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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM FLORES LEMUS, Defendant and Appellant.	B268980 (Los Angeles County Super. Ct. No. NA099103)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesse Rodriguez, Judge. Affirmed.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

In the underlying action, appellant William Flores Lemus was convicted of two counts of making criminal threats (Pen. Code, § 422).[1] He challenges the sufficiency of the evidence to support one of his convictions and the trial court's imposition of the high term on the other conviction. We reject his contentions and affirm.

RELEVANT PROCEDURAL HISTORY

In October 2015, a two-count third amended information was filed, charging appellant in counts 1 and 3 with making criminal threats to Timothy White and Debbi Rivera-Diaz (§ 422). A jury found appellant guilty as charged. The trial court imposed a sentence totaling three years and eight months in prison, composed of the upper term of three years on count 1 and a consecutive term of eight months (one-third of the two-year middle term) on count 3. This appeal followed.

FACTS

A. *Prosecution Evidence*

1. *Events Preceding Charged Offenses*

From 2009 to 2011, appellant was a graduate student in the Department of Counseling and Rehabilitation at California State University, Fresno (Fresno State), and interacted with Albert Valencia, a professor in that

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[1] All further statutory citations are to the Penal Code.

department. When appellant's grade average fell below a B, the minimum necessary for graduation, his academic standing was "disqualified."

In January 2012, appellant told Valencia that he intended to do whatever was necessary in order to be reinstated into the program. Shortly afterward, in an e-mail to Valencia dated January 20, 2012, appellant stated, "This letter is to inform you that I believe that it was a truly fuckin' waste of my time speaking with you yesterday. Don't have any apologies." Troubled by the e-mail, Valencia contacted the Fresno State administration.

Despite the e-mail, Valencia continued to try to help appellant. According to Valencia, he learned that appellant was communicating with many faculty members and administrators. Administrators within the California State University (CSU) system made inquiries to Valencia regarding appellant, including the CSU General Counsel's Office. Because appellant's communications were often "inappropriate," Valencia asked appellant to agree to make Valencia his "single point of contact," but appellant declined to do so.

Throughout 2012, appellant repeatedly contacted Leticia Hernandez, who worked in the CSU Chancellor's Office as trustee secretary. On approximately ten occasions, appellant asked to address the CSU Board of Trustees or contact its members. Hernandez explained how appellant could arrange to speak at a board meeting and

correspond with the trustees, but declined to provide private contact information for individual trustees.

Despite Valencia's efforts to assist appellant, their relationship deteriorated. Appellant filed administrative complaints for discrimination and retaliation against Valencia and the Department of Counseling and Rehabilitation, which were assigned to Brittany Grice, then an employee at Fresno State. She testified that she was responsible for campus compliance with equal opportunity policies and laws, including those imposed under "title 6, title 7, [and] title 9." In January 2013, Grice commenced her investigation, which involved interviews with appellant and numerous other individuals.

During Grice's investigation, flyers appeared on campus. The flyers stated, "We have failing students," referred to a "title 4 investigation," and urged viewers to call Grice's phone number. At the bottom of the flyers was a photo of burning oil fields. Grice believed appellant had created the flyers, as they referred to her and displayed phrases he often used, including the term "title 4" to mean "title 9."

After investigating appellant's allegations of discrimination and retaliation, Grice concluded that none was substantiated by a preponderance of the evidence. Upon receiving Grice's findings, appellant phoned her and angrily asserted that she had "failed him" and "not done a competent job." He further stated that like other Fresno State administrators, she had "not tak[en] his concerns

seriously." Grice referred appellant to the appeal process available through the Chancellor's Office.

After appellant filed an appeal from Grice's determinations, the Chancellor's Office hired Mark Siegle, a human resources consultant and former CSU administrator, to investigate appellant's allegations. Siegle found no evidence of discrimination or retaliation against appellant, and submitted a report containing his findings. By phone and e-mail, appellant told Siegle that his findings were inaccurate and that he had not treated appellant fairly. In an e-mail dated December 13, 2013, appellant stated to Seigle, "Fuck you. It's coming." Siegle felt threatened by the e-mail, which he forwarded to the General Counsel's Office.

In or about 2014, Dr. Joseph Castro was appointed President of Fresno State. Chancellor Timothy White was to perform official duties at Castro's investiture, which was set for May 10, 2014. Several thousand people were expected to be present at the event. On April 10, 2014, appellant sent an RSVP to the investiture's organizer stating that he would attend it, even though no RSVP was required.

On April 14, 2014, Ruben Madrigal, then a Fresno State police sergeant, went to appellant's residence in order to determine his intent in sending the December 13, 2013 to Seigle. Madrigal saw appellant outside his apartment, showed his identification as a sergeant, and asked for clarification regarding the e-mail. Appellant became

agitated, walked into his apartment and slammed the door. Through the door, Madrigal inquired whether appellant sent the e-mail. Appellant replied "No" and said he intended to call the police. When Madrigal answered that he was a police officer, appellant stated he would not talk to him. Madrigal then left.

On May 6, 2014, appellant left a phone message for trustee secretary Hernandez at the Chancellor's Office. Appellant stated: "'Well, I guess I'll be taking some action, and that action would be determined by you. I just want to make sure that's very clear. That I'm going to take action on this issue, Leticia.'" Hernandez was aware of appellant's "issue," as he had repeatedly contacted employees in the Chancellor's Office. Because appellant's message made Hernandez feel "not safe," she forwarded it to the General Counsel's Office.

2 *Criminal Threats Against Debbi Rivera-Diaz (Count 3)*

In May 2014, Debbi Rivera-Diaz was a newly hired administrative assistant and legal secretary in the General Counsel's Office, which is contained within, or closely affiliated with, the Chancellor's Office. Prior to May 7, 2014, she had not interacted with appellant, but was aware of him, as other secretaries in the office had answered calls from him. During those calls, he asked to talk to Daniel Ojeda, an attorney in the General Counsel's Office. He often sounded upset or angry, sometimes would not take "No" for

an answer, and usually demanded to talk to someone else if Ojeda was not available. Rivera-Diaz had been instructed to take messages from appellant in lieu of transferring his calls to Ojeda.

Rivera-Diaz testified that on May 7, 2014, at approximately 8:30 a.m., she answered a call from appellant, who asked to speak to Ojeda. According to Rivera-Diaz, appellant sounded upset and angry. When she asked whether appellant wished to leave a message, he answered, "Virginia Tech, Colorado," and hung up. Rivera-Diaz recognized "Virginia Tech" as referring to a school shooting, but was initially puzzled regarding "Colorado." After a few seconds, she recalled a school shooting in Colorado. Diaz testified, "After I realized what [appellant] said, . . . I felt scared because I didn't know . . . where he was located. . . . I wasn't sure if he was calling from outside or if he was in the building."

When Ojeda arrived at the office, Rivera-Diaz described appellant's message to him. Ojeda provided Rivera-Diaz with "a little history" regarding appellant, which intensified her feelings of fear. Ojeda also contacted the police regarding the call. Because Rivera-Diaz wanted to be able to recognize appellant, Ojeda showed her a photograph of appellant available on the internet. For one or two weeks, Rivera-Diaz was afraid that appellant might carry out a "school shooting" in or near her workplace.

Ojeda testified that Rivera-Diaz appeared to be "extremely concerned and frightened" by appellant's

message. After contacting the police regarding the message, Ojeda found appellant's Facebook page, which displayed a photograph of appellant in military garb holding a knife, and photographs of weapons, including a grenade.[2]

3. *Criminal Threats Against Chancellor Timothy White (Count 1)*

On May 9, 2014, Ojeda answered a call from appellant. Ojeda testified that appellant was angry because he believed that Chancellor White had sent someone named "Ruben" to his residence carrying something that could have been a gun. After stating that Ruben had "terrified" him and that "it was unfair," appellant asserted that he had "a right to protect himself" and obtain a concealed weapon permit. Appellant also said that Ruben's visit had given him "a warped sense of perspective."

According to Ojeda, appellant then stated that he "c[ould] do the same thing" to White, and that he wanted White to experience the fear he had felt when Ruben visited his residence. Appellant further said that he knew the Chancellor's Office was afraid of him, and that he could use that fear to his advantage. Appellant claimed he could "get [White's] attention" by sending someone to White's residence or visiting it personally. Appellant said, "[']I know where

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[2] Andrew Jones, an associate vice-chancellor and deputy general counsel for CSU, testified that he retrieved the phone number relating to appellant's call to Rivera-Diaz from her phone system.

the Chancellor lives. It is a public address. . . . I can go visit the Chancellor myself. He wouldn't even know who I am, or maybe he would, but I know where he lives. And I can visit him in Long Beach and take care of this my own way basically.[']"

White testified that he became Chancellor in early 2013, and that his responsibilities required him to attend many public events. He first became aware of appellant in early 2013, when an executive assistant informed him of a letter from appellant regarding his academic disqualification. The assistant stated that appellant "was a person . . . known to everybody . . . and was being handled."

Shortly before Castor's investiture as President of Fresno State, White learned that appellant had made threatening calls in which he asserted that "he was going to take things into his own hand" and referred to "Virginia Tech" and "Colorado," which White recognized as "code word[s]" for well-known mass shootings. White further learned that appellant's Facebook page displayed weapons, and that he planned to attend Castro's investiture. White became fearful for himself, his family, and CSU employees at Fresno State and in the Chancellor's Office. According to White, appellant's reference to Virginia Tech was significant to him, as the "multiple fatality events" at that university conveyed the "very important but discouraging lesson" that some people "who have a concern . . . [are] going to solve it by the use of weapons. And our public universities are wide

open." White noted that universities "don't have gated security generally."

White considered cancelling his appearance at Castro's investiture, which would have been "a serious omission" on his part, but found it unnecessary to do so because appellant was arrested before that event. Later, in mid-2014, White arranged for a security system to be installed in his home, and developed a home security plan.

4. *Arrest and Investigation*

On May 9, 2014, appellant was arrested The following day, Fresno State police officers searched appellant's residence. There they found a semi-automatic "AK-type" rifle, a 12-gauge shotgun, magazines for guns, and ammunition. In addition, they discovered bayonets, a machete and a kevlar helmet.

B. *Defense Evidence*

Appellant testified that after serving in the United States Army and the National Guard, he became a student at Fresno State. Although he was a good student, other students in his program received preferential treatment. Seeking a "fair shake," he initiated a grievance against his instructors. He believed that Grice and Siegle failed to investigate his allegations adequately. In pursuing his complaints and appeals, he contacted many people and was sometimes directed not to call certain people. He acknowledged that in some instances, he could have used

"better language" in his communications. Appellant denied posting the flyers depicting burning oil fields.

Appellant further testified that at some point, a person named "Ruben" approached him and stated that he had been sent by the Chancellor's Office. Appellant saw what appeared to be a gun under Ruben's vest, became scared, entered his apartment, and contacted the Fresno police department. After appellant told Ruben that he was calling the police, Ruben drove away. When police officers arrived at appellant's residence, he made a verbal report of the incident.

Appellant denied that he threatened Rivera-Diaz or White. He could not recall a phone conversation with Rivera-Diaz on May 7, 2014, and stated that he did not leave the message, "Virginia Tech, Colorado," with anyone. He acknowledged that he spoke to Ojeda on May 9, 2014, but maintained that he did not intend to threaten harm to White. He described the equipment and guns found in his residence as military surplus and "military collector items."

DISCUSSION

Appellant contends (1) that there is insufficient evidence to support his conviction for making a criminal threat against Rivera-Diaz (count 3), and (2) that the trial court erred in imposing the upper term on his conviction for making a criminal threat against White (count 1). For the reasons explained below, we reject his contentions.

A. *Criminal Threat Against Rivera-Diaz (Count 3)*

Appellant contends his conviction for making a criminal threat against Rivera-Diaz fails for want of substantial evidence. He argues there is insufficient evidence that the message he left with her on May 7, 2014, constituted a threat directed at her, for purposes of section 422. We disagree.[3]

To prove the offense of making a criminal threat, as defined in section 422, the prosecution is obliged to establish five elements: "(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

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[3] Generally, "'[t]he proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

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.]"[4] (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Here, appellant contends there is insufficient evidence to establish elements (2) and (3). Generally, "[t]he determination whether a defendant intended his words to be

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[4] Section 422 provides in pertinent part that a criminal threat is made by a 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, [and] 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."

taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate and specific they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone." (*People v. Butler* (2000) 85 Cal.App.4th 745, 754.) Furthermore, "a jury can probably consider a later action taken by a defendant in evaluating whether the crime of making a [criminal] threat has been committed." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1014.)

1. *Specific Intent That The Message Be Taken As A Threat*

Appellant maintains that he lacked the specific intent that Rivera-Diaz take the message, "Virginia Tech, Colorado," as a threat, noting that he left the message after informing Rivera-Diaz that he wished to speak to Ojeda. He argues that he intended Ojeda to receive this message, not Rivera-Diaz, who was "simply the person communicating the statement to Ojeda."

We find guidance regarding appellant's contention from *People v. Lipsett* (2014) 223 Cal.App.4th 1060, 1062 (*Lipsett*), in which the defendant was charged with making criminal threats and other offenses. At trial, the evidence showed that the defendant tried to steal his victim's motorcycle. (*Id.* at p. 1062.) The victim confronted the defendant, resulting in a tug of war between them over the motorcycle. (*Ibid.*) When the victim's German shepherd dog

appeared, the defendant called out several times to an accomplice, "'"Shoot him,"'" or "'"Shoot the dog."'" (*Id.* at pp. 1062-1063.) The victim saw the accomplice appear to point a gun in his direction and fled. (*Id.* at p. 1063.)

On appeal, the defendant challenged his conviction for making criminal threats, arguing that his threat was directed toward the dog, not the victim. (*Lipsett*, *supra*, 223 Cal.App.4th at pp. 1064-1065.) Rejecting that contention, the appellate court stated: "By its plain language, section 422 contains no exception for threats that are technically addressed to third parties. Instead, it requires that a defendant intend 'the statement . . . to be taken as a threat' by the victim. (§ 422, subd. (a).) A defendant may harbor such intent even while grammatically addressing the threat to someone other than the victim. [¶] . . . [¶] Thus, the true question presented is whether defendant intended his 'statement . . . to be taken as a threat' by [the victim] (§ 422, subd. (a)), not whether the threat was syntactically addressed to him." (*Id.* at p. 1065.) The appellate court further concluded there was sufficient evidence that the defendant made his threats with the intention of scaring the victim into retreating with his dog. (*Ibid.*)

In view of *Lipsett*, the key issue is whether appellant intended his message as be taken as a threat by Rivera-Diaz, not whether he framed it as a message for Ojeda. We conclude there is sufficient evidence that he made the threat intending -- at least in part -- to make Rivera-Diaz personally fearful of injury and death. Viewed in context,

appellant's message signified an impending mass shooting affecting Rivera-Diaz's workplace, as that was the most reasonable meaning inferred from appellant's joint reference to Virginia Tech and Colorado, his desire to talk to Ojeda, and his angry tone. That appellant intended to scare Rivera-Diaz is shown by the design of his message, which conveyed a mass shooting likely to include her, as well as his threat relating to White the following day, when he told Ojeda that he knew that the Chancellor's Office was afraid of him, and that he could use that fear to his advantage.

People v. Felix (2001) 92 Cal.App.4th 905 (*Felix*), upon which appellant relies, is distinguishable. There, the defendant made threatening remarks relating to his ex-girlfriend to his psychologist during a therapy session. (*Id.* at pp. 908-909.) In an effort to comply with the duty to warn imposed on psychologists under *Tarasoff v. University of California* (1976) 17 Cal.3d 425, the psychologist conveyed the gist of the remarks to the ex-girlfriend, who became fearful for her life. (*Felix, supra,* at pp. 911-913.) The appellate court reversed the defendant's conviction for criminal threats based on the remarks, concluding there was insufficient evidence that the defendant intended them to be conveyed to his ex-girlfriend. (*Id.* at pp. 913-915.) Here, in contrast, appellant made the pertinent threatening remarks directly to Rivera-Diaz. In sum, there is sufficient evidence that appellant intended the message, "Virginia Tech, Colorado," to be taken as a threat by Rivera-Diaz.

2. *Gravity and Immediacy of the Threat*

Appellant also contends his message was not "so unequivocal, unconditional, immediate, and specific as to convey . . . a gravity of purpose and an immediate prospect of execution" (§ 422, subd. (a)). He argues that the message was merely an angry utterance stemming from his longstanding dispute with CSU and inability to contact Ojeda.

For purposes of section 422, the terms "'unequivocal,'" "'unconditional,'" "'immediate,'" and "'specific'" do not impose unqualified requirements on actionable threats. (*People v. Bolin* (1989) 18 Cal.4th 297, 339-340.) As our Supreme Court has explained, "'unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim.'" (*Ibid.,* quoting *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157.)

A threat may satisfy that requirement even though it does not specify the details of its implementation. In *In re David L.* (1991) 234 Cal.App.3d 1655, 1658, a student fell into a dispute with a classmate. The student then phoned the classmate's friend, made a metallic clicking noise he attributed to a gun, and said that he was going to shoot the classmate. The appellate court concluded that the threat conveyed the requisite "'gravity of purpose and . . . immediate prospect of execution,'" even though it did not communicate when the shooting was to occur. (*Id.* at

p. 1658; see also *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1432 [defendant's threat to kill woman satisfied gravity and immediacy requirement, even though he made threat while in jail, in view of his history of abusive conduct toward the woman]; *People v. Mosley* (2007) 155 Cal.App.4th 313, 316-322 [incarcerated defendant's threats to arrange for fellow gang members to follow jail guards home and kill them satisfied gravity and immediacy requirement, in view of his violent conduct in jail].)

We reach the same conclusion here. As discussed above (see pt. A.1. of the Discussion, *ante*), Rivera-Diaz reasonably understood appellant's message, "Virginia Tech, Colorado," to threaten an impending mass shooting likely to encompass her. As the message was crafted so as to require a modest amount of decoding, it also reflected calculation by appellant, rather than a spontaneous outburst. In our view, the jury reasonably concluded that it demonstrated the requisite "gravity of purpose and an immediate prospect of execution," for purposes of section 422.

Appellant's reliance on *In re Ricky T.* (2001) 87 Cal.App.4th 1132 (*Ricky T.*), *In re George T.* (2004) 33 Cal.4th 620 (*George T.*), and *In re Ryan D.* (2002) 100 Cal.App.4th 854 (*Ryan D.*) is misplaced. In *Ricky T.* a juvenile cursed at a teacher and said, "'I'm going to get you,'" after the teacher accidently hit him with a door while opening it. (*Ricky T., supra,* at p. 1135.) The appellate court concluded there was insufficient evidence that the remarks constituted an "unequivocal" threat, as the juvenile

apologized for the remarks and had no history of misconduct toward the teacher. (*Id.* at pp. 1137-1138.) In contrast, appellant offered no apology to Rivera-Diaz, and did not try to retract the message; instead, he hung up.

In *George T.*, a high school student was charged with making a criminal threat after writing a poem a fellow student perceived as containing threats to her. (*George T.*, *supra*, 33 Cal.4th at pp. 624-625.) When the juvenile court found the criminal threat allegation to be true, the high school student contended on appeal that his poem was subject to First Amendment protection. (*Id.* at p. 630.) In concluding that the poem was protected speech, the Supreme Court determined that it did not constitute an "unequivocal" threat, as its language was ambiguous, and there was otherwise no history of animosity between the students. (*Id.* at pp. 630-639.) In contrast, appellant's message did not purport to be a poem, and its language established that it was a true threat.

In *Ryan D.*, a police officer arrested a juvenile for possession of marijuana. (*Ryan D.*, *supra*, 100 Cal.App.4th at pp. 857-858.) The juvenile painted a picture of himself shooting the officer and submitted it as an art project in his high school painting class. (*Ibid.*) Reversing the juvenile's conviction for making a criminal threat, the appellate court concluded that the painting did not constitute an "unequivocal" threat to the officer, as there was no evidence the juvenile intended the officer to see or learn of it. (*Id.* at pp. 860-862.) Here, appellant spoke directly to Rivera-Diaz.

In sum, the record establishes that appellant's message was sufficiently "unequivocal, unconditional, immediate, and specific" to constitute an actionable threat under section 422.

B. *Imposition of Upper Term on Count 1*

Appellant contends the trial court erred in imposing the upper term on his conviction for making a criminal threat against Chancellor White (count 1). As explained below, we disagree.

When a sentence of imprisonment is imposed, the trial court is required to select the lower, middle, or upper term. (Cal. Rules of Court, rule 4.420(a).) Generally, "[a] single factor in aggravation will support imposition of an upper term. [Citation.]" (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) The trial court, in determining the term appropriate for a crime, "need not state reasons for minimizing or disregarding circumstances in mitigation . . . ." (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) We review the trial court's findings concerning aggravating and mitigating factors for the presence of substantial evidence (*People v. Gragg* (1989) 216 Cal.App.3d 32, 46), and the trial court's balancing of aggravating and mitigating factors for abuse of discretion (*People v. Hetherington* (1984) 154 Cal.App.3d 1132, 1140-1141).

In imposing the three-year upper term on count 1, the trial court identified three aggravating factors and one mitigating factor. The court found that the crime displayed

callousness and viciousness (Cal. Rules of Court, rule 4.421(a)(1)), noting that appellant carried his dispute with CSU directly to Chancellor White in an abusive manner that "impact[ed] not just one person, but impact[ed] the entire system." The court further found that the threat involving planning and sophistication (Cal. Rules of Court, rule 4.21(a)(8)) because it reflected a design to engage in "the most direct, consequential threat [appellant could] make." Additionally, the court found that the Chancellor, as "the face of the whole system," was particularly vulnerable (Cal. Rules of Court, rule 4.421(a)(3)). The court found that appellant's lack of a criminal record constituted a mitigating factor (Cal. Rules of Court, rule 4.423(b)(1)).

We see no reversible error in the court's determinations. There is sufficient evidence that appellant's May 9, 2014 threat relating to White was the culmination of a plan to create fear in him, as the record shows that prior to that threat, appellant repeatedly made menacing remarks to CSU employees and individuals attached to the Chancellor's Office, including Siegle and Hernandez. Indeed, in delivering the May 9, 2014 threat, appellant told Ojeda that he knew the Chancellor's Office was afraid of him, and that he could "use that fear to his advantage to get Chancellor White's attention."

The record also establishes that Chancellor White was "particularly vulnerable" as a victim. (Cal. Rules of Court, rule 4.421(a)(3).) "Particularly, as used here, means in a special or unusual degree, to an extent greater than in other

cases. Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act. An attack upon a vulnerable victim takes something less than intestinal fortitude. In the jargon of football players, it is a cheap shot." (*People v. Smith* (1979) 94 Cal.App.3d 433, 436.) Here, the offense of making criminal threats, as established in section 422, targets "those who try to instill fear in others." (*Felix*, *supra*, 92 Cal.App.4th at p. 913.)

The record shows that Chancellor White was especially open to fear due to the types of violence signified by appellant's May 9, 2014 threat. In addition to mentioning a potential "visit" to White's residence, that threat referred to the fear that appellant's prior threats had created in the Chancellor's Office. White thus reasonably understood the threat to encompass a potential mass shooting, in view of appellant's prior threat to Rivera-Diaz. As Chancellor, White was acutely aware of the difficulties of preventing a mass shooting at CSU campuses, which -- as he testified -- are "wide open," notwithstanding the existence of campus police forces; moreover, White personally was exceptionally exposed to the risk of a shooting because his duties required him to appear at many public CSU events, such as Castro's investiture. The record thus supports the determination that White was "particularly vulnerable" as a victim.

We further conclude there is sufficient evidence to support the finding of callousness and viciousness. Regarding that factor, "[t]he court has an obligation to

convince itself that, when compared to other ways in which such a crime could be committed, the manner of the instant crime's commission indicated viciousness and callousness. [Citation.] "'The essence of 'aggravation' relates to the effect of a particular fact in making the offense distinctively worse than the ordinary.'" [Citation.]" (*People v. Webber* (1991) 228 Cal.App.3d 1146, 1169, quoting *People v. Harvey* (1984) 163 Cal.App.3d 90, 117.) Thus, callousness and viciousness exist when the crime was accomplished in an especially egregious manner. (*People v. Collins* (1981) 123 Cal.App.3d 535, 539 [trial court properly found callousness and viciousness in connection with offense of kidnapping with use of a firearm because defendant held a cocked gun to the victim's head for several hours]; *People v. Karsai* (1982) 131 Cal.App.3d 224, 239, disapproved on another ground in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8 [trial court properly found callousness and viciousness in connection with offense of rape by force because defendant acted in manner tailored to degrade and terrorize the victim].)

Here, the trial court found that appellant's threat to Chancellor White was callous and vicious because it "impact[ed] the entire system." The record supports that determination, as it shows that in addition to threatening harm to White and his family, appellant mounted a campaign to make White fearful for the safety of everyone within the CSU system, for which White was responsible. In sum, the trial court did not erred in imposing the upper

term on appellant's conviction for making a criminal threat against White (count 1).

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.