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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LAWRENCE PHILLIPS, Defendant and Appellant.	B269883 (Los Angeles County Super. Ct. No. BA433085)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Abzug, Judge. Affirmed.

Barbara A. Smith, 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, Paul M. Roadarmel, Jr., and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Lawrence Phillips appeals from the judgment of conviction of two counts of criminal threats. Appellant argues that the trial court erred by failing to instruct the jury sua sponte on the lesser included offense of attempted criminal threats. We reject this contention and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and the victim, K.P., were married and lived with their son and K.P.'s daughter from a prior relationship.

On the morning of January 21, 2015, K.P. and appellant were home alone and began to argue. K.P. asked appellant to take his possessions and move out. Appellant refused to leave and they continued to argue for about an hour. Eventually appellant left the house and drove away in his car.

Fearful that appellant might return to harm her, K.P. called her nephew, S.M., and asked S.M. if he would come to her house; S.M. and his wife arrived about 30 minutes later. Shortly after that, appellant returned home.

Appellant appeared aggressive and looked angry. S.M. met appellant at the front door, and according to K.P., S.M. asked appellant to leave. Appellant told them he was not going to leave, and "[i]f anybody was gonna leave, it was gonna be [K.P., S.M., and his wife]."

Appellant walked down the hall into the master bedroom, and returned to the living room, carrying a gun.[1] As appellant approached K.P., he raised the gun and pointed it at her, holding it six inches from her chest. K.P. feared for her life. At some point,

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[1] The gun had belonged to K.P.'s grandfather. In 2005, appellant found the gun under a drawer in the hallway. He had fired it a couple of times and kept it in the master bedroom. S.M. stated that on a prior occasion, appellant had displayed the gun and threatened to shoot S.M.

appellant moved the gun to his side, pointing it in the direction of S.M. and his wife. S.M. testified that as appellant pointed the gun at him, appellant said, "You're gonna be the mother fucker to get out," and "I'll kill all you all motherfuckers." S.M., his wife, and K.P. were scared and believed appellant was going to shoot them. K.P. reached for the alarm panel on the wall and pushed the buttons to summon the police and simultaneously, with her other hand, she pushed away appellant's arm in which appellant held the gun. As appellant walked to the master bedroom to retrieve a remote to deactivate the alarm, K.P. instructed the others that they needed to leave the house. S.M.'s wife called 911—she described appellant, stated that he had pulled a gun on her husband and gave the 911 operator the address.

K.P., S.M. and his wife all exited the house, while appellant remained inside. According to S.M., by the time they emerged from the house, the police had arrived. When appellant came out of the house, he no longer held the gun.

The police arrested appellant and did an initial search of the home. Police returned the next day and did a follow-up search during which they found the loaded gun under the drawer in the hallway.

Appellant was arrested and charged: In counts 1, 2, and 3, with assault with a firearm in violation of Penal Code section 245, subdivision (a)(2), as to K.P., S.M., and S.M.'s wife; and in counts 4, 5, and 6, with criminal threats in violation of Penal Code section 422, subdivision (a), as to the three victims. As to the criminal threats counts, the information alleged that appellant personally used a firearm, within the meaning of Penal Code section 1203.06, subdivision (a)(1), and section 12022.5, subdivision (a). In count 7, appellant was charged with possession of a firearm by a felon, in violation of Penal Code section 29800, subdivision (a)(1), and in count 8, appellant was charged with

unlawful possession of ammunition in violation of Penal Code section 30305, subdivision (a)(1).

The jury found appellant guilty on the criminal threats counts as to K.P. (count 4) and S.M. (count 5), as well as the firearm and ammunition offenses alleged in counts 7 and 8, and they found him not guilty of the assault with a deadly weapon counts (counts 1, 2, and 3) and the criminal threats count as to S.M.'s wife (count 6). As to the criminal threats convictions in counts 4 and 5, the jury found "not true" the allegations that appellant used a firearm in the commission of those offenses. The trial court sentenced appellant to state prison for a total of 4 years 4 months.

Appellant timely appealed.

DISCUSSION

Appellant contends the trial court err by failing to instruct sua sponte on the lesser included offense of attempted criminal threats. As discussed below, we disagree.

A trial court errs when it fails to instruct sua sponte on all lesser included offenses which find substantial support in the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162, abrogated on another ground by amendment of Penal Code section 189.) " 'Such instructions are required only where there is "substantial evidence" from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense.' " (*People v. Whalen* (2013) 56 Cal.4th 1, 68, disapproved on another ground by *People v. Romero and Self* (2015) 62 Cal.4th 1, 44; *People v. Breverman, supra,* 19 Cal.4th at p. 162 [" 'Substantial evidence' . . . is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]" ' that the lesser offense, but not the greater, was committed."]; *People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8 [defining substantial evidence as "evidence that a reasonable jury could find

persuasive"].) We review the trial court's failure to instruct on a lesser offense under the "independent or de novo standard of review." (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

The prosecution must prove that the threat "cause[d the victim] reasonably to be in sustained fear for his or her own safety" or for the safety of "any other person who regularly resides in the household." (Pen. Code, § 422, subds. (a) & (b).) "A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1140.)

Attempted criminal threats is a lesser included offense of criminal threats. (*People v. Toledo* (2001) 26 Cal.4th 221, 231.) "A variety of potential circumstances fall within the reach of the offense of attempted criminal threat. For example . . . if a defendant, with the requisite intent, orally makes a sufficient threat directly to the threatened person, but for some reason the threatened person does not understand the threat, an attempted criminal threat . . . would occur. Further, if a defendant, again acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not actually cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat. In each of these situations, only a fortuity, not intended by the defendant, has prevented the defendant from perpetrating the completed offense of criminal threat itself." (*Ibid.*, italics omitted.)

Appellant argues that there was substantial evidence from which a reasonable jury could conclude that K.P. and S.M. did *not* experience sustained fear as a consequence of his conduct. He claims that the jury could have doubted that K.P. and S.M. were

actually afraid of appellant based on the evidence that K.P. pushed away appellant's hand in which he purportedly held the gun; that at trial, S.M.'s wife could not remember the exact words appellant used to threaten them; and that they did not flee the property after the alleged threat, but remained outside the house until the police arrived. In addition, appellant points out that the jury's verdicts indicate that they did not believe that he used a gun to threaten K.P. and S.M. We are not convinced.

K.P. and S.M. testified consistently and without equivocation that appellant threatened to kill them and that they were afraid he would carry out that threat. And none of the circumstances that appellant cites would cause a reasonable jury to doubt that the victims experienced sustained fear. In fact, this evidence supports the verdicts on the criminal threats counts as to K.P. and S.M. Indeed, K.P. instinctively pushed appellant's hand away to protect herself, and as she did, she pushed the alarm button to summon the police. Her simultaneous actions disclose a fearful state of mind and are in no way inconsistent with her testimony that she was afraid of appellant. And although, during the trial S.M.'s wife could not recall appellant's exact words, she unwaveringly testified that appellant threatened them all. Also, the victims remained on the property because, according to S.M., immediately upon fleeing the house the police had arrived on the scene. We conclude that the evidence presented at trial demonstrates that these victims experienced sustained fear during the encounter. The trial court did not err in failing to instruct sua sponte on the lesser included offense; there was no substantial evidence from which a reasonable jury could conclude that appellant was guilty of attempted criminal threats *but not* criminal threats.

Finally, as to the relevance of the jury's other verdicts, the fact that the jury ultimately rejected the allegations that appellant used a firearm in the commission of the criminal threats does not

prove that the court erred in failing to instruct sua sponte on the lesser included offense. The jury's verdicts on the other charges and findings on gun-use allegations do not categorically determine whether the court committed an error in failing to instruct on attempted criminal threats, but rather the verdicts would have been relevant on the issue of whether, if an error had been found, appellant suffered prejudice. (*People v. Campbell* (2015) 233 Cal.App.4th 148, 167 ["[A] jury's determination on a factual issue under other instructions is relevant to determining whether an instructional error is harmless."].) Here, because we conclude the trial court did not err in failing to instruct on the lesser included offense of attempted criminal threats, we do not assess for prejudice, and thus, the jury's verdicts on the gun allegations are not dispositive.[2]

[2] In addition, although the use of the gun may give added weight to the victim's testimony that he or she was afraid, the use or presence of a weapon is not a necessary element of the offense of criminal threats. (Pen. Code, § 422.) Thus, the fact that the jury concluded that the prosecution failed to prove appellant used a weapon to commit the crimes does not undermine the verdicts on the criminal threat charges.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

CHANEY, J.

JOHNSON, J.