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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. SYED Z. SHIRAZI, Defendant and Appellant.	B230677 (Los Angeles County Super. Ct. No. SA 073295)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. H. Chester Horn, Jr., Judge. Affirmed.

Susan Morrow Maxwell, 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, Senior Assistant Attorney General, and Blythe J. Leszkay and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

Defendant Syed Z. Shirazi was convicted of making criminal threats, burglary in the first degree, carrying a concealed firearm, and carrying an unregistered loaded firearm. He challenges the sufficiency of the evidence supporting the criminal threats conviction, contends the trial court should have given a unanimity instruction in connection with the criminal threats charge, and asserts his custody credits should not have been limited to 15 percent because there was insufficient evidence a person was present during the residential burglary (making it a violent felony).

We affirm the judgment.

FACTS

The victim Irene V. lived with her parents and had been dating defendant for more than a year. Irene was at home with a bad cold on December 10, 2009. She and defendant had had some arguments that week, and had another one on the telephone that day, yelling and saying hurtful things to each other. Irene told her mother about the argument, and, according to her mother, defendant told Irene "he had a bullet for [Irene's father] and for [Irene]." Irene's mother was worried that something would happen to Irene and dialed 911, then handed the telephone to Irene. Irene described defendant, and told the 911 operator he "made threats a lot," but did not hit or hurt her; she described the type of threats defendant made as "[j]ust like, uh, threats to like hurt me and my family." Irene told the operator that, when she refused to get in defendant's car and go to his house, defendant "was like, 'Watch. I'ma come back, and, 'I have enough bullets for you and you[r] dad,' and then he took off." Irene's mother believed that Irene was afraid, and said that she (Irene's mother) was afraid, too.

Police officers arrived in response to the dispatcher's report that Irene "told our dispatch that her ex-boyfriend had threatened to shoot her and her dad," and "indicated that her boyfriend, the defendant, said he had enough bullets to put into her, meaning Irene, and her father." After the officers arrived, Irene's telephone rang. Irene looked at the phone and said, "Oh, my God. It's him again," and asked the police officers, "'What do I do?'" One of the officers told Irene to answer and use the speaker phone so they

could hear the conversation. After Irene said "[h]ello," defendant said, "'Oh, yeah. I'm coming over now, bitch.'" Irene responded, "'No, I'm sick.'" Defendant then said, "'Oh, yeah. I'm coming over now. I'm gonna fuck you up. It's on.'" Defendant also said, "'Oh, yeah. I'm on Venice now, bitch.'" Irene hung up the phone. She was afraid, and she was crying.

The officers requested an additional unit be dispatched, because Venice Boulevard was nearby. As they were taking Irene's report, defendant drove by the house. The officers ran to their patrol car to try to apprehend defendant and also requested a helicopter to help search, but could not locate him. They drove back to Irene's home, and as they pulled up in front of her house, Irene "ran out of the house, jumped down the steps and ran towards" the officers, screaming, "'He's in the back. He's breaking into the back of my house.'" Irene was "yelling frantically," and "very hysterical."

The officers got out of the car, one of them called for backup officers, and then they ran around the side of the house toward the backyard. Officer Ryan Stout saw defendant "climbing in . . . an open back window with a bent window screen at his feet, and he was climbing in the kitchen window." Defendant's "upper torso was in the window, climbing in the kitchen sink area." Officer Douglas Gettinger testified defendant was "up to his waist" in the window.

The officers drew their firearms and told defendant to stop, put his hands up, and lie on the ground in a prone position. Defendant "came out of the window and stood up," but did not follow the instructions and "kept making gestures towards his waistband," which "was obscured by his shirt," so the officers jumped over a fence between them and defendant and brought defendant to the ground. As Officer Stout handcuffed defendant, defendant yelled that he had a gun, and Stout saw the gun lying on the ground by defendant's leg. The gun was loaded with 10 rounds of .40-caliber ammunition, and "was live and capable of firing." The officers took defendant into custody. As he was transported to the police station, defendant "continued to plead with" the officers to let him go back and talk to Irene.

The gun defendant had was not registered to defendant. At the police station, defendant told an officer that a male black in his mid-20's who went by the name of "G" had sold him the gun. Defendant said he purchased the gun for his protection because he used to sell marijuana in the area and a gang "was trying to tax him" for the marijuana he sold.

According to defendant, he and Irene argued that morning, they were both sick, Irene "started bringing everything up that she was irritated about," and defendant left. He came back later in the day, and was talking with Irene through the open kitchen window for about two minutes when he heard footsteps. He walked toward the side gate and saw four officers with guns who hopped over the fence and "took me down." He said he did not threaten to kill Irene or her father, and never entered into the window "in any fashion at all."

Defendant was charged by information with four felonies: making criminal threats, a serious felony (Pen. Code, §§ 422, 1192.7, subd. (c)(38));[1] first degree burglary with a person present, a serious felony and a violent felony (§§ 459, 1192.7, subd. (c)(18) & 667.5, subd. (c)(21)); carrying a concealed firearm (§12025, subd. (a)(2)); and carrying an unregistered, loaded handgun (§ 12031, subd. (a)(1)). The first two counts included an allegation defendant was armed with a firearm. (§ 12022, subd. (a)(1).)

About a month after defendant's arrest, another police officer responded to a call from Irene's home. Irene told the officer she had argued with defendant (who was out of custody on bail) because she wanted to leave his house, but he would not let her and "hit her three times with a closed fight [*sic*] to the right side of the head." Irene told the officer that she maintained a relationship with defendant "[b]ecause she's afraid he's going to kill her family or hurt her family if she doesn't."

At the time of trial, Irene and defendant were "still together." Irene testified that she loved defendant and did not want to get him in trouble; that she did not tell her mother about defendant's "bullets for you and your dad" statement and did not speak

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1 All undesignated statutory references are to the Penal Code.

with a 911 operator that day; and that she had never been afraid of defendant and never thought he wanted to kill her.

The jury found defendant guilty on all counts, and found true the allegations that defendant carried a firearm and knew he was doing so (as to the criminal threats and burglary counts); that the burglary was in the first degree; and that defendant was not the registered owner of the firearm. While the information charged defendant with first degree burglary, person present, and alleged that the offense was a violent felony (§ 667.5, subd. (c)) "in that another person, other than an accomplice, was present in the residence during the commission" of the offense, the jury verdict contained no finding on the "person present" allegation.

The trial court sentenced defendant to state prison for three years, consisting of a two-year term on the burglary count, and a one-year enhancement on the jury's finding the defendant was armed with a firearm in the commission of a felony (§ 12022, subd. (a)(1)). On the criminal threats count, the court imposed the low term of 16 months, plus a one-year firearm enhancement, to be served concurrent with the sentence on the burglary count. On count 3 (concealed firearm), the court imposed the low term of 16 months, to run concurrent with the principal term, and on count 4 (loaded firearm not registered), the court imposed and stayed (§ 654) a term of 16 months.

After making other orders not at issue in this appeal, the court found that, "[s]ince [defendant] has been convicted of violent felonies, he's entitled to 15 percent [conduct] credit." Defendant had 110 days of actual custody, so the court found his credits were a total of 126 days, "calculated at 110 actual and 16 good time/work time credits."

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant first challenges the sufficiency of the evidence supporting the criminal threats conviction, contending there was insufficient evidence of intent. He is mistaken.

We review a claim of insufficient evidence by determining whether, viewing the whole record in the light most favorable to the prosecution, the record discloses substantial evidence—evidence which is reasonable, credible, and of solid value—from

which a reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Osband* (1996) 13 Cal.4th 622, 690.) We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*Ibid.*)

People v. Toledo (2001) 26 Cal.4th 221 (*Toledo*) explains the five elements of a criminal threat with particular reference to the intent element: "[A] defendant acts with the specific intent to commit the offense of criminal threat only if he or she specifically intends to threaten to commit a crime resulting in death or great bodily injury with the further intent that the threat be taken as a threat, under circumstances sufficient to convey to the person threatened a gravity of purpose and an immediate prospect of execution so as to reasonably cause the person to be in sustained fear for his or her own safety . . . ." (*Id*. at pp. 230-231.)

Defendant asserts the evidence showed only that defendant "was a disappointed teenager who made a very angry, ugly immature statement to Irene in the moment and out of frustration," and that defendant was "venting." The jury thought otherwise, and the evidence we have recited fully supports the conclusion both that defendant "intend[ed] to threaten to commit a crime resulting in . . . great bodily injury" and "further inten[ded] that the threat be taken as a threat . . . ." (*Toledo, supra*, 26 Cal.4th at pp. 230-231.) The evidence showed defendant said he "[had] enough bullets for you and you[r] dad," that a short time later he called Irene again and said, "'I'm coming over now. I'm gonna fuck you up. It's on[,]'" and that he did indeed come looking for Irene with a loaded weapon. The jury was fully justified in concluding defendant made the threatening statement—that he had enough bullets for Irene and her father—intending to threaten to do great bodily injury; that he made the statement "with the specific intent [that it] be taken as a threat" (*Toledo*, supra, 26 Cal.4th at pp. 227-228); and that each of the other elements described in *Toledo* was satisfied as well.

Defendant next contends that the trial court should have given a unanimity instruction and that it was prejudicial error not to do so. He argues the evidence showed two separate threats—his statement that he had enough bullets for Irene and her father,

and his later statement, overheard by the police officers, that "I'm coming over now. I'm gonna fuck you up. It's on"—and the jury was not instructed it had to agree on the particular unlawful act. We conclude there was no prejudicial error.

"When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534 (*Melhado*).) The court has a sua sponte duty to instruct on unanimity if the prosecution makes no election. (*Ibid.*) "By giving the unanimity instruction the trial court can ensure that a defendant will not be convicted when there is no agreement among the jurors as to which single offense was committed." (*Ibid.*)

Here, defendant was charged with a single count of criminal threats. The evidence showed he made two separate threatening statements, and defendant claims the prosecutor made no election, instead "refer[ing] to both events in a way that communicated to the jury that they could find either event or both beyond a reasonable doubt in determining whether to find [defendant] guilty of making a criminal threat." (See *Melhado*, *supra*, 60 Cal.App.4th at p. 1539 ["If the prosecution is to communicate an election to the jury, its statement must be made with as much clarity and directness as would a judge in giving instruction. The record must show that by virtue of the prosecutor's statement, the jurors were informed of their duty to render a unanimous decision as to a particular unlawful act."].)

As an initial matter, we entertain some doubt that defendant's second statement, standing alone and without reference to the first, could have been charged as a separate offense. (See *Melhado*, *supra*, 60 Cal.App.4th at p. 1539 ["the evidence presented in this case established that appellant committed two acts of making terrorist threats, each of which could have been charged as a separate offense, yet the matter went to the jury on only one such offense"].) The words, "'I'm coming over now. I'm gonna fuck you up. It's on[,]'" do not necessarily threaten death or great bodily injury, unless one knows

what "it's on" means. But in any event, while the prosecutor in her closing argument referred to the second statement as a threat, the closing arguments make it clear that the prosecutor was relying on defendant's "bullets for you and your dad" statement, and that his second statement was argued only as showing his intent to have his earlier words understood as a threat (and the reasonableness of Irene's fear). And even if we assume a unanimity instruction should have been given, the closing arguments as a whole confirm that we can say, beyond a reasonable doubt, that any assumed instructional error was harmless (*Chapman v. California* (1967) 386 U.S. 18, 24) and that, unlike the case in *Melhado*, "each juror agreed on the particular criminal act that formed the basis for the verdict." (*Melhado, supra*, 60 Cal.App.4th at p. 1536.)

These were the pertinent closing arguments. The prosecutor first told the jury the evidence showed that Irene and defendant "got into a huge fight, which culminated in [defendant] threatening to put a bullet in her and her dad." Further:

> "You also heard evidence that before he came [to Irene's house], [defendant] was placed on speaker phone, and the two officers testified that they, themselves, also heard the defendant not only threatening, but saying, 'I'm coming over. I'm on my way. It's on.' And I'll spare you the profanities, but I'm sure you remember what they heard. [¶] In a nutshell, [defendant] did just about everything that he promised he would do, except actually use the bullets against Irene V. and her dad."

The prosecutor described the evidence for the "easy counts" involving carrying the concealed firearm and then specifically addressed the criminal threats count, discussing the elements of the crime. She said:

> "The defendant willfully threatened to unlawfully kill or cause great bodily injury to Irene V. Now, not only is a threat of, 'I've got bullets for you and your dad[']a threat,[] so is, 'It's on. I'm on my way. I'm going to fuck you up, bitch.' Those are threats. [¶]
>
> "He made the threat orally or by means of electronic communication, and in this case it was by telephone. [¶]

"The defendant intended that his statement be understood as a threat and understood it be communicated to Irene V. [¶]

"Well, . . . I think a reasonable person would be stretched in their imagination to ask how else could such a threat be taken. It's not said with laughter. It's not said in passing. It's said to threaten. That's the only way you can take such statements. [¶]

"The threat was so clear, immediate, unconditional and specific that it communicated to Irene V. a serious intention and the immediate prospect that the threat would be carried out. [¶]

"Well, in this case it was very specific. 'I have bullets.' 'Bullet for you.' 'Bullet for your dad.' 'I'm on my way over.' It was pretty clear what he was planning on doing. [¶]

"The threat actually caused Irene V. to be in sustained fear for her own safety or for the safety of her family. [¶]

"Now, recall in this case, Irene told her mother about what happened. She's very close to her mother. And her mother called 911. Irene cooperated with the 911 operator. She got herself a restraining order after everything was done. She was in fear. [¶] . . . [¶]

"And your job, jurors, is what happened on that day. And Irene's fear was reasonable under the circumstances. Would a reasonable person be afraid if someone that they have a volatile relationship with threatened to kill her or him or that family member? Would that fear be amplified by that person actually coming over? . . . [¶] . . . [¶]

"Now, the defense is going to say a few things to undermine the criminal threats. He's going to say, I didn't mean it. We mess around all the time. I tell her I'm going to kill her all the time. [¶] . . . [¶]

"The criminal threats instruction says, someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act. So did he actually intend to kill her and her dad? Even if he says he didn't, it doesn't matter."

The prosecutor also argued, with respect to the burglary count, that when defendant entered the house, he intended to commit the crimes of criminal threats or

assault with a deadly weapon or false imprisonment. In that connection, the prosecutor said:

> "What was his intent when he said, 'enough bullets for you and your dad?' What was the intent when he said, 'It's on'? I'll let you read the rest. Those were his words. You can glean what his intent was from those words."

And:

> "So you've got to ask yourself, based circumstantially on Irene's actions and words, was she actually threatened or scared? . . . Well, why did she tell her mom? Why did they call 911? Why did she jump up and down pointing to the police when he drove by? Why did she come running out of the house yelling, 'He's coming in,' jumping over the stairs? Before the police even parked their car, she was running out. Why cry and tremble when she sees him calling on the phone? And why get a restraining order? Because she was scared. Because he threatened her."

And finally:

> "What matters to you is whether the defendant, in fact, did the things that he did on that day; whether he actually threatened to put bullets in her and her dad; whether he actually said, 'It's on. I'm coming over[';] whether he actually climbed through that window; and whether he actually had the gun."

Defense counsel's own argument confirmed that the pertinent threat for purposes of a conviction was the defendant's statement that he had bullets for Irene and her father. Defense counsel argued:

> "And you saw Irene testify . . . . Do you think—and believe me, you have to believe beyond a reasonable doubt, do you think at any time in this actual thing that Irene actually thought that [defendant] was going to shoot her or her father? . . . [¶] But ask yourselves this, . . . do you believe from what you saw here that she actually thought [defendant] was ever going to shoot her? And you have to believe that she thought he was actually going to shoot her beyond a reasonable doubt. And based on what I've seen here, and what you've seen here, I don't see how you could possibly think that.

> [¶] . . . [¶] Did she ever believe [defendant] was going to shoot her, truly?"

The prosecutor responded in rebuttal:

> "I'm at a bit of a loss for words when counsel stands up and says that a man threatening to kill a woman that he supposedly loves, and kill her father, put bullets in them, and then actually drives to her house, climbs through the window, armed with a loaded gun is not a serious crime. How can that not be a serious crime?"

One cannot review these arguments without concluding that, even if the trial court should have given a unanimity instruction, any error was harmless beyond a reasonable doubt. That being so, we need not consider respondent's argument that there was no obligation to give a unanimity instruction because defendant's statements were "a continuous series of threats" and "two components of one criminal event." [2]

Finally, defendant contends his conduct credits should not have been limited to 15 percent because there was insufficient evidence a person was present during commission of the residential burglary. Again, we disagree.

Section 2933.1, subdivision (a) puts a 15 percent limit on worktime credit for persons convicted of certain violent felonies, including "[a]ny burglary of the first degree, . . . wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary." (§ 667.5, subd. (c)(21).)

In this case, the information alleged that another person was present during the commission of the burglary, but the jury was not asked to and did not make a finding on the point. In *People v. Garcia* (2004) 121 Cal.App.4th 271, the court held that "determining whether a defendant's current conviction for first degree burglary is a violent felony for the purpose of calculating presentence conduct credits is properly part of the trial court's traditional sentencing function." (*Id.* at p. 274.) Here, the court stated

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[2] "Neither an election nor a unanimity instruction is required when the crime falls within the 'continuous conduct' exception." (*People v. Salvato* (1991) 234 Cal.App.3d 872, 882.) But in *Salvato*, the court held that the criminal threats statute, section 422, "does not come within the continuous course of conduct exception." (*Salvato*, at p. 883.)

that "[s]ince he's been convicted of violent felonies, he's entitled to 15 percent credit." Consequently, if there is sufficient evidence to support the trial court's conclusion that the first degree burglary conviction was a violent felony—that is, that there was a person "present in the residence during the commission of the burglary" (§ 667.5, subd. (c)(21))—then defendant's claim he is entitled to additional conduct credits has no merit.

Substantial evidence in the record supports the trial court's determination that the burglary was a violent felony under section 667.5, subdivision (c)(21). The evidence showed that as the police were interviewing Irene in her home, the defendant drove by, and they left to search for him. When they returned and pulled up in front of the house, Irene "ran out of the house, jumped down the steps and ran towards" the officers, screaming, "'He's in the back. He's breaking into the back of my house.'" On this evidence, it is reasonable to infer that Irene could not have known defendant was coming into the back of the house unless she had seen him in the act of doing so before she ran out the front door. Thus the evidence was sufficient that Irene was in the house during the commission of the burglary and the crime was a violent felony (§ 667.5, subd. (c)(21)), limiting defendant's conduct credits to 15 percent.

DISPOSITION

The judgment is affirmed.

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GRIMES, J.

WE CONCUR:

RUBIN, ACTING P. J.

FLIER, J.