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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ERIC KONSTANTELOS, Defendant and Appellant.	B225211 (Los Angeles County Super. Ct. No. PA064256)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Marilee Marshall, 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, Senior Assistant Attorney General, Daniel C. Chang and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In an information, the People charged defendant Eric Konstantelos with making criminal threats while personally using a firearm (Pen. Code,[1] §§ 422, 12022.5, subd. (a); count 1), misdemeanor exhibiting a firearm (§ 417, subd. (a)(1); count 2), and misdemeanor resisting, obstructing, and/or delaying a peace officer in the performance of his/her duty (§ 148, subd. (a)(1); count 3). Later, the People, in an amended information, charged defendant with an additional crime, assault with a firearm and personal use of a firearm (§§ 245, subd. (a)(2), 12022.5, subd. (a); count 4).

A jury found defendant guilty of all four counts and also found true as to counts 1 and 4 that he personally used a firearm. The trial court sentenced defendant to state prison for a total of seven years, plus one year in county jail to be served consecutively. The court then suspended execution of sentence and placed defendant on formal probation for five years, with the condition that he serve 365 days in county jail. This appeal followed.

Defendant contends: (1) his motion to dismiss for vindictive prosecution should have been granted; (2) the trial court deprived him of his right to present a defense; (3) the evidence is insufficient to support his conviction for criminal threats; (4) the evidence is insufficient to support the finding that he resisted, obstructed or delayed peace officers as required under section 148; and (5) the trial court used the wrong standard in denying his section 1118.1 motion. Finding no merit to these contentions, we affirm.

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

FACTS

A. Prosecution

1. The Incident

On December 23, 2008, defendant, his wife Amy Konstantelos (Amy) and their children (collectively the Konstanteloses) lived on West Avenue E-8 (E-8) in Antelope Acres, a rural area in Lancaster. William McGowan (McGowan) lived across from the Konstanteloses. They did not get along.

Donald Bucio (Bucio) was McGowan's longtime friend and was aware that there was ongoing conflict between McGowan and the Konstanteloses. The hostility had been occurring for about seven years.[2] Bucio had witnessed numerous yelling matches. It seemed as though every time Bucio visited McGowan something would happen. Bucio felt no anger or hostility toward the Konstanteloses.

Around 5:30 p.m. on December 23, 2008, Bucio was en route to McGowan's house to deliver Christmas presents to McGowan's grandchildren. As Bucio turned east from 90th Street onto E-8, a dirt road, he saw the Konstanteloses' car ahead of him stopped in the middle of road approximately 500 feet away, facing east. He was unable to tell who was driving. Given the ongoing problems between the Konstanteloses and McGowan, Bucio decided to stay back and wait for the Konstanteloses car to turn onto their property. Bucio stopped his truck 100 to 200 feet away near a volunteer fire station.

The Konstanteloses' car did not move for a few minutes and then drove to the side of the dirt road like it was about to turn onto the family's property. Bucio, who had been sitting in his car with his windows up for two to three minutes, listening to the radio, started to drive again.

Believing the driver wanted him to go around, Bucio drove around the left side of the Konstanteloses' car, at approximately five miles per hour, so as not to kick up dirt,

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[2] During the 15 years that Bucio had known McGowan, McGowan always lived on E-8.

since the Konstanteloses had previously gotten upset when motor bikes kicked up dirt. When Bucio passed by, he did not look into the Konstanteloses' car, as he did not want any confrontation. As soon as Bucio passed the car and the first entrance to their property, he heard a racking sound, which sounded like a shotgun was being engaged.[3] He looked to the right in the direction of the sound and saw defendant standing at his passenger window, pointing a shotgun at his head. He had no intention to block their driveway. There was no lock on the shotgun.

Defendant told Bucio to "[g]et the fuck off his property" or he would "fucking kill" him. Bucio, who at some point got out of his truck, asked defendant, "'What the fuck is your problem?'" Defendant again threatened to "fucking kill" Bucio if he did not "get the fuck off his property." Bucio replied that he was in the middle of the road. His "adrenaline was flowing," and he was "scared," "pissed" and "upset." Defendant Bucio told defendant to shoot him.[4]

Bucio was fixated on the barrel of the shotgun. He was afraid he was going to be killed. He thought about returning to his truck where he had a "hickey bar" or rebar bender in the back of his truck. He thought he could defend himself by "whack[ing]" defendant with it. He did not do so, however.

Within a minute or two, Bucio saw the Konstanteloses' car start to pull over behind his truck. At that time, he saw Amy driving the car. Amy started to roll her window down. She was on the phone with 911. Bucio overheard Amy telling the operator that he had followed her from work, was stalking her and not letting her onto her property. At trial, Bucio denied following or stalking Amy. He had been on route to McGowan's to drop off Christmas gifts.

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[3] Bucio, a former Marine in the infantry division, was familiar with weapons. He did not actually see defendant rack the shotgun; he assumed he had done so after hearing the sound of a shotgun being racked.

[4] At trial, Bucio acknowledged that he did not want to be shot and this was not a smart thing to say. At the time, however, "all these emotions [were] going through [him]."

After perhaps telling Amy that what she was telling the 911 operator was not true, Bucio called 911.[5] Shortly thereafter, Amy drove onto her property, and defendant walked back.

While Bucio was on the line with the 911 operator, McGowan came out of his house. At the request of the 911 operator, Bucio stayed on the road. Deputies from the Los Angeles County Sheriff's Department arrived shortly thereafter. At gun point, they detained Bucio and McGowan, handcuffed them and placed them in patrol cars. The deputies then turned their efforts to getting the Konstanteloses out of their house. Later, Bucio was released. Since that night, Bucio no longer visits McGowan regularly.

2. The Investigation

In the evening of December 23, 2008, Sergeant Donald Rubio responded to a radio call about a man with a shotgun on E-8. He arrived around 5:40 p.m. Other units already had arrived. Bucio and McGowan were detained while the deputies conducted an investigation and determined that the individual with the shotgun was inside the Konstanteloses' house.

Sergeant Rubio learned that there were weapons and four young children inside. The occupants refused to come outside when contacted. The Special Enforcement Bureau was called when it appeared that the adults were barricading themselves inside the house. A sheriff's helicopter arrived and a command center was set up. Patrol cars were stationed on the front corners of the Konstanteloses' property, and deputies used the public address systems in their patrol cars to ask the occupants to come outside.

Amy came out of the house about 10 minutes later. She appeared to be "a little confused." She stood outside for a while and then walked to a patrol car. Amy was placed in the back of the car.

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[5] A recording of Bucio's 911 call was played for the jury.

Later, Sergeant Rubio spoke with defendant on the telephone. Defendant denied doing anything wrong and did not understand the police presence. Although defendant sounded angry, he answered questions. Sergeant Rubio told defendant to come outside so that he could check on the welfare of the children and keep the firearm away from the children. The sergeant used a "soft demeanor" and emphasized that he wanted to figure out what had happened. Defendant said he would come outside once the helicopter left. After the helicopter departed, defendant said he would come outside if they let Amy return to the house. Amy went back to the house. Defendant finally exited the house around 70 minutes after Sergeant Rubio first arrived.

At the direction of Sergeant Rubio, a team of deputies, including Deputy Sheriff Clayton Marion, entered the Konstanteloses home to check on the welfare of the children and to preserve evidence. Inside, Deputy Marion located Amy and four children. Deputy Marion found the shotgun leaning against the wall inside an open closet in the master bedroom. The shotgun was not loaded. A yellow padlock was on the weapon, but it was not locked. A shoulder strap was also attached to the shotgun. An extra barrel was found next to the shotgun. Based on information from Amy, Deputy Marion also located an older handgun on a shelf inside the same closet. Nearby on the shelf were about eight shotgun shells. The shotgun and handgun were seized; the shotgun shells were left behind inadvertently.

B. *Defense*

1. The Incident

Amy and her family had lived in Lancaster for seven years. Their problems with McGowan, who lived directly across the street, started two years after moving to their home. Although they tried to get along with McGowan, he would come over to their property drunk and yell at them. They yelled back and told McGowan to leave. Amy sought assistance from the sheriff's department on numerous occasions.

Although Amy did not know Bucio's name, she knew he was McGowan's friend. Several times, Bucio had stopped his truck in the road and screamed at them. He told

them that McGowan did not like them, that they did not belong and that they needed to move back to Pasadena. Bucio also had yelled at Amy to watch her kids and had threatened to turn them into the Department of Children and Family Services. According to Amy, McGowan was upset because she and her family had moved his mailbox, which had been on their property, farther down the road.

For several days prior to defendant's arrest, the Konstanteloses had been having trouble with McGowan, individuals that lived down the street and others whom she did not know. People had been driving up and down in front of their home, calling her children "little fuckers," flipping them off and screaming at her. In addition, they would spin out in front of her house, causing dirt to fly up. One time, a friend of McGowan's threw a beer at her children while they were getting the mail. Bikers, who frequented McGowan's house would do "wheelies," ride dirt bikes and "rev" in front of her home.

Amy filed a complaint with the sheriff's department, believing it had responded inappropriately to her requests for help. On one occasion, deputies had called her and defendant "assholes" when they responded to a call about McGowan. On another occasion when she called, the person replied, "oh, you're that public defender."[6]

When things happened and the department did not take her statement, she asked Lieutenant Stefanie Fredericks to initiate an investigation. The lieutenant left Amy two messages asking her to contact her and to come in after 9:00 p.m. Amy advised the department that she was still nursing her baby, but they did not contact her to reschedule. Lieutenant Fredericks did not take Amy's statement and finished the investigation in one week without interviewing any of Amy's witnesses.

Believing Lieutenant Fredericks had acted inappropriately, Amy thereafter complained to Sheriff Lee Baca, District Attorney Steven Cooley, Supervisor Michael Antonovich, and Supervisor Antonovich's field deputy, Norm Hickling. In addition,

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6 Amy was a deputy public defender, working out of the Lancaster courthouse.

Amy complained to Lieutenant Fredericks's boss, Captain Axel Anderson, and wrote letters.

On December 21, 2008, a deputy came to the Konstanteloses' home in response to a call by McGowan that defendant had a pistol outside of his property. According to Amy, defendant was wearing an antique pistol without a clip on his hip and never left their property. A judge had advised Amy to carry a weapon or wear one on her hip or shoulder so that it could be seen in the hope that people would leave her family alone and stop harassing them.

On December 23, 2008, defendant called Amy at work and told her that a light colored truck had gone by their house several times, and the driver had called their children "little fuckers." Defendant advised Amy to be careful on her way home. Amy left her office between 5:00 and 5:30 p.m. and was very nervous.

When she reached 90th Street and E-8, Amy saw a couple of cars parked at the corner store, including a truck parked at a strange angle. She turned onto E-8 and observed a truck on her tail. The truck was going fast and got within nine feet of her bumper. Amy pulled over as far as she could in the hope that it was just a speeder or "some jerk" who would pass her.

The truck pulled over right behind Amy, however, and almost kissed her bumper. Amy attempted to call defendant but she was scared and kept misdialing. She wanted to tell him that she was being followed and ask him to open the gate so she could just drive onto her property. She finally dialed correctly, defendant did not answer.

The truck pulled out from behind her and started racing down the street towards her property at 20 miles per hour. Amy proceeded when the truck stopped almost in the center of her driveway. She rolled down her window after the truck stopped, and Bucio got out of his truck screaming.

Amy started to call 911 and yelled at Bucio to leave. Defendant was approaching to open the gate and told Bucio to "get the fuck out of here." Amy told Bucio he was blocking her and told him to leave.

According to Amy, she did not see defendant come past the gate area. Defendant had a shotgun slung over his shoulder, but Amy did not see defendant remove it from his shoulder. She did not see defendant point the shotgun at Bucio or rack the shotgun.

Bucio was angry. While moving his arms up and down, he yelled, "I'm not leaving mother fucker." "I'm not leaving. Fuck you. I'm not going anywhere." Defendant told Bucio, "get out of here, you're a trouble maker, get out of here, get the fuck out of here, you're on my property. Get out. Get the fuck off our property." Amy did not hear defendant threaten to kill Bucio.

Based on the placement of Bucio's truck, Amy did not think she could fit between his truck and the railroad ties on her property to get inside the gate. Amy just drove over the railroad ties. Once she made it to the driveway, defendant locked the gate. Defendant and Bucio continued to have a shouting match. Defendant told Bucio to "get the fuck out of here." Bucio said he was not going anywhere and was calling 911.

Amy drove to the back of the house. Defendant followed. Once inside her home, Amy could not hear anything from the road, but she remained on the line with the 911 operator. She complied with the operator's directive to check the windows and look for deputies. At first, all she could see was Bucio's truck. Then she heard a helicopter. The operator then told her that the deputies had arrived.

Amy was afraid to go outside because she could see Bucio and McGowan. She did not hear any public address announcements asking them to come out of the house. She did hear the helicopter and her crying children.

Eventually, while still on the phone with the 911 operator, Amy went outside. Deputies instructed her to go to her gate. She was "freaking out" because she did not want to go near Bucio's truck. In addition, she was fearful because the deputies' guns were drawn. Amy spoke with a deputy and was placed in the back of a patrol car. She remained on the phone with the 911 operator and was upset, wanting to know why she was in a patrol car. The deputies never told Amy that she was under arrest and just told her they needed to get a statement. She said she would be happy to make a statement, in that she called 911 and was the victim.

Amy explained to the operator that defendant could not come out of the house because they had four small children, a fire was burning and they were cooking dinner. At some point, defendant came outside and she returned to her home to be with her children. Deputies accompanied her. They directed the children to sit on the couch. While a deputy watched the children, Amy, accompanied by another deputy, retrieved the shotgun from a closet and gave it to the deputy. Amy also told the deputy that they had an antique handgun that did not work because it did not have a clip. Also recovered from the closet were shotgun shells.

Amy had purchased the shotgun in her name a few weeks before. The gun was not kept loaded and it had never been fired. At the time the weapon was recovered, a yellow padlock was on it.

A portion of the recording of Amy's 911 call was played for the jury. Amy claimed that the man in the truck was the friend of her neighbor who was a "snitch for the Feds" and had filed false gun charges on her family two days before. When the operator told Amy that deputies were being sent, Amy said she hoped not because they covered for the neighbor and had been trying to frame her family.

The 911 operator asked to speak to defendant. The operator told defendant he needed to go outside and talk to the deputies. Defendant said he would not, in that he was on his own property, his wife had been threatened and the man had threatened him the day before as well. The operator informed defendant that the deputies would not leave until they came out. Defendant said to leave them alone, that it was harassment and he would not talk to the deputies.

Amy got back on the phone with the 911 operator. The operator told Amy that the watch commander wanted her and her children to go outside and talk to the deputies. When Amy inquired who the watch commander was, the operator said it was Lieutenant Fredericks. Amy replied that she was the one that covered up the matter.

After the 911 tape was played, Amy admitted that she was very emotional and at time incoherent on the tape. Amy stated she believed at the time of the incident that McGowan was an informant because she was unable to get help from the Los Angeles

County Sheriff's Department or the Los Angeles County District Attorney's Office (DA or DA's office). McGowan had told Amy he was an informant. Since the incident, probation officers had told her they believed McGowan was a snitch. Amy also believed the DA was involved in a cover up and believed the DA sought to punish defendant who did not commit any crime.

2. Interviews with Bucio

On the night of the incident, Bucio told Deputy Michelle Kaser that he saw defendant standing at the gate of his property. Defendant then stepped onto the road with a shotgun as Bucio got out of his truck. Bucio stated that after he got out, defendant racked and pointed the shotgun at him.

When Deputy Kaser first spoke with Bucio, his truck was east of the Konstanteloses' driveway. Access was not blocked. The deputy did not know where the truck was before she arrived.

Detective Randy Megrele interviewed Bucio on January 7, 2009. The detective recalled Bucio telling him that he was still inside his truck when defendant racked the shotgun. His report, however, reflected that Bucio was already outside of his truck when defendant racked the shotgun. Although Detective Megrele acknowledged that his report was misleading, he wrote his report based upon his interpretation of what Bucio told him.

Douglas Davis, an investigator with the DA's office, interviewed Bucio on March 4, 2009. Bucio stated he was driving past a vehicle stopped in the road when defendant confronted him with a shotgun. Bucio said he saw and heard defendant manipulate the shotgun, as if he were chambering a round, while approaching his truck. Defendant pointed the shotgun at Bucio through the porthole of the truck's passenger window.

C. *Rebuttal*

From July 2008 through December 2008, Lieutenant Fredericks was the night shift watch commander at the Lancaster Sheriff's Station (station). In July 2008, Lieutenant

Fredericks was assigned to investigate a complaint that Amy made via letter regarding certain personnel at the station. The incident to be investigated occurred toward the end of July 2008.

In her letter, Amy asked to be contacted in writing, not by telephone. Lieutenant Fredericks sent Amy a registered letter asking that Amy contact her. One day, Amy called the station at 9:00 p.m. before Lieutenant Fredericks's shift started. Amy left a message asking that the lieutenant not call her at home between the hours of 9:30 p.m. and 5:30 a.m. because her children would be sleeping. Lieutenant Fredericks arrived early that day and returned Amy's call at 9:15 p.m. Receiving no answer, Lieutenant Fredericks left a message on the recorder. About a week later, Lieutenant Fredericks learned that Amy had complained to the Board of Supervisors that she had tried to contact Amy too late at night.

Lieutenant Fredericks spoke to Amy once on the telephone about six months after she lodged her initial complaint. Contact was made after the December 23, 2008 incident.

Lieutenant Fredericks's investigation spanned a couple of months, and included a second complaint made by Amy. The lieutenant interviewed all the witnesses she was aware of[7] and wrote two reports, submitting them to operation staff on the date they were due. Although she was aware that the reports went to downtown regional headquarters, she did not know whether her reports were submitted to internal affairs.

Lieutenant Fredericks had no ill will against the Konstantelos family and had no knowledge about McGowan being an informant of any kind. Lieutenant Fredericks did not take any actions in order to protect McGowan. She also did not instruct any deputies to take such action.

Investigator Davis listened anew to the audio recording he made of his interview with Bucio in March 2009. During that interview, Bucio stated that Amy was in the

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[7] Lieutenant Fredericks interviewed 10 to 12 deputies, McGowan, his former probation officer, a store owner and an FBI investigator.

center of the road and then veered to the right. He proceeded to go around her, and as he did so and got in front of her, defendant "came out with a shotgun, racked a round in the chamber, pointed the shotgun in my window and told me to get the fuck off his property or he was going to fucking kill me."

Bucio also stated he was still moving when the defendant walked out of the driveway gate but then qualified his answer. He said he did not see him walk out through the gate. Bucio heard the sound of a shotgun being racked. When he looked over, he saw defendant pointing the shotgun in his window. Bucio described the shotgun defendant pointed at him as a black single barrel pump shotgun with a black sling.

Investigator Davis did not believe there was much difference between what he wrote in his report and the recorded interview.

D. *Surrebuttal*

Amy received a telephone call from Lieutenant Fredericks sometime towards the end of August. Amy met with Norm Hickling at his field deputy office and complained that Lieutenant Fredericks had asked her to come to the station after 9:00 p.m. Amy was upset because she was a nursing mother. Hickling sent her an email, stating he would try set something up, but Amy never heard anything else. Amy could not recall whether or not she spoke to Lieutenant Fredericks.

DISCUSSION

A. *Vindictive Prosecution*

On January 29, 2009, the People filed a misdemeanor complaint against defendant, alleging that he resisted, obstructed, and/or delayed a peace officer in the performance of his/her duty in violation of section 148. On March 4, after evaluating the evidence

against defendant with regard to alleging a violation of section 422 with a firearm enhancement, the People filed a felony complaint, setting forth new charges.[8]

Defendant's preliminary hearing was held on August 12, 2009. The People filed the original information on August 26, charging defendant with criminal threats while personally using a firearm (count 1), exhibiting a firearm (count 2), and resisting, obstructing, and/or delaying a peace officer in the performance of his/her duty (count 3). On September 9, defendant was arraigned and pled not guilty.

On January 15, 2010, defendant filed a motion to recuse the DA's office. Defendant maintained that the DA had a conflict of interest, which made it unlikely he would receive a fair trial. Defendant maintained that a conflict of interest existed because (1) Deputy District Attorney John Tantroup called defendant as a witness in McGowan's probation violation hearing,[9] (2) defendant filed a state bar complaint against Attorney Tantroup for failing to prosecute McGowan for violating his probation after McGowan harassed him and his family, (3) the DA's office in Lancaster purportedly committed discovery violations by giving McGowan a copy of the incident report pertaining to the events of December 23, 2008,[10] and (4) the charges the People filed against defendant

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[8] We derive these facts from the declaration of Deputy District Attorney Luke Sisak submitted in support of the People's opposition to defendant's motion to recuse the DA's office, which is discussed later in the opinion. Attorney Sisak was the trial deputy assigned to this case since the filing of the initial misdemeanor complaint. Neither the original misdemeanor complaint nor the subsequent felony complaint is contained in the record on appeal.

[9] McGowan was on probation for felony hit and run causing death or injury (Veh. Code, § 20001, subd. (a)) charged in an information filed on November 19, 2002 in *People v. William McGowan* (Super. Ct. L.A. County, 2002, No. MA025035).

[10] On February 11, 2009, the trial court held a hearing on petitions for restraining orders that McGowan filed against defendant and Amy Konstantelos filed against McGowan. During that hearing, McGowan described the incident that occurred on December 23, 2008, and said "here's the incident report on that." Defendant, believing that the DA's office provided McGowan with the incident report, wrote to District

were escalating. Defendant's recusal motion was opposed by the DA and the California Attorney General's Office. The trial court denied the motion on February 10.[11]

On March 15, 2010, the People filed an amended information, adding a new charge of felony assault with a firearm and personal use of a firearm (count 4). On March 12, the date defendant was arraigned on count 4, the prosecutor explained to the trial court that "the new amended count is actually just an alternative filed from facts proven at the prelim. Currently charged in count 2 is a 422. The reason the count was added at a later date was research that I had personally done gave me reason to believe that it could be charged as a 245 and proven in that respect, and that was the reason for the late adding of that count."

On April 8, 2010, defendant filed a motion to dismiss for vindictive prosecution. Defendant's motion was made on the ground that the People filed more serious charges against him "after [he] exercised his procedural rights to go to trial in this matter." The People opposed the motion, and at the hearing on the motion submitted the matter on "our previous argument from previous motions as well." The trial court denied the motion. On appeal, defendant challenges the court's ruling. We reject defendant's challenge.

The People may not retaliate against a criminal offender who has exercised his constitutional rights by increasing the charges against him. Such retaliation violates state and federal principles of due process. (*United States v. Goodwin* (1982) 457 U.S. 368, 372 [102 S.Ct. 2485, 73 L.Ed.2d 74]; *People v. Jurado* (2006) 38 Cal.4th 72, 98.)

A presumption of vindictiveness arises "if the prosecutor 'ups the ante' after exercise of a postconviction right." (*People v. Puentes* (2010) 190 Cal.App.4th 1480, 1484.) In the pretrial setting, however, there is no presumption of vindictiveness if the

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Attorney Steve Cooley in an effort to find out who in the DA's office gave McGowan criminal information to be used against him in a civil matter.

11 Defendant does not challenge the propriety of the order denying his motion to recuse the DA.

People increase the charges against the defendant. (*People v. Jurado*, *supra*, 38 Cal.4th at p. 98; *People v. Bracey* (1994) 21 Cal.App.4th 1532, 1544.) "While a defendant's exercise of some pretrial procedural right may present an opportunity for vindictiveness, 'a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule.'" (*Bracey*, *supra*, at p. 1544, quoting *United States v. Goodwin*, *supra*, 457 U.S. at p. 384.) Thus, before the commencement of trial, the defendant must "prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something the law plainly allowed him to do." (*Goodwin*, *supra*, at p. 384; accord, *Jurado*, *supra*, at p. 98.)

As the trial court aptly noted, it is quite common for prosecutors to amend an information after the preliminary hearing. The court expounded that "in this county, and it's no reflection on the D.A.'s office, filing deputies filing cases which are increased, either by adding charges or strikes, or things of this nature, after the preliminary hearing, and all too often . . . informations are amended during the trailing period. There has been nothing shown in an objective setting to show that there has been vindictive prosecution and the motion is denied."

In this case, we agree with the trial court. Defendant provided no *objective* evidence that the prosecutor's decision to add a fourth count was vindictive. (*United States v. Goodwin*, *supra*, 457 U.S. at p. 384; *People v. Jurado*, *supra*, 38 Cal.4th at p. 98.) Accordingly, the trial court properly denied his motion to dismiss for vindictive prosecution.

B. *Right to Present a Defense*

As previously noted, McGowan was on probation for felony hit and run causing death or injury. At a probation violation hearing held on January 4, 2008, the trial court ordered McGowan not to associate with, and to stay away from, defendant and his family and residence. Defendant contends the trial court deprived him of his right to present a defense by excluding evidence of this protective order. We disagree.

Prior to trial, defendant filed a motion in limine seeking to admit evidence of this protective order. Defense counsel argued that "it goes to establish the history between the two parties, and gives a reference point for the jury as to why all of a sudden would there be an incident on December 23rd. And the reason for what was going on on December 23rd is the fact that, again, there was a prior history of harassment. At one point [defendant] was a protected party from a court order for a criminal matter that Mr. McGowan was under. This Mr. Bucio, the complaining victim, is a friend of Mr. McGowan, so I think it goes to, once again, the reference point."

Ultimately, the trial court denied defendant's motion in limine. Utilizing an Evidence Code section 352 analysis, the court ruled that the probative value of the protective order was outweighed by the extent to which it would confuse the issues. The court recognized, however, that any contentiousness between defendant and McGowan "may be relevant for purpose of bias." The court therefore ruled that defendant would be permitted "to get into areas of contentiousness just to show bias." The court noted, however that "the protective order adds nothing to that."

A trial court's decision to admit or exclude evidence pursuant to Evidence Code section 352 will not be disturbed absent an abuse of discretion. (*People v. Eubanks* (2011) 53 Cal.4th 110, 144-145; *People v. Hamilton* (2009) 45 Cal.4th 863, 929-930.) In this case, the trial court acted well within its discretion in excluding evidence of the protective order. While the protective order is part of the long history of contentiousness between the Konstanteloses and McGowan, McGowan was not the victim in this case and was not called as a witness by either side. Moreover, the protective order was no longer in force at the time of the incident giving rise to this case. To the extent the trial court recognized that McGowan's relationship with the Konstanteloses may be relevant to the issue of bias, it ruled that evidence establishing such bias was admissible. Thus, the court did not prevent defendant from introducing evidence demonstrating the long history of contentiousness between McGowan and the Konstanteloses. Rather, it simply precluded defendant from using the protective order to do so. No abuse of discretion has been demonstrated. (*Eubanks*, *supra*, at pp. 144-145; *Hamilton*, *supra*, at pp. 929-930.)

C. *Criminal Threats*

Next, defendant challenges the sufficiency of the evidence to support his conviction of making criminal threats. There is no merit to this contention.

When the sufficiency of the evidence is challenged, we review the entire record in the light most favorable to the judgment to determine if it contains substantial evidence—i.e., evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Solomon* (2010) 49 Cal.4th 792, 811.) This standard of review is applied regardless whether the People rely primarily on direct or circumstantial evidence. (*Ibid.*) We presume in support of the judgment the existence of any fact the jury reasonable could have deduced from the evidence. (*People v. Vines* (2011) 51 Cal.4th 830, 869.) Thus, we must accept logical inferences that the jury could have drawn even if we would have reached a contrary conclusion. (*Solomon*, *supra*, at pp. 811-812.)

In 2008, section 422 provided: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is 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, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison." (Stats. 1998, c. 825 (S.B. 1796), § 3.)

In order to prove the crime of making criminal threats under section 422, the People 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, in writing, or by means of an electronic communication device"—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.'" (*In re George T.* (2004) 33 Cal.4th 620, 630, quoting *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Defendant does not dispute that there was substantial evidence that he willfully threatened to commit a crime which would result in death or great bodily injury, that he made the threat with the specific intent that the statement be taken as a threat, that the threat was on its face and under the circumstances in which it was made, so unequivocal, unconditional, immediate, and specific as to convey a gravity of purpose and an immediate prospect of execution of the threat, that Bucio was afraid or that his fear was reasonable. Rather, defendant challenges only the sufficiency of the evidence to support the fourth element—i.e., that Bucio's fear was "sustained."

The term "sustained fear" is not defined in section 422. It has, however, been interpreted to mean "a period of time that extends beyond that which is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) Fear that does not continue after the threatening verbal encounter is not sustained fear. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1140.) We look to "all of the surrounding circumstances" to determine if a criminal threat has been made. (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013.)

Defendant's reliance on *In re Ricky T., supra,* 87 Cal.App.4th 1132 is misplaced, in that it is factually distinguishable. Ricky T. was a student who threatened to "get" his teacher after the teacher accidently hit him on the head while opening a door. (*Id*. at p. 1135.) While the teacher "felt physically threatened," defendant "did not make a specific threat or further the act of aggression." (*Ibid*.) Following the incident, the teacher sent Ricky T. to the school office. (*Ibid*.) The following day, a police officer interviewed him. The latter acknowledged being in a verbal altercation with his teacher

after being disrespected. Ricky T. admitted to speaking in an angry manner and getting in his teacher's face but denied threatening him. Ricky T. said he did not mean to sound threatening. He further acknowledged the inappropriateness of his conduct and apologized. (*Ibid*.) The following week, however, Ricky T. admitted to police that he told his teacher that "he would 'kick [his] ass.'" (*Id*. at p. 1137.) The statement was not accompanied by any movements or gestures in furtherance of the threat, however. (*Id*. at p. 1138.) There had been no previous incidents between Ricky T. and his teacher. (*Ibid*.)

In reversing the finding of the juvenile court that Ricky T. committed the crime of making criminal threats, the Court of Appeal concluded that the evidence was insufficient to support the finding that Ricky T.'s threat was a true threat within the meaning of section 422 (*In re Ricky T.*, *supra*, 87 Cal.App.4th at p. 1139) or that it caused the teacher to be in sustained fear (*id*. at pp. 1139-1141). With regard to the element of sustained fear, the court noted that "there was nothing to indicate that the fear was more than fleeting or transitory." (*Id*. at p. 1140.) Although the teacher felt threatened, he acknowledged that the threat was not specific. He directed Ricky T. to report to the school office, and Ricky T. complied. It was not until the following day that the police were contacted. Thus, the court opined, the "fear did not exist beyond the moments of the encounter." (*Id*. at p. 1140.)

The facts of this case are a far cry from those in *Ricky T*. Bucio testified that he tried to avoid any contact with Amy by parking his truck and waiting for Amy to drive onto her property. He did so because of past confrontations with the defendant and his wife. After some time had passed, Amy pulled over to the right, which Bucio interpreted as an indication that Amy wanted Bucio to go around her. As he did so, he heard a shotgun being racked and then saw defendant pointing a shotgun at his head. Although Bucio was on the road, defendant threatened to "kill" Bucio if he did not "get the fuck off his property." The confrontation lasted a couple of minutes during which defendant repeated his threat numerous times. Bucio testified that he was afraid that defendant would shoot him. While Bucio's decision to get out of his truck and tell defendant to shoot him was not the wisest, it does not negate the fear Bucio experienced when a man

with whom he had a history of confrontation pointed a cocked shotgun at his head. In fact, Bucio contemplated trying to retrieve a weapon from his vehicle and make a desperate attempt to defend himself by striking defendant.

We conclude that substantial evidence supports the jury's determination that Bucio's fear was not momentary, fleeting or transitory (*People v. Allen*, *supra*, 33 Cal.App.4th at p. 1156) but rather continued after the threatening verbal encounter (*In re Ricky T.*, *supra*, 87 Cal.App.4th at p. 1140) and thus was sustained within the meaning of section 422. (*People v. Solomon*, *supra*, 49 Cal.4th at p. 811.)

D. *Obstruction*

In order to establish a violation of section 148, subdivision (a), the People must prove the following elements: "'"(1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties."'" (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 894-895.) The People also must prove that the officer was acting lawfully at the time the violation of section 148 occurred. (*Garcia v. Superior Court* (2009) 177 Cal.App.4th 803, 818-819.) "'The offense is a general intent crime, proscribing only the particular act (resist, delay, obstruct) without reference to an intent to do a further act or achieve a future consequence. [Citation.]' [Citation.]" (*People v. Christopher* (2006) 137 Cal.App.4th 418, 431.)

Defendant challenges the sufficiency of the evidence supporting the first element of his conviction for violating section 148, subdivision (a). He does not dispute that the deputies were engaged in the performance of their duties, that he knew they were peace officers engaged in the performance of their duties, or that the deputies were acting lawfully at the time section 148 was violated. Before reaching the merits of defendant's limited challenge to the sufficiency of the evidence, we set forth some procedural background.

Prior to trial, defendant made a section 995 motion, seeking to dismiss count 3, the section 148 charge. He maintained that absent an arrest warrant, he was not required to exit his home when ordered to do so. Thus, in his view, he did not resist, delay or obstruct the officers in the performance of their duties.

The trial court ruled that there were exigent circumstances to enter the residence without a warrant, explaining that, in the view of the police, this was a "barricade situation" and "deemed an emergency." Defense counsel clarified: "I am not saying that the officers did not have probable cause authority to go into the property. What I am saying is . . . [defendant] had no obligation to exit the property. The police decide[d] not to go in, that's a tactical decision on their part. Still, for a [section] 148, he did not have the obligation to exit, and that was the gist of the argument." The trial court was not swayed and denied defendant's section 995 motion.

After the People rested, defendant made a motion to dismiss pursuant to section 1181.1. With regard to the section 148 charge, defendant reiterated the argument he had made at the hearing on his section 995 motion. He argued that in the absence of an arrest warrant, he had no obligation to exit his residence. The trial court denied the section 1181.1 motion.

On appeal, defendant does not challenge the trial court's determination that exigent circumstances existed, permitting the police to enter defendant's home. Defendant maintains, however, that he had no obligation to come out of his home when requested to do so by the police because the deputies did not tell him he was under arrest and did not have an arrest warrant for him. We disagree.

If the police could reasonably enter his home to arrest him, we see no reason they could not order him to come outside. The deputies unquestionably acted prudently in choosing the latter option, in that they had reason to believe that defendant was armed and there were children inside the residence.

Defendant's claim that he had no knowledge that the deputies wanted to detain him for questioning is disingenuous at best. He had just threatened to kill Bucio with a shotgun. Defendant and Amy were contacted by deputies but refused to come outside.

Sergeant Rubio noted that it appeared they were barricading themselves inside the house. A helicopter was dispatched, and patrol cars were positioned on the front corners of defendant's property. The deputies used their public address systems to order defendant and Amy to exit from the property. The 911 operator told defendant he needed to exit his house and defendant said he refused to speak with the deputies.

In addition, Sergeant Rubio spoke directly with defendant by telephone and ordered him to come out of the house so that Sergeant Rubio could check on the welfare of the children and keep the firearm away from them. Defendant refused to comply, and started making demands as a condition of his compliance. First, he demanded that the helicopter leave. After Sergeant Rubio directed the helicopter to depart, defendant demanded that the deputies permit Amy to come inside the house. The delay caused by defendant lasted 70 minutes after Sergeant Rubio first arrived. During this time, defendant delayed the deputies from performing their duties. Specifically, the deputies were unable to check on the welfare of the children, to conduct their investigation and to detain or arrest defendant. We conclude this is sufficient evidence to support defendant's conviction for violating section 148, subdivision (a)(1). (See *People v. Christopher*, *supra*, 137 Cal.App.4th at p. 432.)

E. *Motion for Judgment of Acquittal*

Defendant contends the trial court applied the wrong standard when ruling on his motion for a judgment of acquittal pursuant to section 1118.1. Once again, we disagree.

"The standard applied by the trial court under section 1118.1 in ruling on a motion for judgment of acquittal is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction. [Citation.]" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.) Here, prior to ruling on the motion, the trial court correctly stated that "[t]he standard for Penal Code section 1118.1 is, is there sufficient evidence to uphold a conviction on appeal." Thus, the trial court applied the proper standard in ruling on the motion.

That the trial court noted as to count 3 that "these are the same arguments you made during the [section] 995" and denied the section 1118.1 motion "for the same reasons and the cases" cited during the hearing on the section 995 motion, does not establish that the trial court applied the wrong standard when ruling on defendant's motion for judgment of acquittal.

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.