Filed 1/4/13 P. v. Montez CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALFREDO MONTEZ, Defendant and Appellant.	B237327 (Los Angeles County Super. Ct. No. SA075841)

APPEAL from a judgment of the Superior Court of Los Angeles County. Katherine Mader, Judge. Affirmed as modified.

Heather J. Manolakas, 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, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Alfredo Montez guilty of one count of first degree burglary and one count of making criminal threats. On appeal, Montez contends: (1) insufficient evidence supported the criminal threats conviction; (2) the trial court erred in allowing the victim to testify that he remained frightened at the time of trial; (3) Montez's Sixth Amendment rights of confrontation and cross-examination were violated during a bench trial on his prior convictions; and (4) the trial court improperly failed to award him presentence conduct credits. We modify the judgment to reflect conduct credits and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In the late evening of November 1, 2010, Kevin Benjamin and Elizabeth Vogel were at home in their apartment in Los Angeles. Vogel was falling asleep while Benjamin watched television. Benjamin heard a noise in the downstairs area of the apartment. When he went downstairs to investigate, he encountered Montez coming out of a bedroom. Benjamin asked, "What are you doing in my house?" Montez seemed to "get agitated." Montez reached for something in his waist or pocket. Benjamin thought Montez was reaching for a weapon. Benjamin crossed the distance between them; Montez moved as if to punch Benjamin. Benjamin, who is trained in martial arts, blocked the punch, then kicked Montez in the shin. He forced Montez to the floor. Montez struggled. Benjamin punched Montez and managed to get him in a "lock," lying face down on the floor.

While on the floor, Montez continued to struggle and repeatedly said, "I'm going to kill you," and "I'm going to stab you." Benjamin was afraid. He thought that if Montez got free, he would stab Benjamin or inflict some kind of harm. When Vogel came downstairs, Benjamin told her to call the police, and to hand him a cane by the door. Montez had several times called out a name, so Benjamin feared someone else might enter the apartment. Benjamin told Vogel to lock herself in a room until the police came.

Eventually Montez said, "Just let me go," and "I'll give you $100," then he asked for a pillow for his head. Benjamin held Montez down for 20 to 25 minutes until police arrived. He remained afraid for his safety during that time. Montez struggled and tried to

dig his fingernails into Benjamin's hand, causing Benjamin to "bang [Montez's] head into the ground" to make Montez stop. Benjamin told Montez "just to relax, no one has to get hurt." A silver ring of Benjamin's had fallen out of Montez's pocket when Benjamin forced him to the ground. Police later found other jewelry belonging to Benjamin and Vogel in Montez's pockets. When Benjamin looked in the bedroom from which Montez had emerged, he saw a screwdriver that did not belong to him and had not been in the room before.

The People charged Montez with one count of first degree burglary with a person present (Pen. Code, § 459), and one count of making criminal threats (Pen. Code, § 422).[1] As to both counts, the People alleged Montez had suffered four prior serious or violent felony convictions within the meaning of section 667, subdivisions (a)(1) and (b) through (i), and section 1170.12, subdivisions (a) through (d). The People additionally alleged Montez had suffered seven prior convictions within the meaning of section 667.5, subdivision (b), and six prior convictions within the meaning of section 1203, subdivision (e)(4).

Montez did not testify at the trial. On cross-examination, Montez's counsel elicited testimony establishing Benjamin is taller than Montez, and that Benjamin smelled alcohol on Montez during the incident.

A jury found Montez guilty on both counts. Following a bench trial, the court found the prior conviction allegations true. The priors included four convictions for first degree burglary, and three convictions for second degree burglary, all occurring between 1978 and 1996. The court denied Montez's *Romero*[2] motion and sentenced him to a total prison term of 45 years to life.

---

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

2 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

DISCUSSION

I. Sufficient Evidence Supported the Criminal Threats Conviction

Montez contends there was insufficient evidence for the jury to conclude he was guilty of making criminal threats under section 422. " 'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." [Citation.]' [Citation.]" (*People v. Wilson* (2010) 186 Cal.App.4th 789, 805 (*Wilson*).)

Under section 422, the prosecution must prove " '(1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat . . . was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.' [Citation.]" (*In re George T.* (2004) 33 Cal.4th 620, 630.)

Montez contends the evidence was insufficient to prove the third, fourth, and fifth elements. He asserts that he made threats only while Benjamin held him down, and, in context, his statements were not so unequivocal, unconditional, immediate, and specific that they conveyed a gravity of purpose and immediate prospect of execution of the threats. We disagree. Although Benjamin was restraining Montez when he made the threats, Montez continued to struggle in an attempt to get free. There was nothing equivocal or conditional in Montez's actual statements that he would kill or stab

Benjamin. The jury could reasonably conclude Montez intended to convey that he would break free, and once free, he would carry out his threats. As Montez acknowledges, the third element of section 422 "requires the threat to convey ' "a gravity of purpose and an immediate prospect of execution of the threat," ' " but " 'does not require an immediate ability to carry out the threat. [Citation.]' [Citations.]" (*Wilson, supra,* 186 Cal.App.4th at p. 807.) Although Montez was momentarily restrained, he was attempting to break free, he had entered Benjamin's home with an apparent criminal purpose, and when Benjamin confronted him he reached for his pants as if reaching for a weapon. These circumstances indicated the threat to kill or stab Benjamin was unequivocal, unconditional, immediate, and specific with an immediate prospect of execution. (*People v. Mosley* (2007) 155 Cal.App.4th 313, 324.) The evidence was sufficient to support the conclusion that Montez intended to instill fear in Benjamin, and that he intended for Benjamin to understand his statements as a threat. (*Wilson, supra,* at p. 805; *People v. Fierro* (2010) 180 Cal.App.4th 1342, 1348 (*Fierro*).)

There was also substantial evidence that Benjamin suffered a sustained, reasonable fear. " 'Sustained fear' refers to a state of mind. As one court put it, '[d]efining the word "sustained" [in section 422] by its opposites, we find that it means a period of time that extends beyond what is momentary, fleeting, or transitory.' [Citation.]" (*Fierro, supra,* 180 Cal.App.4th at p. 1349.) Montez argues that since Benjamin was able to quickly restrain Montez and Montez eventually pleaded for his release, Benjamin could not have suffered sustained fear from Montez's threats. We again disagree. The evidence established that Montez repeatedly struggled to get free while also threatening to kill or stab Benjamin. The jury could reasonably credit Benjamin's testimony that his fear did not subside in the 20 or 25 minutes it took for the police to arrive and he remained alone, physically restraining the man who had broken into his house at night, appeared to reach for a weapon when confronted, fought back when restrained, and threatened to kill or stab

him.[3] Benjamin's testimony further suggested he feared for Vogel. For example, he told her to lock herself in a room, even though he had restrained Montez. Although Benjamin appeared to have the upper hand physically, he could reasonably remain afraid while the situation continued and Montez had the possibility of following through on his threats.

Moreover, no specific minimum time is required to meet the "sustained fear" element. (*Fierro, supra,* 180 Cal.App.4th at p. 1349; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 [no minimum; 15 minutes of fear of armed, mobile, at-large defendant more than sufficient to constitute sustained fear].) Benjamin testified he was afraid for his safety during the 20- to 25-minute duration of the incident. The entirety of the evidence supported a conclusion that Montez's threats caused Benjamin to experience a reasonable, sustained fear for his and Vogel's safety.

In re Ricky T. (2001) 87 Cal.App.4th 1132 does not require a different result. In *Ricky T.*, a teacher accidentally hit a student with a classroom door. The student became angry and said, "I'm going to get you." (*Id.* at p. 1135.) There was no specific threat or further act of aggression. The teacher sent the student to the school office and said he felt threatened. The circumstances in *Ricky T.* were thus markedly different from those presented here. Montez broke into Benjamin's house, at night. Montez made a gesture that looked like he was reaching for a weapon. The two men engaged in a physical

---

[3] Montez asserts Benjamin testified that his "real fear" came from the situation, not Montez's comments, and that he was "more frightened because of the situation" than Montez's threats. This misconstrues the record. In fact, Benjamin testified as follows: "Q: At the time he was saying, 'I'm going to stab you, I'm going to kill you,' was he still struggling to get free of your grasp? [¶] A: Yes. [¶] Q: Did you have any thoughts or concerns about what would happen if he got free from your grasp? [¶] A: Yes. [¶] Q: What did you think would happen if he got free from you. [¶] A: That he would either stab me or, you know, inflict some kind of harm. [¶] Q: Was that based on just his statements? Or was that based on everything? [¶] A: The statements and the fact that he broke into my house in the middle of the night." The jury could certainly understand this testimony as Benjamin explaining that Montez's threats—both the actual statements and the context in which they were made—made him fear for his safety. We reject Montez's contention that this testimony established Benjamin was not frightened by Montez's threats.

confrontation. Montez made a specific threat to do serious bodily injury to Benjamin, or to kill him. This was not an equivocal statement like, "I'm going to get you," uttered by a student to a teacher at school.

Substantial evidence supported the criminal threats conviction.

II. The Trial Court Did Not Err in Admitting Evidence About Benjamin's Fear at the Time of Trial

Montez argues the trial court prejudicially erred by overruling his objection to Benjamin's testimony that he remained afraid at the time of trial. We find no error.

At trial, the prosecutor asked Benjamin about the fear he experienced during and after the incident, including the following exchange which Montez challenges on appeal:

"Q: Now, in this 20 to 25 minutes, were you still afraid for your safety?

"A: Yes.

"Q: After the police took the defendant into custody and left, were you still feeling that way? Were you still afraid?

"A: Yes.

"Q: As we sit here today, and it's been some time, how do you respond when you hear noises outside or noises in the evening?

"[DEFENSE COUNSEL]: Objection. Relevance.

"THE COURT: Overruled.

"[A]: I still -- it's a heightened sensitivity to sounds that I don't recognize.

"Q: . . . Are you still afraid?

"A: I would say --

"[DEFENSE COUNSEL]: Objection. Vague.

"THE COURT: Overruled.

"[A]: I would say, yeah. I mean, there's a -- a portion that you just think, 'Can this happen again?' "

Montez asserts the testimony was inadmissible because it was not relevant to prove Benjamin experienced a sustained fear because of Montez's threats. "Relevant evidence is evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' (Evid. Code, § 210.)" (*People v. Wilson* (2006) 38 Cal.4th 1237, 1245.) The trial court has broad discretion in determining the relevance of evidence, and we conclude it did not abuse its discretion in this case. (*People v. Harris* (2005) 37 Cal.4th 310, 337.)

The trial court could reasonably conclude the challenged testimony was relevant to Benjamin's state of mind on the night of the incident. The defense urged the jury to conclude Benjamin could not possibly have been more than momentarily frightened, given how quickly he restrained Montez, their relative heights, his comments to Montez, and his success in preventing any harm to himself or Vogel. However, Benjamin testified he was afraid that night, and Montez's threats frightened him. Benjamin's continued state of fear at the time of trial suggested the severity of the incident in his mind. His testimony about his lingering fear because of the incident created an inference that he was afraid *during* the altercation with Montez, and, the jury could also properly infer, because of Montez's threats to kill or stab him. The trial court did not abuse its discretion in admitting the testimony.[4]

III. Montez's Sixth Amendment Rights Were Not Violated at the Priors Trial

At the bench trial on Montez's prior convictions, the prosecutor offered four packages of documents pursuant to section 969b (969b packet). Montez's counsel objected to the prosecutor's failure to present a witness to testify about the documents, and argued this improperly prevented any cross-examination. The trial court overruled the objection, noting the documents were certified copies from the Department of Corrections and Rehabilitation. On appeal, Montez contends his Sixth Amendment right

---

[4] The evidence was also relevant to Vogel's credibility as a witness. (*People v. Valdez* (2012) 55 Cal.4th 82, 135.)

to confront and cross-examine witnesses was violated because the trial court allowed the prosecutor to prove the prior convictions using certified records alone. We find no error.

Montez acknowledges that the Sixth Amendment argument he makes here was considered, and rejected, by the Court of Appeal in *People v. Moreno* (2011) 192 Cal.App.4th 692 (*Moreno*). In *Moreno,* the defendant argued the documents in a 969b packet, and the clerk's certification that the documents within the packet were true and correct copies of Department of Corrections and Rehabilitation records, were testimonial statements subject to confrontation and cross-examination. (*Id.* at p. 710.) The court rejected both arguments. It followed *People v. Taulton* (2005) 129 Cal.App.4th 1218 (*Taulton*), in which the court determined section 969b did not violate the confrontation clause, even in light of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). (*Moreno,* at pp. 708-709.) *Crawford* stands for the proposition that admission of out-of-court testimonial statements violates the defendant's right to confrontation unless the declarant of the statement is unavailable and the defendant has had a prior opportunity for cross-examination. (*Crawford,* at pp. 54, 68.) The *Crawford* court generally described testimonial statements as " 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial' [citation]." (*Id.* at pp. 51-52.) In *Taulton,* the court concluded that while the documents in a 969b packet might ultimately be used in criminal proceedings, they are not prepared for the purpose of providing evidence in criminal trials and are outside the scope of *Crawford.* (*Taulton,* at p. 1225; *Moreno,* at p. 709.) The *Moreno* court adopted this conclusion.

The *Moreno* court also rejected the argument that *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*), invalidated the *Taulton* court's analysis. (*Moreno, supra,* 192 Cal.App.4th at p. 709.) In *Melendez-Diaz,* "the high court held that certificates or affidavits signed under oath by forensic analysts affirming that a substance found in the defendants' possession was cocaine, fell within the ' "core class of testimonial statements" ' described in *Crawford.*" (*Moreno,* at p. 709, citing *Melendez-Diaz,* at p. 310.) However, as explained in *Moreno,* the *Melendez-Diaz* decision "made

clear that '[b]usiness and public records are generally admissible absent confrontation . . . because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.' (*Melendez-Diaz,* at p. 324.) The [*Melendez-Diaz*] court explained that the [forensic] analysts' certificates in the case before it [did] not qualify as business or public records because they were ' "calculated for use essentially in the court, not in the business." ' (*Id.* at p. 321.)" (*Moreno,* at p. 710.) The *Moreno* court concluded that, in contrast to the *Melendez-Diaz* forensic analysts' certificates, the documents contained in a 969b packet are nontestimonial documents. The *Moreno* court also explained that *Melendez-Diaz* distinguished a testimonial forensic analyst's report from a clerk's certificate authenticating an official record for use as evidence, noting *Melendez-Diaz* explicitly stated a clerk could by affidavit authenticate an otherwise admissible record. (*Moreno,* at p. 711.)

Similarly, in *People v. Perez* (2011) 195 Cal.App.4th 801, 804 (*Perez*), the Court of Appeal rejected the defendants' arguments that the documents in a 969b packet could only be admitted if the custodians of records were available for cross-examination. (*Id.* at p. 804.) The *Perez* court relied on *Melendez-Diaz* and *Moreno*, concluding "the respective custodians' declarations authenticating the documents in prison packets 'are precisely the kind [of] authenticating affidavit approved of in *Melendez-Diaz.*' [Citations.] [¶] The underlying prison and jail records themselves are outside the scope of the Sixth Amendment because they were plainly prepared for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." (*Perez,* at p. 804.) In *People v. Larson* (2011) 194 Cal.App.4th 832 (*Larson*), the court also rejected the argument that the preparer of the 969b packet must be brought to court and made subject to confrontation and cross-examination, relying on *Taulton*, and concluding *Melendez-Diaz* did not require a different result. (*Larson,* at pp. 837-838.)

We see no reason to reject the reasoning of the other courts of appeal that have considered this issue. The 969b packets in this case contained administrative records that document Montez's prior convictions. Pursuant to section 969b, the trial court properly admitted certified copies of records as proof, and, as explained above, this did not violate Montez's rights to confrontation or cross-examination. The reasoning of *Taulton*, *Melendez-Diaz*, *Moreno*, *Larson*, and *Perez* applies to Montez's argument here.

Montez further contends the trial court did not resolve questions he raised relating to the validity or reliability of the documents, such as why the duplicate packets contained different information, why the records reflected different birthdates, or "what tied these packets together." However, the court reviewed the evidence and both heard and overruled Montez's objections. We therefore presume the trial court did in fact consider and resolve these issues, in the prosecution's favor. (See *People v. Miles* (2008) 43 Cal.4th 1074, 1083 [unless rebutted, official government document prepared contemporaneously as part of the judgment record and describing the prior conviction, standing alone, is sufficient evidence of the facts it recites about the nature and circumstances of the prior conviction].) We have no basis to question the trial court's findings.

IV. Montez Is Entitled to Presentence Custody Credits

The parties agree that Montez is entitled to additional presentence custody credits. At sentencing, the trial court awarded 374 days of actual custody credits, but did not award any conduct credits. Montez was entitled to 15 percent of his actual days in custody as presentence conduct credit. (§ 2933.1; *People v. Philpot* (2004) 122 Cal.App.4th 893, 908.) Thus, the trial court should have awarded Montez 56 days of conduct credit. (*People v. Ramos* (1996) 50 Cal.App.4th 810, 815-816.)

DISPOSITION

The judgment is modified to reflect an award of 56 days of presentence conduct credits. In all other respects, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect the corrected presentence custody credits and forward copies to the Department of Corrections and Rehabilitation.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.