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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. SERGIO D. ORTIZ, Defendant and Appellant.	B245694 (Los Angeles County Super. Ct. No. BA395239)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman J. Shapiro, Judge. Affirmed as modified.

Paul J. Katz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Sergio Ortiz appeals from the judgment following his conviction for an attempted criminal threat (Pen. Code, §§ 664/422, subd. (a))[1] against his ex-girlfriend, Margarita H. He contends the trial court erred in failing to give an instruction on jury unanimity, because there was evidence of multiple threats, any one of which a juror could have used as the basis for his conviction for attempted criminal threats. He further contends that the trial court erred in issuing a no-contact order at sentencing pursuant to section 136.2. Finally, he contends that the trial court erred in failing to order that his excess days in custody be applied to satisfy his restitution and parole revocation fines pursuant to section 2900.5.

We hold that no unanimity instruction was required to be given in this case. However, we conclude that the protective order was not authorized under section 136.2, and that the restitution and parole revocation fines should have been deemed satisfied based on Ortiz's excess days in custody. As modified, we affirm the sentence.

FACTUAL AND PROCEDURAL BACKGROUND

Charges

In an amended information, Ortiz was charged in counts 1, 2, 4 and 5 with making criminal threats (§ 422, subd. (a)). Count 1 was for a threat made to Margarita on March 9, 2012; count 2 was for a threat made to Margarita on March 17, 2012; count 4 was for a threat made on March 18, 2012 to Margarita's brother-in-law; and count 5 was for a threat made on March 18, 2012 to Margarita. He was

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[1] All subsequent undesignated references are to the Penal Code.

also charged in count 3 with burglary (§ 459), and in count 6 with stalking (§ 646.9, subd. (a)).

Ortiz pled not guilty. The case proceeded to jury trial.

With respect to the four criminal threat counts, the jury was instructed on the elements of the offense of criminal threats as well as the offense of attempted criminal threats. The jury did not receive a unanimity instruction. The jury acquitted Ortiz of all six charged offenses, but convicted him of attempted criminal threats against Margarita on March 18, 2012.[2]

Evidence at Trial

A. *Prosecution Evidence*[3]

On the night of March 17, 2012, Ortiz called Margarita more than once on her cell phone while she was at a friend's house. In one of the calls, which came

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[2] By finding him not guilty of criminal threats on March 18, but guilty of attempted criminal threats on that date, the jury apparently concluded that Margarita was not in sustained fear as a result of the threats, even though a reasonable person could have been afraid. (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 605, 608 [without evidence that intended victim was actually in sustained fear from defendant's threats, defendant could not be found guilty of criminal threat, but, because all other elements of crime were established, he could be found guilty of attempted criminal threat].) To find Ortiz guilty of attempted criminal threat, the jury had to find four elements: (1) Ortiz specifically intended to threaten to commit a crime resulting in death or great bodily injury; (2) with the further intent that the threat be taken as a threat; (3) under circumstances sufficient to convey to Margarita a gravity of purpose and an immediate prospect of execution; and (4) such that Margarita reasonably could have been placed in sustained fear for her own safety or for her family's safety, even if she was not actually afraid. (*People v. Toledo* (2001) 26 Cal.4th 221, 230-231.)

[3] Because this appeal solely concerns the conviction arising from events in the early morning hours of March 18, 2012, we limit our discussion of the facts to those relevant to that conviction.

before midnight, he said he was waiting for her, and he was going to "chop [her] off in little pieces."

At around 12:30 a.m. on March 18, 2012, Margarita returned to her apartment, even though her brother had called her and told her that Ortiz was there and had tried to get into her bedroom through a window. She testified that she ran into her apartment while Ortiz was screaming at her and telling her he was going to throw a rock at her window. He threw the rock, which hit the wall, and then ran towards the alley behind the apartment. Once Margarita got inside the apartment, she called the police, who arrived 10 minutes later. In the interim before the police arrived, Ortiz called her cell phone repeatedly. He told her that he was going to kill her and slice her face and told her she was going to "get it." He also told her to "stop fucking with other guys." She testified that during these conversations he threatened to kill her a number of times.

Once the police arrived at approximately 1:00 a.m., Ortiz continued to call Margarita more than 10 times, every one to two minutes, according to the testimony of Officer Josue Merida, one of the responding officers. Margarita put one of his calls on speaker phone, and Officer Merida heard him say that he was going to "fuck her up and fucking kill her." The police stayed for approximately 15 minutes, and then left to check the rear of the apartment complex. In the alley the police saw a man, who immediately ran away when he saw them. The man matched the description they had been given of Ortiz. Officer Merida and his partner gave chase, but he escaped. After circling the block in their police car, the officers returned to Margarita's apartment, and her cell phone was ringing non-stop. When Margarita answered one of the calls and put it on speaker phone, Officer Merida heard a man saying, "Why did you call the cops? You fucking bitch. I'm going to fuck you up. I'll fucking kill you." He also said, "I'll cut you

up in little fucking pieces." He continued to call repeatedly, and finally Officer Merida answered the phone. The man identified himself as Sergio, which is Ortiz's first name. Officer Merida told him that they needed him to meet with them, but Ortiz stated he was not in the area, and denied it was he who ran from them in the alley.

At that point, Officer Merida and his partner left to continue their patrol duties. After the police left, Ortiz continued to call Margarita and asked her to meet him in the back of the alley.

Officer Merida and his partner returned to the area, still in the early morning hours, and were flagged down by Margarita's mother, whom they had met earlier in Margarita's apartment. She told them that Margarita had gone to the rear of the apartment complex to meet Ortiz. The police drove to the alley, where Margarita was meeting with the same man who had run away from them earlier. He had his arm around Margarita and they were hugging. According to Margarita, he was apologizing to her. When the man saw the police, he pushed Margarita away, then fled and escaped. However, Ortiz turned himself in later that morning.

B. *Defense Evidence*

Ortiz admitted to making threats in the early morning of March 18. However, he testified that Margarita was not afraid because "she knows I would never do anything to her," and "we've known each other for quite some time, and she knows it's just words." He also stated, "if she thought that I would do something to her, do you think she would go to the alley?"

Sentencing

Ortiz was sentenced to one year in prison. However, he was credited for 412 days spent in pre-sentence custody, and thus was released from custody upon sentencing. The court imposed a $240 restitution fine and stayed a $240 parole revocation fine. The court also imposed a protective order against Ortiz under section 136.2 prohibiting contact with Margarita.

Ortiz timely appealed.

DISCUSSION

I. *Unanimity Instruction*

Although only one count was alleged with respect to threats against Margarita on March 18, 2012, Ortiz contends that the jury heard evidence of *multiple* threats to Margarita in the early morning hours of March 18, 2012. Ortiz contends that his right to a unanimous guilty verdict was violated because the jury was not instructed that they needed to agree on which one of the March 18, 2012 threats supported his single conviction for attempted criminal threats, and different jurors could have based their verdicts on different threatening phone calls.

When a unanimity instruction is required, the court has a sua sponte obligation to give it, and the defendant may raise the issue on appeal even if it was not raised below. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199 (*Riel*); *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534 (*Melhado*).) "'We review de novo a claim that the trial court failed to properly instruct the jury on the applicable principles of law. [Citation.]' [Citation.]" (*People v. Lueth* (2012) 206 Cal.App.4th 189, 195 (*Lueth*).)

The California Constitution guarantees a criminal defendant the right to a unanimous jury verdict. (*People v. Jones* (1990) 51 Cal.3d 294, 321; Cal. Const.,

art. I, § 16.) In order to find a defendant guilty of a particular crime, the jurors must unanimously agree that the defendant committed the same specific act constituting the crime. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Crow* (1994) 28 Cal.App.4th 440, 445.) If the prosecution presents evidence of several acts, each of which could constitute a separate offense, a unanimity instruction is generally required, unless the prosecution elects one of the acts as the basis for the charged offense. (*Melhado, supra,* 60 Cal.App.4th at p. 1534; see *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1374-1375; *People v. Benavides* (2005) 35 Cal.4th 69, 101.)

However, there is a "continuous course of conduct" exception to this requirement, which arises in two contexts. (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299.) The first, not implicated here, is when "'the statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.]' [Citation.]" (*Ibid*.) The second, applicable here is "when (1) 'the acts are so closely connected in time as to form part of one transaction,' (2) 'the defendant tenders the same defense or defenses to each act,' and (3) 'there is no reasonable basis for the jury to distinguish between them. [Citations.]' [Citation.]" (*Lueth, supra*, 206 Cal.App.4th at p. 196; see *People v. Williams* (2013) 56 Cal.4th 630, 682 (*Williams*) [unanimity instruction may not be required where the "'criminal acts . . . took place within a very small window of time,'" and "'the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.'"]; *People v. Bui* (2011) 192 Cal.App.4th 1002, 1010-1011; *People v. Beardslee* (1991) 53 Cal.3d 68, 93 "'[W]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury's understanding of the case.' [Citations.]"].)

Ortiz argues that the "continuous course of conduct" exception is not applicable because the jury rationally could have viewed the threats by phone against Margarita on March 18, 2012 as falling into three distinct categories: (1) threats that Margarita testified she received on her cell phone when she arrived at her apartment shortly before 1:00 a.m. and before the police arrived at approximately 1:00 a.m., during which calls Ortiz allegedly threatened to kill her a number of times, and told her he was going to slice her face and that she was going to "get it"; (2) threats to "fuck her up and fucking kill her" heard by Officer Merida on speaker phone during the next 15-minute period during which the police were present in Margarita's apartment; and (3) threats after the police had unsuccessfully chased the fleeing Ortiz and then the police had returned to Margarita's apartment, when Officer Merida heard Ortiz say over the speaker phone, "Why did you call the cops? You fucking bitch. I'm going to fuck you up. I'll fucking kill you," and "I'll cut you up in little fucking pieces."

The appellate court's application of the "continuous course of conduct" exception in *People v. Percelle* (2005) 126 Cal.App.4th 164 (*Percelle*) is instructive. In that case, the defendant was charged with one count of attempted use of a counterfeit access card. The defendant had attempted to use the card at a tobacco shop twice in one day, and on appeal he argued that because no unanimity instruction was given, some jurors may have convicted him based on his first visit to the shop while others may have based the conviction on the second visit. (*Id.* at p. 181.) The appellate court found that the "continuous course of conduct" exception applied: "There is no reasonable basis to distinguish between defendant's first visit to Discount Cigarettes on September 20, 2002, and his second visit a little over an hour later. Defendant came into the store and asked to buy 60 cartons of cigarettes using the broken card. When [the employee's] stalling

made defendant nervous, he left, informing [the employees] that he would return. When he returned a little over an hour later, he continued his effort to purchase the 60 cartons with the same broken card, urging [an employee] to look for the paper with the price calculations [an employee] had made earlier. Defendant did not proffer a separate defense to the two acts. His defense was based entirely upon an asserted lack of proof—proof that the broken card was indeed a counterfeit access card. There is no conceivable construction of the evidence that would permit the jury to find defendant guilty of the crime based upon one act but not the other. No unanimity instruction was required." (*Id.* at p. 182; see *Riel, supra,* 22 Cal.4th at p. 1199 [where two acts of robbery occurred but only one count was charged, there was no danger some jurors would find defendant committed the first robbery at the truck stop but not the second one in the car, while others would find he committed the robbery in the car but not the earlier one, where the parties never distinguished between the two acts, and the defense was the same as to both]; *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1296 [no unanimity instruction required where the defendant twice robbed the victim of "the same property" "just minutes and blocks apart," and "[t]he acts were successive, compounding, part of a single objective of getting all the victim's cash"].)

Like the successive offenses in *Percelle,* the alleged threats by Ortiz on March 18, 2012 were virtually identical: threats to kill Margarita, made by phone while she was at her apartment. Moreover, the threats all "'took place within a very small window of time'" (*Williams, supra,* 56 Cal.4th at p. 682), approximately half an hour, and were continuous, except when Ortiz was in the act of fleeing from the police. Further, Ortiz did not provide differing defenses to the various threats in that time period. He did not deny that he made threats that morning in multiple phone calls; rather, he testified that, notwithstanding his words

threatening violence and death, Margarita was not afraid because "she knows I would never do anything to her," and "we've known each other for quite some time, and she knows it's just words." In closing argument, defense counsel argued that Ortiz did not intend his threats to be taken as threats, but instead was trying to upset Margarita because he was angry that she had left him for another man. There is thus no reasonable basis for differentiating between the various threats on March 18, 2012 with respect to whether Ortiz intended that Margarita take his words as a threat.

Ortiz speculates on a number of purported ways the jury could have factually distinguished between the various threats. He contends that jurors could have differentiated the first category of calls, before the police arrived, from the two subsequent calls overheard by the police. First, he argues that some jurors could have found it would have been *reasonable* for Margarita to feel sustained fear (a necessary element of the crime, even if Margarita was not actually afraid) when she had no police protection, but not reasonable when the officers were in her apartment. However, Margarita could not have expected the police to remain in her apartment all night, and, indeed, they left soon after hearing the last threat from Ortiz despite the fact that he had eluded capture. Moreover, the question for the jury was not whether Margarita could have reasonably feared that Ortiz would attack her immediately, but rather whether Margarita had reasonable cause to feel sustained fear from the threat that could be carried out at a future time. (*People v. Lopez* (1999) 74 Cal.App.4th 675, 679 [section 422 "does not require an immediate ability to carry out the threat"]; see, e.g., *People v. Wilson* (2010) 186 Cal.App.4th 789, 817, fn. 3 ["The threat of serious injury upon the occasion of release of the prospective assailant from prison in just 10 months *does* represent an immediate prospect of execution—not a distant event beyond the scope of section 422."].)

Thus, that the police were temporarily present in Margarita's apartment when threats were made does not reasonably differentiate those threats from the others. Further, in light of Ortiz's admission that he made multiple threats to Margarita in the early morning hours of March 18, 2012, we also reject Ortiz's argument that some jurors could have discounted Margarita's testimony about the first category of calls because it found her not credible, and only credited the two calls heard by Officer Merida.

Ortiz also contends that the jury could have distinguished between the two calls heard by Officer Merida, because one occurred before the police chased Ortiz, and one occurred after. He contends that some jurors could have found that Ortiz intended only the first call to be taken as a threat (an element of the offense) because at that point he did not know the police had been called and were on the scene. However, as discussed above, there is no requirement that the threat have been capable of immediate execution, or that Ortiz have thought he could immediately carry it out. Therefore, we see no reasonable distinction between the calls on this basis. Likewise, the argument that some jurors may have viewed only the last call as a threat, because at that point Ortiz was enraged that Margarita had called the police, is far too speculative. In sum, the jury could not have rationally distinguished between the threats on March 18, 2012, such that Ortiz was denied his right to a unanimous verdict. Therefore, a unanimity instruction was not required.

By contrast, in *Melhado*, the case chiefly relied upon by Ortiz, jurors reasonably *could* have distinguished between the two threats about which they heard at trial. In that case, the defendant Melhado was having difficulty paying his car repair bill and thus was unable to pick up his car from the repair shop once the repairs were finished. Upon visiting the shop at 9 a.m. one morning and learning

that the owner had put his car in storage, he became visibly upset and told the owner he was going to blow him away if he did not bring his car back, and that he was going home to get a grenade. Melhado left the shop and the owner called the police. Melhado returned two hours later, at 11 a.m., and appeared to be angry. He walked up to the owner and two of his mechanics and pulled a grenade from his pocket. He held it up in front of his face and yelled, "I'm going to blow you away," and "I'm going to blow up this place. If I don't get this car by Monday, then I'm going to blow it away." (*Melhado, supra*, 60 Cal.App.4th at p. 1533.) The grenade turned out not to be real, but the owner and one of the mechanics believed it was real; the other mechanic told them not to be frightened because he thought the grenade was fake. (*Ibid.*) Melhado was convicted of making a criminal threat in violation of section 422. (*Id.* at p. 1532.)

On appeal, Melhado argued that the trial court erred in refusing to give an instruction on jury unanimity. (*Melhado, supra*, 60 Cal.App.4th at p. 1535.) The appellate court concluded that both the 9 a.m. threat and the 11 a.m. threat were sufficient to establish liability, and thus held that the trial court committed reversible error in failing to instruct the jury on unanimity. (*Id.* at pp. 1536-1539.)

The *Melhado* court did not analyze whether the "continuous course of conduct" exception applied, and thus the decision is not authority that the principle does not apply here. In any event, it is evident that there was a reasonable basis for factually distinguishing between the threats in that case, in that they were separated by two hours and by factual context (the first a threat made without a grenade, the second a threat made with what appeared to be a grenade). (Cf. *Williams, supra,* 56 Cal.4th at p. 682 [finding the continuous conduct exception applied where the "'criminal acts . . . took place within a very small window of time.'"].) *Melhado* is therefore distinguishable.

In sum, the trial court did not err in failing to give a unanimity instruction in this case.

II. *Post-Judgment Protective Order*

At sentencing, the trial court issued a protective order pursuant to section 136.2, preventing Ortiz from having any contact with Margarita. Ortiz contends that the court lacked statutory authority to issue this post-judgment protective order. As a matter of statutory interpretation, the question whether the order was authorized under section 136.2 is reviewed de novo. (*Babalola v. Superior Court* (2011) 192 Cal.App.4th 948, 956.)

Section 136.2 primarily authorizes trial courts to issue *prejudgment* restraining orders to protect victims and witnesses during the pendency of the criminal action in which they are issued. (*People v. Ponce* (2009) 173 Cal.App.4th 378, 383; *People v. Stone* (2004) 123 Cal.App.4th 153, 159.) However, effective January 1, 2012, new subdivision (i) of section 136.2 requires trial courts to consider the issuance of *post-judgment* protective orders in particular contexts, including "[i]n all cases in which a criminal defendant has been convicted of a crime of domestic violence as defined in Section 13700." (§ 136.2, subd. (i).) A crime of domestic violence under section 13700 requires that the defendant commit "abuse" against the victim, defined as "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." (§ 13700, subd. (a).)

The Attorney General contends that the post-judgment protective order prohibiting contact with Margarita was authorized under subdivision (i) of section 136.2, because Ortiz "has been convicted of a crime of domestic violence as

defined in Section 13700" in that he was convicted of attempted criminal threats. (§ 136.2, subd. (i).) A conviction under section 422 for criminal threats against a former cohabitant *could* qualify as a crime of domestic violence, as an offense "placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another" (§ 13700, subd. (a)), because such a conviction requires a finding that the threat actually caused the person threatened to "reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety." (§ 422, subd. (a); *Toledo, supra*, 26 Cal.4th at p. 227.) However, we agree with Ortiz that the definition of a crime of domestic violence under section 13700 does not include the offense of *attempted* criminal threats, because such a conviction does not necessarily include a finding that the victim of the threat was in fear for the safety of the victim or another person. In sum, Ortiz was not convicted of a crime involving "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." (§ 13700, subd. (a).) Therefore, the trial court lacked the authority under section 136.2, subdivision (i) to issue the post-judgment protective order.

III. *Application of Excess Credits to Satisfy Fines*

The trial court imposed a $240 restitution fine under section 1202.4, subdivision (b) and stayed a $240 parole revocation fine under section 1202.45. Ortiz contends, and the Attorney General concedes, that because he was credited for 47 days in custody beyond his one-year sentence, those fines should be deemed satisfied. We agree.

Section 2900.5, subdivision (a) provided: "In all felony and misdemeanor convictions, . . . when the defendant has been in custody, including, but not limited

to, any time spent in a jail, . . . all days of custody of the defendant, including days . . . credited to the period of confinement pursuant to Section 4019 . . . shall be credited upon his or her term of imprisonment, or credited to any fine on a proportional basis, including, but not limited to, base fines and restitution fines, which may be imposed, at the rate of not less than thirty dollars ($30) per day, or more, in the discretion of the court imposing the sentence. If the total number of days in custody exceeds the number of days of the term of imprisonment to be imposed, the entire term of imprisonment shall be deemed to have been served. In any case where the court has imposed both a prison or jail term of imprisonment and a fine, any days to be credited to the defendant shall first be applied to the term of imprisonment imposed, and thereafter the remaining days, if any, shall be applied to the fine on a proportional basis, including, but not limited to, base fines and restitution fines." (2012 version.) Thus, "under section 2900.5, subdivision (a) if a defendant is 'overpenalized' by serving presentence days in custody in excess of his imposed imprisonment term, those excess days are to be applied to the defendant's court-ordered payment of monies that serve as punishment" (*People v. Robinson* (2012) 209 Cal.App.4th 401, 407), including restitution fines and other punitive fines such as parole revocation fines. (*Id.* at p. 406.)

Ortiz's 47 days of excess credit translate to $1,410 in monetary credit at the $30 per day rate; accordingly, that credit is more than sufficient to satisfy both his $240 fines.

DISPOSITION

The protective order under section 136.2 is vacated, and the restitution and parole revocation fines are deemed satisfied. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.