, 1448-1449.) Murray leaned in close to G.H. and repeated his threat. A defendant's proximity to the victim also tends to show an immediate prospect of execution. (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1348.)

That Murray did not state the precise time he intended to carry out his threat is not determinative: "A threat is not insufficient simply because it does 'not communicate a time or

precise manner of execution.'" (*People v. Butler* (2000) 85 Cal.App.4th 745, 752.) Nor do J.H.'s actions after Murray started to walk home negate a finding that his threat conveyed a gravity of purpose and immediate prospect of execution. G.H. was the victim named in the information, thus our focus is the effect of Murray's threat on him. (*People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1158.) He obtained a weapon shortly after the incident with Murray, and later installed security cameras and motion sensors, corroborating his testimony that he felt threatened. The evidence meets the requirements of section 422.

The prior serious felony enhancement

When a defendant is convicted of a serious felony, and has previously been convicted of one or more serious felonies, the trial court must impose a consecutive five-year prison term for each of the prior serious felony convictions. (§ 667, subd. (a)(1).) A section 667, subdivision (a)(1), sentence enhancement is mandatory and may not be stricken. (§ 1385, subd. (b); see *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561.) Making criminal threats is a serious felony. (§ 1192.7, subd. (c)(38).) So are Murray's prior convictions for first degree residential burglary and robbery with the personal use of a firearm. (§ 1192.7, subd. (c)(18), (19) & (23).) The court was thus required to impose two consecutive five-year prison terms instead of one.

In their briefs, the People urged us to modify the sentence by adding five years to Murray's prison term. (See *People v. Purata* (1996) 42 Cal.App.4th 489, 498-499.) Murray conceded the trial court erred when it did not impose the second enhancement, but argued remand is required to permit the court to "reconsider all of its sentencing choices," including its ruling on his section 17, subdivision (b), motion. (*People v. Savala* (1983)

147 Cal.App.3d 63, 69-70, disapproved on another ground by *People v. Foley* (1985) 170 Cal.App.3d 1039, 1046.) At oral argument, the People conceded remand is required. We agree.

When a sentence is illegally imposed, the trial court may "properly review[] the sentence in its entirety" upon remand. (*People v. Kelly* (1999) 72 Cal.App.4th 842, 847.) It is "'[n]ot limited to merely striking illegal portions,'" but "'may reconsider all sentencing choices.'" (*People v. Garner* (2016) 244 Cal.App.4th 1113, 1118; see also *People v. Bowman* (1989) 210 Cal.App.3d 443, 447, superseded by statute on another ground as stated in *People v. Green* (2011) 197 Cal.App.4th 1485, 1492-1493 [remanding to allow trial court to reconsider "all aspects" of the sentence].) This is especially true where, as here, the appeal involves the propriety of imposing a sentence enhancement and does not consider the trial court's exercise of its sentencing discretion. (*People v. Letteer* (2002) 103 Cal.App.4th 1308, 1321-1322, disapproved on another ground by *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1258, fn. 6; see also *People v. Hubbard* (2018) 27 Cal.App.5th 9, 13 [remanding to permit the trial court to exercise its discretion under section 1385].) We thus remand the case for a resentencing hearing. On remand, the court "retains discretion and all sentencing options under applicable law." (*Letteer*, at p. 1322.)

DISPOSITION

Murray's sentence is vacated, and the matter is remanded for a resentencing hearing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Jeffrey G. Bennett, Judge

Superior Court County of Ventura

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