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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. JULIO LOPEZ, Defendant and Appellant.	B231627 (Los Angeles County Super. Ct. No. BA373762)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig J. Mitchell, Judge. Affirmed.

Hancock & Spears and Alan E. Spears, 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, Colleen M. Tiedemann and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Julio Lopez was charged in count 1 with attempted second degree robbery (Pen. Code, §§ 664, 211),[1] in counts 2 and 3 with assault with a deadly weapon (§ 245, subd. (a)(1)), in count 4 with criminal threats (§ 422), and in count 5 with assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)). It was alleged defendant was armed with a deadly weapon within the meaning of section 12022 with respect to counts 1-3.

The jury found defendant guilty in counts 2, 4, and 5.[2] The jury also found true the allegation of personal use of a weapon as to count 2. The court sentenced defendant to four years eight months in state prison.

Defendant's only contention on appeal is that the evidence was insufficient to establish the victim in count 4 was in sustained fear for her own safety as required by section 422. We affirm the judgment.

FACTS[3]

On July 18, 2010, Maria Vargas was sitting on her front patio of her house when she saw defendant walking toward the back of the property and into the alley. Vargas had never seen defendant before. She described him as "clean and just simply walking." About 15 minutes to half an hour later, she saw defendant walk back through the alley, across the property, and toward the front of her house. Defendant stopped in the front yard beside Vargas's car. "He was wearing a muscle shirt hanging from his shoulder and he was all profusely bleeding." One side of defendant's face was covered in blood.

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1 Unless otherwise indicated, all statutory references are to the Penal Code.

2 The jury was hung as to counts 1 and 3.

3 The description of the incident is limited to testimony presented by the prosecution, as defendant testified that he didn't remember seeing Maria Vargas. He explained that he had been hit in the head and "lost consciousness of where [he] was at."

Vargas asked defendant if he was okay. Defendant responded in a normal tone of voice, "You know what? You little bitch, you better tell your friends that I'm coming back." Vargas answered that she did not know what friends he was referring to. She just wanted to call 911 for defendant because she saw that he was bleeding. Defendant began insulting Vargas "as though [she] had done something to him." Defendant told Vargas in an angry voice that he was going to kill her and "You're going to meet up with my friend." He was yelling at this point and "raised his pitch somewhat." Vargas "was defending him" and told defendant to be quiet. Defendant responded, "You're going to regret this, you're going to regret this, because I am going to kill you." Defendant then stepped out of the driveway and through Vargas's gate to stand in front of her, approximately four feet away. Vargas thought defendant wanted to hit her. She grabbed her chair and said, "Don't get near me, because I'm going to fuck you." Defendant continued to threaten Vargas and accused her of feeling like she was really hot stuff. Vargas was afraid defendant was going to kill her. She did not think defendant's mind was clear because of the way he was looking at her and talking to her.

At that point, Vargas's neighbor, Jesus Lopez, intervened. Lopez jumped over the fence and said, "Hey, calm down, how are you going to hit a lady?" Defendant turned around and punched Lopez in the face with a closed fist. The two men proceeded to punch and grab each other. They fell to the ground with defendant on top of Lopez. Defendant hit Lopez numerous times while he was on top of him.

Vargas yelled for help. A young man passing by pulled defendant off Lopez. Lopez stood to the side as the young man and defendant proceeded to fight. Then both men took defendant by the ears and began to beat him until he fell against a tree. They either hit defendant with stones lining Vargas's front yard or defendant fell into the stones when the men knocked him down.[4] Defendant hit the back of his head on the stones and was bleeding. Vargas became concerned for defendant when he injured his

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[4] Vargas testified inconsistently as to whether Lopez and the young man hit defendant with stones or if his head hit the stones when they knocked him down.

head. She told defendant to be quiet because Lopez and the young man were going to kill him if he did not calm down. Defendant continued to threaten Vargas. Vargas left and called the police.

Lopez was injured at the back of his head and along his jaw. Defendant got on a bicycle and began to leave. Vargas asked him to stay because he was bleeding profusely. She told him she was going to call an ambulance. Defendant rode away on the bicycle.

Officer Alexander Tan responded to the incident. He met with Vargas and described her demeanor as "shaken up." Officer Tan also noted that Vargas "had a scared look on her face."

DISCUSSION

Defendant contends there was insufficient evidence of the "sustained fear" element of the criminal threats offense to support his conviction pursuant to section 422, because any fear that Vargas experienced was "fleeting or momentary." We disagree.

"'In reviewing the sufficiency of evidence . . . the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' [Citations.] . . . 'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must . . . presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.] The same standard also applies in cases in which the prosecution relies primarily on circumstantial evidence. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1175 (*Young*).)

We therefore review the record in the light most favorable to the prosecution to determine whether the challenged conviction is supported by substantial evidence, meaning "evidence which is reasonable, credible, and of solid value . . . ." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "[M]ere speculation cannot support a conviction. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 35.) "In deciding the sufficiency

of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*Young*, *supra*, 34 Cal.4th at p. 1181.)

Pursuant to section 422, subdivision (a), "[a]ny 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 . . . is to be taken as a threat, even if there is no intent of actually carrying it out, 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, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison." (Emphasis added.) To establish the "sustained fear" element, "the statute . . . requires proof of a mental element in the victim." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 (*Allen*).) "Sustained fear" is fear that is more than "momentary, fleeting, or transitory." (*Ibid*.)

Defendant argues that Vargas was fearful for "very little time," starting when defendant advanced toward her and ending as soon as Lopez intervened. Defendant argues that Vargas's concern for his welfare demonstrates she was not fearful after defendant had been injured.[5]

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[5] Defendant also notes that although Officer Tan testified Vargas was "shaken up" and looked frightened, Vargas's reaction was "equally consistent with one suffering from the emotional distress of having watched the bizarrely bloody episode unfold." Defendant points out that the prosecutor did not attempt to tie the officer's testimony with respect to Vargas's demeanor to her sustained fear. This argument fails because it is insufficient for defendant's interpretation of the facts to be "equally consistent" with the conclusion defendant presumes the jury to have reached. (*See In re George T.* (2004) 33 Cal.4th 620, 630-631 ["'"'If the circumstances reasonably justify the trier of fact's

The jury could have reasonably found Vargas was in fear for her safety for a longer time period than defendant alleges. Vargas showed concern for defendant when she first encountered him before he began insulting her and then again at the very end of his struggle with Lopez and the young man, in which defendant was seriously injured. It would be reasonable for the jury to conclude Vargas became afraid as soon as defendant insulted her, calling her a "bitch" and threatening her. It would also be reasonable for the jury to find that Vargas was afraid until defendant was being beaten severely by both the young man and Lopez. Lopez was losing the fight before the young man intervened, so it could be reasonably inferred that Vargas was not yet out of harm's way and still fearful for her safety.

Defendant further asserts his case can be differentiated from *Allen*, *supra*, 33 Cal.App.4th 1149 and *People v. Fierro* (2010) 180 Cal.App.4th 1342 (*Fierro*), two cases in which the appellate court found the challenged convictions were supported by substantial evidence that the victims experienced "sustained fear." He first argues that Vargas did not believe him to be armed, in contrast to the victims in *Allen* and *Fierro*, who saw or reasonably believed the defendants in those cases were carrying guns. Defendant reasons that he had "no apparent means, other than his hands, to carry out the threat." Second, defendant asserts the defendants in *Allen* and *Fierro* made methodical, calculated threats with the intent to elicit sustained fear in their victims, whereas he was dazed, confused, and suffering from head wounds. Finally, defendant contends that unlike the victims in the other cases, Vargas did not believe that she was going to die, but only that defendant wanted to hit her. Vargas's fear was fleeting and dissipated as soon as defendant was unable to harm her.

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findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'"' [Citations.]"].) Regardless, we need not determine whether a reasonable trier of fact could find the statements showed sustained fear because even if Vargas's fear dissipated prior to when she spoke with Officer Tan the jury could find that she suffered sustained fear beyond a reasonable doubt, as we discuss below.

In *Allen,* the victim was threatened at gunpoint by her daughter's ex-boyfriend, who had a recent history of vandalism and violence against her daughter. (*Allen, supra,* 33 Cal.App.4th at pp. 1151-1153.) The victim had called the police concerning Allen on several occasions. (*Id*. at pp. 1153, 1156.) She had seen Allen around her house looking into the windows several times and observed him in close proximity to her house four times on the morning of the incident. (*Id*. at p. 1153.) Allen approached the victim at her door, used profanity, and while brandishing a handgun, told the victim "'I'm gonna kill you. I'm gonna kill you and your daughter.'" (*Ibid*.) Allen extended his arm and pointed the gun at the victim. (*Ibid*.) Shaking with fear, the victim called 911. (*Ibid*.) The police arrested Allen within approximately 15 minutes. (*Id*. at pp. 1153, 1156.)

The *Allen* court found the victim was reasonably in sustained fear for her own and her daughter's safety. (*Allen, supra,* 33 Cal.App.4th at p. 1156.) The court reasoned that the victim knew about Allen's prior conduct, knew that he looked into her windows, and had reported Allen to police several times. (*Ibid*.) The court concluded "[f]ifteen minutes of fear of a defendant who is armed, mobile, and at large, and who has threatened to kill the victim and her daughter, is more than sufficient to constitute 'sustained' fear for purposes of this element of section 422." (*Ibid*.)

In *Fierro*, the victim and his son were at a gas station where the defendant was also fueling his vehicle. (*Fierro*, *supra*, 180 Cal.App.4th at pp. 1344-1346.) The defendant's vehicle was blocking the victim's access to the gas pump, so the victim asked the defendant to move his vehicle. (*Id*. at p. 1345.) The defendant refused, and the two exchanged words. (*Ibid*.) The defendant left the gas station and the victim moved his vehicle up to pump gas. (*Ibid*.) He then drove back into the station, asked "'Do you want to fuck with me now?'" and lifted up his shirt to reveal what the victim and his son believed to be a gun tucked into his waistband.[6] (*Id*. at pp. 1345-1346). The victim testified "'the game changed. I was in fear for my life. I was in fear for my son's

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[6] When defendant was apprehended shortly after the incident, he was found to have only a knife in his possession.

life. . . . The only thing that kept me there was I was completely backed in. . . . I was afraid for my son and my life. I was afraid . . . . I was . . . afraid of losing my life that day.'" (*Id*. at p. 1346.) The victim's son testified that seeing the gun "[got my] 'heart pumping. I got a little scared. . . . Like he might pull the gun out of the holster and shoot us or something.'" (*Ibid*.) The defendant said, "'I should kill you. I will kill you.' [He] also said, 'I ought to kill you and'—pointing to [the victim's son]—'the stupid mother fucker too.'" (*Ibid*.) The defendant then stated he ought to kill them "'ahorita,' which means 'right now.'" (*Ibid*.) He told the victim to "'get the fuck out of here.'" The victim left immediately. (*Ibid*.) The victim called 911 from the highway about 15 minutes later when he was "'out of harm's way'. . . and told the operator that he was 'scared shitless.'" (*Ibid*.)

The *Fierro* court found the victim was reasonably in sustained fear for his own and his son's safety. (*Fierro, supra*, 180 Cal.App.4th at pp. 1348-1349.) The *Fierro* court analogized the case to *Allen*, *supra*, 33 Cal.App.4th 1149 and reasoned that the victim saw a weapon and was threatened with death and therefore had cause to be fearful for the length of the confrontation and the 15 minutes that passed between the end of the confrontation and the victim's call to the police. (*Fierro, supra*, at p. 1349.) The *Fierro* court held that "even if we accept appellant's argument [that the victim was not fearful during the 15 minutes before he called the police], we believe that the minute during which [the victim] heard the threat and saw appellant's weapon qualifies as 'sustained' under the statute. When one believes he is about to die, a minute is longer than 'momentary, fleeting, or transitory.' [Citation.]" (*Ibid*.)

Despite defendant's arguments that this case is distinguishable from *Allen* and *Fierro*, a jury could reasonably conclude that Vargas feared for her safety regardless of whether she believed defendant was armed. Defendant presented a physically intimidating threat to his female victim. He was able to overpower Lopez almost immediately after Lopez intervened. Defendant's wounds evidenced that he was willing to engage in a physical fight, and his demeanor indicated that he was not thinking straight, which would arguably make him an even more dangerous aggressor than the

defendants in *Allen* and *Fierro*. Defendant threatened to kill Vargas in no uncertain terms, and Vargas testified that she was fearful that he would kill her. Vargas went so far as to pick up a chair to defend herself. The fact that she believed defendant was about to hit her does not establish that Vargas was not in sustained fear; it is evidence of the manner in which she expected to be attacked by defendant. There is nothing in the record to negate a finding that Vargas was in sustained fear that defendant would attempt to kill her through a violent physical assault, regardless of the absence of a weapon. Although the situations differ, there is sufficient evidence to demonstrate that Vargas was in "sustained fear" for her safety in this case, just as the victims in *Allen* and *Fierro*.

For all of the foregoing reasons, we hold that the evidence presented was sufficient to allow a rational trier of fact to conclude that Vargas was in "sustained fear" in her encounter with defendant such that the criminal threats conviction should be upheld.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.