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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. ANDRE PURRY, Defendant and Appellant.	B284669 (Los Angeles County Super. Ct. No. BA447136)

APPEAL from a judgment of the Superior Court for Los Angeles County, Bernie C. LaForteza, Judge. Affirmed.

Kiran Prasad, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Andre Purry appeals from the judgment of conviction following his conviction by jury of one count of making a criminal threat and one count of vandalism. He contends the trial court committed reversible error in admitting evidence of a prior uncharged offense. Finding no error, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

On May 30, 2016, defendant and two other tenants, Larry Monger and John Rice, were watching television in a shared lounge in the housing complex in which they all lived. Defendant and Monger argued over what show to watch. Jason Arroyo, the security guard in an office about 20 feet away, heard (and saw on monitors) an argument in the lounge, and went to break it up. As Arroyo arrived, defendant and Monger left; Rice remained in the lounge. Ten or 15 minutes later, defendant returned carrying a metal pipe about two feet long. He stomped on and broke the remote control, then swung the pipe at the television screen, smashing it. Defendant raised the pipe, advancing toward Rice. He repeatedly told Rice to "shut the fuck up," and said "I'll beat your ass." Rice, who was 74 years old, slight and 5'10" (or shorter), was afraid of defendant (who was about 6'3" tall). Arroyo rushed into the lounge with a can of mace. He saw defendant lift the pipe toward Rice. Defendant yelled at the elderly man to "shut the fuck up," and threatened to "beat [his] ass," as he lifted the pipe. Rice quickly "jumped back" and "ricocheted off the wall." Arroyo aimed the pepper spray at defendant, but did not use it.

Defendant left the building. Arroyo followed him out while calling 911, then returned inside upon instruction of the police dispatcher. Defendant returned to the building within ten minutes. Before entering the building, defendant "threaten[ed]" Arroyo "saying he was going to handle [him] one-on-one," then stormed toward defendant's room. Arroyo understood defendant's threat to mean "the moment [Arroyo] would step outside, [defendant] was going to fight [him]." Defendant is several inches taller than Arroyo (who is about 5'11"), and had threatened him as recently as two weeks earlier. Arroyo was more fearful of the threats defendant made on May 30 than he had been two weeks earlier because this time, defendant "definitely showed aggression and agitation." The police arrived about 10 minutes after defendant had returned. Rice was still afraid of defendant when the police officers arrived. Among other things, the security video of the May 30, 2016 incident obtained after defendant's arrest depicts him stomping on a remote control and swinging a pipe twice to smash a television, before leaving the lounge.

Defendant was charged with one count each of criminal threats against Rice and Arroyo (Pen. Code,[1] § 422, subd. (a); counts 1 and 2), and one count of vandalism (§ 594, subd. (a); count 4). The information also alleged that defendant had five prior prison terms (§ 667.5, subd. (b)), and one prior "strike" conviction (§ 667, subd. (d)).

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[1] Additional undesignated statutory references are to the Penal Code.

At trial, over defendant's objection, the court permitted Arroyo to testify that about two weeks before the May 30 incident, he had "a couple previous incidents" in which defendant threatened him. The jury was instructed regarding consideration of evidence of prior uncharged conduct. (Evid. Code, § 1101.)

During its deliberations, the jury requested a read back of testimony "specifically with regard to testimony of Mr. Rice and Mr. Arroyo specific to the verbal threats." After the parties were informed of this request, the prosecution moved to dismiss the criminal threats charge regarding Arroyo (count 2). (§ 1385.) That motion was granted and the bailiff was instructed to inform the jury it "no longer needed to address" count 2. The requested testimony was read to the jury.

The jury found appellant guilty as to counts 1 and 4. The court found three prior prison terms true, and struck two others pursuant to section 1385. One prior strike allegation was found not true. Defendant received an aggregate prison sentence of four years: the upper–term of three years on count 1, plus one year for the prior prison term (§ 667.5, subd. (b)), and a concurrent sentence as to count 4.

DISCUSSION

1. *The Court Did Not Abuse its Discretion in Admitting Evidence of an Uncharged Prior Threat*

a. *Controlling Legal Principles and the Standard of Review*

"'Subdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person's character, including evidence of

character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition.' [Citation.] 'Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue. . . . [Citations.] The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citation.] When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.]' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 667.) Evidence of a prior act is material if the prosecution seeks to use it to prove an element of the charged offense, such as intent. (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 239–240 (*Hendrix*).) The principal question affecting the probative value of an uncharged prior act is its nature and the degree of similarity to the charged offense. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211.) The least degree of similarity between an uncharged act and the charged offense is required to prove intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).) We review a decision to admit evidence of an uncharged

prior act for abuse of discretion, based on facts known to the trial court at the time it made its ruling. (*Hendrix, supra,* 214 Cal.App.4th at pp. 238, 243.)

b. *The Prior Threats Evidence was Probative as to Intent and Reasonable Fear*

Arroyo's testimony concerning defendant's prior threats was very brief. He testified that about two weeks before the charged incident, he "had a couple previous incidents with" defendant in which defendant threatened him, and he did not recall what defendant threatened him with. At the time it was admitted, evidence of defendant's previous threats against Arroyo was material, relevant and minimally prejudicial. Section 422, subdivision (a), requires the prosecution to establish that: (1) the defendant willfully threatened to commit a crime that would have resulted in death or great bodily injury; (2) the defendant made the statement with the specific intent that the statement be taken as a threat; (3) the threat was, on its face and in context, a threat of immediate action; (4) the threat caused the victim to be in a sustained fear for his or her own safety; and (5) the victim's fear was reasonable. (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228 (*Toledo*).) The prosecution argued the evidence of prior threats defendant made against Arroyo was material to the elements of defendant's intent that his statements be understood as a threat, as well as the victim's reasonable fear.

The court did not abuse its discretion in finding evidence of prior threats made by defendant against Arroyo two weeks before the charged offense was sufficiently similar to the charged offense such that it was relevant to show defendant's intent. "The question . . . is not the number of points of similarity but their logical relevance to establish the mental element of the charged offense." (*People v. Rocha* (2013) 221 Cal.App.4th 1385, 1394.) Contrary to defendant's contention, the evidence was neither vague nor improper character propensity evidence. Nor was the evidence substantially more prejudicial than it was probative.

The evidence was not vague. Very limited evidence of defendant's prior threats was admitted, and that evidence was specific to defendant's most recent threat of violence against Arroyo. The court admonished jurors that they could consider that evidence only for the limited purpose of evaluating defendant's intent which "eliminated any danger 'of confusing the issues, or of misleading the jury.'" (*People v. Lindberg* (2008) 45 Cal.4th 1, 26 (*Lindberg*); see *Hendrix, supra*, 214 Cal.App.4th at p. 247 [admonition may ameliorate Evid. Code, § 352 prejudice by eliminating danger jurors will consider evidence for improper purpose].) We presume the jury followed this instruction. (*Lindberg, supra,* 45 Cal.4th at p. 26.)

Nor was the prior threats evidence mere propensity evidence. That defendant had threatened Arroyo and another tenant just two weeks before the charged crime (even if the evidence of that threat was nonspecific in terms of the words he had used, or the precise

circumstances involved) is relevant to defendant's intent in the current criminal threats charge. The lowest degree of similarity is required between an uncharged act and a charged offense when the evidence is offered to show intent. (*Ewoldt, supra*, 7 Cal.4th at p. 402; *Hendrix, supra*, 214 Cal.App.4th at pp. 240-241.) The facts of the uncharged offense and the charged offense were not dissimilar in any material respect. In both cases, defendant communicated an intent to physically harm Arroyo. The charged instance was simply a more agitated and aggressive version of the prior uncharged threat.

The evidence was also offered to establish reasonable fear. Arroyo documented the prior threat incident, but did not call the police, and defendant had not acted on that threat. With regard to the charged offense, however, Arroyo felt compelled to summon the police because defendant took "more specific action," including threatening to harm Rice with the metal rod he had just used to destroy property, and acted more aggressively than he had before. The evidence was pertinent to establish elements of intent and reasonable fear. (See *People v. Fruits* (2016) 247 Cal.App.4th 188, 203-204.)

Nor did the court err in admitting the evidence of the uncharged offense under Evidence Code section 352. "Evidence Code section 352 provides that a court 'in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' . . . 'Prejudice for purposes of Evidence Code

section 352 means evidence that tends to evoke an emotional bias against the defendant with very little effect on issues, not evidence that is probative of a defendant's guilt.' [Citation.]" (*People v. Valdez* (2012) 55 Cal.4th 82, 133.) Here, the court concluded the evidence was not substantially more prejudicial than probative given the similarity between the uncharged and charged offenses, which tended to show intent, and the fact that defendant's prior "threats were close in time . . . and . . . pretty specific as to [Arroyo]." The jury heard only limited evidence of the most recent threat, and was appropriately instructed to consider the evidence only in evaluating defendant's intent. (See *Hendrix, supra*, 214 Cal.App.4th at p. 247 [admonition ameliorates prejudice by eliminating the danger jurors will consider evidence for improper purpose].)

c. *No Prejudice*

Although the trial court did not err in admitting Arroyo's testimony regarding defendant's prior threats against him, that evidence was relevant only to count 2, the criminal threats charge in which Arroyo was the alleged victim, and the prosecution later dismissed that count during jury deliberations. The question then becomes whether, given that the evidence was not relevant to the criminal threats charge in which Rice was the victim, that evidence affected defendant's conviction of the Rice count.[2] To prevail on this

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[2] Defendant does not challenge his vandalism conviction (count 4).

issue, defendant must demonstrate that it is reasonably probable he would have obtained a more favorable result. (*People v. Watson* (1956) 46 Cal.2d 818, 836; cf. *People v. Carter* (2005) 36 Cal.4th 1114, 1152 [applying *Watson* standard to claim that other crimes evidence was improperly admitted].) Having reviewed the record, we are convinced defendant would not have obtained a more favorable verdict had evidence of the uncharged offense been excluded.

The evidence of defendant's prior threats against Arroyo was very brief and non-inflammatory, and not likely to spill over onto consideration of the Rice count. Further, the evidence supporting the Rice count was strong. The video evidence shows defendant smashing the television screen. According to Rice and Arroyo, after destroying the television, defendant then appeared as though he was about to strike Rice with the metal rod, while yelling "I'll beat your ass" at the 74-year-old, and telling him to shut up. Arroyo said the elderly Rice was so frightened he jumped back and "ricocheted off the wall."

Viewed in context, the jury could reasonably infer from defendant's actions and the nature of his words that he was about to commit an act of violence against Rice, similar to smashing the television. This evidence established that defendant specifically intended to threaten immediate action that would result in Rice suffering great bodily injury. The evidence was specific to Rice, against whom defendant threatened significant physical harm. Thus, even if

evidence of defendant's prior threats were excluded, it is not reasonably probable that defendant would have achieved a different result on the Rice count.

2. *The Record Contains Sufficient Evidence Demonstrating That Rice had a Sustained Fear of Harm*

Defendant maintains the record contains insufficient evidence to establish that Rice feared him for more than a few fleeting seconds. We conclude otherwise.

a. *Standard of Review*

In an appeal seeking relief based on a claim of insufficient evidence, we review the record to determine whether a rational factfinder could find sufficient evidence of each element of the crime, viewing the evidence in the light most favorable to the respondent. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) "When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence . . . from which [the factfinder] could find the defendant guilty beyond a reasonable doubt. [Citation.]" (*Lindberg, supra,* 45 Cal.4th at p. 27.) "If the circumstances reasonably justify [those] findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.]" (*Ibid.*)

b. *The Evidence Established that Rice Suffered Sustained Fear For His Personal Safety Due to Defendant's Threat of Harm*

An essential element of a criminal threats charge is that defendant's threat must have caused the victim to suffer sustained fear for his own safety. (*Toledo, supra*, 26 Cal.4th at pp. 227-228.) "Sustained fear" "extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156; *People v. Wilson* (2015) 234 Cal.App.4th 193, 201; *People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1140.)

Defendant does not dispute that Rice genuinely feared him. He maintains that Rice's fear was not "sustained" because the interaction between defendant and Rice lasted only about 34 seconds (as reflected in the time elapsed in the security video). This argument is based on the flawed premise that a criminal threat is actionable only if the victim's fear lasts a specific, minimum amount of time. There is no absolute minimum.

Courts generally have held that fear lasting at 15 or more minutes will suffice. (See e.g., *People v. Allen, supra*, 33 Cal.App.4th at p. 1156 ["Fifteen minutes of fear of a defendant who is armed, mobile, and at large, and who has threatened to kill the victim and her daughter, is more than sufficient to constitute 'sustained' fear"].) Under some circumstances, however, even a single moment may be enough time to establish sustained fear: "When one believes he is about to die, a

minute is longer than 'momentary, fleeting, or transitory.'" (*People v. Fierro, supra*, 180 Cal.App.4th at p. 1349; see *People v. Culbert* (2013) 218 Cal.App.4th 184, 190–191.)

Rice clearly had an imperfect memory. Nevertheless, he remembered that he continued to fear defendant from the time defendant threatened to, as Arroyo said, "beat [his] ass," at least until the police officers arrived (20 minutes later). Indeed, he testified he may have remained afraid of defendant for more than a day. In the face of defendant's words and violent conduct, Rice's reasonable fear cannot be characterized as "momentary, fleeting, or transitory."

We reject defendant's assertion that Rice was not a convincing witness. It is not our role to assess witness credibility or to resolve evidentiary conflicts. (*People v. Truong* (2017) 10 Cal.App.5th 551, 556.) The jury had reason to believe Rice. Video and testimonial evidence demonstrates that defendant returned to the lounge to destroy the television. After that extraordinary act of violence, he turned on his former friend, yelled profanities at him and threatened to "beat [his] ass" as he lifted a metal rod in his direction, causing Rice reasonably to fear he was about to be struck. There is ample evidence of Rice's sustained fear.[3]

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[3] Defendant asserts that the evidence was vague because Rice did not indicate what he was afraid of. Rice testified that he remained fearful of defendant when officers arrived, a fear that arose only because of defendant's threat.

We also reject the claim that there is insufficient evidence to show that Rice had a reasonable sustained fear for his safety because defendant did not

In sum, Rice's and Arroyo's testimony was sufficient evidence to establish that Rice feared appellant for a sustained period of time and that Rice's fear was reasonable.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.

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take the pipe away with him after the incident. Defendant does not explain how that fact would cause Rice to overcome the traumatic ordeal he experienced, nor does it remove the possibility that Rice feared defendant would return and harm him some other way. Defendant's "'mannerisms, affect, and actions,'" established that Rice's sustained fear was reasonable. (*People v. Wilson* (2010) 186 Cal.App.4th 789, 808.)