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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JORGE LUIS CACHU, Defendant and Appellant.	B287610 (Los Angeles County Super. Ct. No. MA068230)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven I. Goorvitch, Judge. Affirmed in part, reversed in part, and remanded with directions.

John L. Staley, 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, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jorge Luis Cachu was convicted by a jury of one count of dissuading a witness by force or threat (Pen. Code,[1] § 136.1, subd. (c)(1)) and one count of felony vandalism (§ 594). The jury found true the allegations that defendant committed the offenses for the benefit of, at the direction of, and in association with a criminal street gang. The trial court sentenced defendant to a term of life in prison for the dissuasion conviction pursuant to section 186.22, subdivision (b)(4)(C), which applies when a gang allegation is found true and a defendant is convicted of "threats to victims and witnesses, as defined in Section 136.1." (*Ibid.*)

Defendant filed a timely notice of appeal. He contends there is insufficient evidence he intended to dissuade a witness from testifying. He further contends the trial court erred prejudicially in failing to instruct the jury on every element of the dissuasion offense and on the requirement of section 186.22, subdivision (b)(4)(C) that defendant's section 136.1 conviction be based on threats to a witness. The People agree the trial court did not fully instruct the jury on the section 136.1 offense and the section 186.22 enhancement, but contend the errors were harmless beyond a reasonable doubt. We find sufficient evidence of defendant's intent to dissuade and we find the section 136.1 instructional error harmless beyond a reasonable doubt. We cannot find the instructional error related to the section 186.22 allegation harmless, however, and we reverse the true finding on that allegation and remand for further proceedings.

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[1] Further undesignated statutory references are to the Penal Code.

BACKGROUND

In April 2015, David F.[2] agreed to cooperate with law enforcement officials concerning a homicide matter. He was put into protective custody at the Los Angeles County jail. David was a member of the Down As Fuck (DAF) gang, and believed the gang viewed him as a snitch because of his cooperation with law enforcement.

On September 30, 2015, David testified against Andrew Cachu and Ernest Casique at a preliminary hearing in the homicide matter. Andrew is defendant's brother and Ernest is the brother of defendant's girlfriend, Brenda Casique. David grew up in the same neighborhood as Andrew and was friendly with Ernest. Andrew is a member of the DAF gang; Ernest is a member of the Palmas Trece gang which associated with DAF.

David was released from custody on November 6, 2015. He was scheduled to testify at Andrew's and Ernest's trial when it ultimately took place. He was "on alert" but not scared.

The weekend David was released from custody, probably on November 7, DAF gang member "Rascal" called or texted David's sister and told her everyone knew David was out and to tell him to be careful. Rascal's real name is Peter Villa and David described him as a senior member of DAF. David understood the text message to mean younger gang members wanted his head.

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[2] We refer to various parties by their first names for the sake of clarity.

David's sister was scared. David was worried for his sister, his family and himself.[3]

On November 25, 2015, about 11:00 or 11:15 a.m., David went to Superior Grocers with his father, Terry F. David drove, and he parked his car in a part of the parking lot that was not very full, to avoid damage to his car. Brenda was working at Superior Grocers that day. She clocked out at 11:31 a.m. and drove her gold Honda Civic home for lunch. It was about a five-minute drive. Defendant was there, and asked to borrow the car. Brenda testified she refused to let him use the car. Los Angeles County Sheriff's Department Detective Robert McGaughey testified he interviewed Brenda about the incident in February 2016. She told him defendant left their residence with her vehicle when she arrived home for lunch.

David and his father spent about half an hour shopping for groceries. As they left the store, David noticed a man in a hoodie running through the parking lot. David believed the man was running toward David's car and so started running after him. David heard glass breaking and realized the man had thrown two objects through the back windshield of David's car. David described the objects as a rock and half a brick (hereafter collectively "rocks").

The man continued to run. David followed and saw the man get into a passenger seat in a gold Civic which David recognized as belonging to Brenda. David had ridden in the car on previous occasions. David recognized the driver of the Civic as

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[3] The trial court instructed the jury that evidence of the communications to David's sister was admitted for the limited purpose of evaluating David's state of mind and credibility.

defendant. David had known defendant for about 10 years by the time of the incident. The Civic was parked next to an exit, facing west so it could just pull straight out. David later tentatively identified the rock-throwing man as Gabriel Chavez, whose gang name was "Minor."

David tried to get into the Civic. Defendant looked at David through the car window, made an obscene gesture[4] and said, "Fuck you." Defendant then drove off.

David returned to his car and called 911. Los Angeles County Sheriff's Deputy Scott Leaf responded to the call and observed the rear window of David's car was shattered. At that point, David was not concerned for his own safety; he just wanted to get his car repaired. David identified defendant as the driver of the car. Going forward, David had concerns for his safety because he realized he had to testify at trial against Andrew and Ernest.

In July 2016, as David was walking through a courthouse parking lot on his way to testify at Andrew's and Ernest's trial, a car drove by and a passenger flashed a gun at him. David did not recognize the passenger or the driver. David became afraid and left. He did return to court the next day and testified.

Detective McGaughey testified as a gang expert in this matter. He identified defendant as a DAF gang member, and opined defendant was an active member in 2015. The detective testified generally that gang members "will go out and vandalize" the property of witnesses against them and "will go out and beat them up" and "threaten" them. He also opined "snitching" is

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[4] David testified that defendant "flipped me off." Defendant's hand gesture consisted of extending his middle finger up while keeping his thumb and other fingers down.

"extremely serious" to a gang. Detective McGaughey did not describe any specific acts of witness intimidation by the DAF gang, however. Given a hypothetical based on the facts of this case, the detective opined the crimes would benefit the gang and would assist the gang in its criminal conduct.

Defendant did not present any evidence in his defense.

DISCUSSION

Section 136.1 prohibits intimidation of witnesses or victims. Subdivision (a) prohibits a number of specified acts including "knowingly and maliciously" preventing or dissuading a witness from attending or giving testimony at any trial or other proceeding authorized by law, or attempting to dissuade a witness. (§ 136.1, subds. (a)(1) & (a)(2).) As relevant here, subdivision (c)(1) is violated when a defendant does an act specified in subdivision (a) and "the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person." (§ 136.1, subd. (c)(1).)[5] As

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[5] We note that CALCRIM No. 2623, the instruction on dissuading a witness by force or threat within the meaning of section 136.1, subdivision (c)(1), refers to subdivision (c)(1) as a sentencing factor. However, as our colleagues in the Sixth District Court of Appeal have explained, "In *Apprendi's* [*Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]] terms, subdivision (c)(1) does not describe a 'sentencing factor' of a subdivision [(a) or (b)] violation, as a finding of the subdivision (c)(1) circumstances invokes a higher range of punishment than authorized for a subdivision [(a) or (b)] conviction, with a maximum sentence of four years. Neither does

used in section 136.1, "'[m]alice' means an intent to vex, annoy, harm, or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice." (§ 136, subd. (1).)

A. *Sufficiency of the Evidence—Section 136.1*

Defendant contends there is insufficient evidence to establish he acted with the intent to deter David from testifying and so to support his dissuasion conviction under either subdivision (a) or subdivision (c)(1) of section 136.1. Defendant argues that in the absence of a specific oral or written statement from defendant telling David not to testify at the upcoming trial, there is no way to know whether defendant's conduct was retaliation for David's prior testimony or an attempt to discourage future testimony.[6]

1. Law—Sufficiency of Evidence

"'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine

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subdivision (c)(1) describe an enhancement. An enhancement is 'an additional term of imprisonment added to the base term.' (Cal. Rules of Court, rule 4.405(3); cf. *People v. Dennis* (1998) 17 Cal.4th 468, 500 . . . .) Subdivision (c)(1) must be recognized as describing a greater offense with its own alternative and separate sentencing scheme." (*People v. Torres* (2011) 198 Cal.App.4th 1131, 1147, fn. omitted.)

[6] Defendant's claim implicitly assumes that he is capable of harboring only one intent at a time: he either intended to retaliate for David's past testimony *or* to dissuade future testimony. We see no reason in law or logic that defendant could not have harbored both intents simultaneously.

the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—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.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]'" (*People v. Nelson* (2011) 51 Cal.4th 198, 210.) "'We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]' [Citations.]" (*Ibid.*)

"The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.]'" (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

2. <u>The Required Specific Intent To Dissuade a Witness May Be Inferred from the Circumstances of a Defendant's Actions or Statements</u>

"Section 136.1, subdivision (a)(2) prohibits '[k]nowingly and maliciously attempt[ing] to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.' The crime of attempting to dissuade a witness from testifying is a specific

intent crime. [Citation.] 'Unless the defendant's acts or statements are intended to affect or influence a potential witness's or victim's testimony or acts, no crime has been committed under this section.' [Citation.] The circumstances in which the defendant's statement is made, not just the statement itself, must be considered to determine whether the statement constitutes an attempt to dissuade a witness from testifying. [Citation.] If the defendant's actions or statements are ambiguous, but reasonably may be interpreted as intending to achieve the future consequence of dissuading the witness from testifying, the offense has been committed. [Citation.]" (*People v. Wahidi* (2013) 222 Cal.App.4th 802, 806.) Subdivision (c)(1) of section 136.1 incorporates the "knowingly and maliciously" requirement of subdivision (a), making subdivision (c) a specific intent crime as well.

3. There is Substantial Evidence of Defendant's Intent To Dissuade

Defendant had familial and gang reasons for attempting to dissuade David from testifying at the upcoming trial involving defendant's brother. The familial motivation is obvious. The gang expert's testimony showed defendant also had a gang-related motive. These motives, together with the circumstances of the rock-throwing vandalism, reasonably justify an inference defendant intended to dissuade David from testifying in the future.

The evidence establishes defendant's vandalism of David's car was preceded by a period of planning and preparation. Brenda was working in the grocery store when David entered it. She then clocked out and drove her car home for lunch.

Defendant was at the residence, took Brenda's car, picked up a gang member companion, acquired at least two rocks, drove to the grocery store parking lot, and parked the car in a position to make a quick departure. Defendant then waited in the car while his companion performed the actual rock-throwing. These actions are consistent with a considered decision to send a message to David. Further, given the risk of apprehension inherent in defendant's decision to commit vandalism in broad daylight in a busy parking lot, it is more than reasonable to infer defendant took such a risk with the intent of preventing future serious harm to his brother from David's expected trial testimony rather than simply to retaliate for the relatively minor consequences of David's preliminary hearing testimony.

Since the circumstances justify the jury's finding of an intent to dissuade, reversal is not warranted, even if those circumstances might also reasonably be reconciled with a finding defendant only intended to retaliate. (See *People v. Stanley*, *supra*, 10 Cal.4th at pp. 792-793.)

B. *Section 136.1 Instructions*

The trial court instructed the jury on section 136.1 with CALCRIM No. 2622, which provides in pertinent part:

"[T]he People must prove that: [¶] 1. The defendant maliciously tried to prevent or discourage David . . . from giving testimony at a criminal prosecution against Andrew Cachu; [¶] 2. David . . . was a witness in the criminal prosecution against Andrew Cachu; [¶] AND [¶] 3. The defendant knew he was trying to prevent or discourage David . . . from testifying against Andrew Cachu." The instruction also told the jury that "[a] person acts maliciously when he or she unlawfully intends to

annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice."

The trial court did not give CALCRIM No. 2623, which sets forth the requirements for a conviction pursuant to section 136.1, subdivision (c)(1). That instruction provides in pertinent part: "If you find the defendant guilty of intimidating a witness, you must then decide whether the People have proved the additional allegation[s] that the defendant [acted maliciously] [and] . . . used or threatened to use force . . . . [¶] To prove (this/these) allegation[s], the People must prove that: [¶] . . . [¶] . . . The defendant used force or threatened, either directly or indirectly, to use force or violence on the person or property of [a] (witness[,]/[or] victim[,]/[or] any other person."

Defendant contends the trial court's failure to fully instruct the jury on the elements of section 136.1, subdivision (c)(1) violated his state and federal right to due process and to a jury determination of all the facts. He contends the error was not harmless because it was more extensive than a mere omission of "a single element of an offense which was uncontested at trial and . . . defendant conceded the evidence established that element." Defendant takes too narrow a view of the circumstances which may support a finding of harmless error.

When a trial court does not fully instruct a jury on every element of a charged offense, "'[t]he critical inquiry . . . is not the *number* of omitted elements but the *nature* of the issues removed from the jury's consideration.'" (*People v. Merritt* (2017) 2 Cal.5th 819, 828 (*Merritt*).) "Certainly, the more elements that are omitted, the less likely it is that the error is harmless, but so long as the error does not vitiate *all* of the jury's findings, it is amenable to harmless error analysis." (*Id*. at p. 829.) Assuming

the error does not vitiate all the jury's findings, we must determine "whether it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*Id*. at p. 831.)

Here, the only omitted element was the requirement defendant dissuade the witness by means of force or threat. This omission did not vitiate the jury's finding that David was a witness in a criminal proceeding or its finding that defendant intended to dissuade David from testifying. CALCRIM No. 2622 properly instructed the jury on both those elements. Since the omission did not vitiate all of the jury's findings, it is subject to harmless error analysis.

As for the omitted element of force or threat, it was virtually uncontested that someone threw rocks through David's rear windshield. This is indisputably an act of force. Thus, the evidence was overwhelming and virtually uncontested that force was used against David's property. The prosecutor's arguments made it clear the People's theory of the case was that the act of throwing the rocks through David's car windshield was the method used to attempt to dissuade David from testifying. (See *Merritt*, *supra*, 2 Cal.5th at p. 831 [prosecutor's discussion of missing element is a factor to consider in assessing prejudice].)

The only contested issue at trial was the identity of the rock-thrower (and the driver of the getaway car). The jury resolved this issue against defendant when it convicted him of the vandalism charge; the jury was properly instructed on that charge.

"[W]hat the jury, properly instructed, necessarily found supports the conclusion the error did not contribute to the verdict." (See *Merritt*, *supra*, 2 Cal.5th at p. 832.) The jury found

defendant intended to dissuade David from testifying and defendant participated in the rock-throwing. "No reasonable jury that made all of these findings could have failed to find the remaining elements" of the charged offense, that is that defendant used force in his attempt to dissuade a witness. (*Ibid.* [jury found the defendant was the perpetrator, acted with the required mental state for robbery and used a firearm during the commission of the offenses; jury could not reasonably have failed to find the remaining elements of robbery].) Thus, we find it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error. (See *id.* at p. 831.) The error was harmless.

C. *Gang Allegation Finding and Sentence*

The trial court sentenced defendant to a life term pursuant to section 186.22, subdivision (b)(4)(C), which provides for such a sentence when a defendant has been convicted of a felony involving "threats to victims and witnesses, as defined in Section 136.1." (§ 186.22, subd. (b)(4)(C).) As we have just discussed, the jury's guilty verdict on the vandalism charge establishes that defendant used force to dissuade David. That is sufficient to satisfy section 136.1, subdivision (c)(1), which may be violated by the use of "force *or* by an express or implied threat." (Italics added.) Subdivision (b)(4)(C) of section 186.22, however, only applies to violations of section 136.1 which involves threats.

As the People have conceded in the past, a sentence under section 186.22, subdivision (b)(4)(C) should be vacated when the jury does not make a finding of "'threats to victims and witnesses.'" (*People v. Pettie* (2017) 16 Cal.App.5th 23, 56.) As the court explained in *Pettie*, "as a matter of law, the plain

language referencing 'threats' in section 186.22, subdivision (b)(4)(C) does not encompass those offenses defined under section 136.1 that do not include the element of threat." (*Ibid.*; see *People v. Lopez* (2012) 208 Cal.App.4th 1049, 1065.)

This explanation is consistent with the Legislature's treatment of "threats" to witnesses as a unique subset of section 136.1 elsewhere in the Penal Code. The Legislature has classified the crime of "intimidation of victims or witnesses, in violation of Section 136.1" as a serious felony. (§ 1192.7, subd. (c)(37).) "Threats to victims or witnesses, as defined in Section 136.1," however, is classified as a violent felony. (§ 667.5, subd. (c)(20).)[7]

Here, the jury was never instructed that only threats met the requirement of section 186.22, subdivision (b)(4)(C),[8] and was not asked to determine if defendant made such threats to David. We analyze this instructional error using the framework of *Merritt*, set forth in detail above.

The omission of an instruction on the subdivision (b)(4)(C) requirement of "threats to victims or witnesses" did not vitiate the jury's findings under section 186.22, subdivision (b)(1). The

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[7] The penal consequences of such designations vary, but under section 186.22, subdivision (b)(1), unless otherwise specified, a serious felony conviction is subject to an additional term of five years (subd. (b)(1)(B)), while a violent felony conviction is subject to an additional term of 10 years (subd. (b)(1)(C)).

[8] We invite the CALCRIM committee to draft a jury instruction informing the jury that subdivision (b)(4)(C) requires the jury to find the defendant dissuaded a witness by threats; the use of force alone does not meet the subdivision's requirements.

jury was properly instructed on the elements necessary to find a crime was committed for the benefit of a criminal street gang under the more general provisions of subdivision (b)(1). Thus, the omission is subject to harmless error analysis. (*Merritt*, *supra*, 2 Cal.5th at p. 831.)

Here, the circumstances do not support the conclusion that the error was harmless beyond a reasonable doubt. There was no evidence defendant made an express threat of violence or force regarding future testimony. The prosecutor argued generally that the rock-throwing was an implied threat of future violence should David persist in his intent to testify at defendant's brother's then-future trial. However, neither party discussed the "threats" requirement of section 186.22, subdivision (b)(4)(C). Thus, the jury was not fully aware of the elements of the enhancement. (See *Merritt*, *supra*, 2 Cal.5th at p. 831 [prosecutor's discussion of missing elements is a factor to consider determining prejudice].)

Defense counsel did not concede the rock-throwing was an implied threat of future violence or force. While the defense did not address this issue directly, as part of its attack on the credibility of witnesses, the defense argued David and the police did not appear to fear future violence. The defense pointed out that police did "nothing" after the rock throwing incident. Defendant was not even arrested in this matter until more than a year later. The defense also elicited some evidence David travelled freely in public and did not act as if he were afraid of further violence, and raised this point in closing argument. (Compare *Merritt*, *supra*, 2 Cal.5th at p. 831 [omission of element is harmless if defendant concedes or admits that element].)

Even assuming the rock-throwing carried an implicit threat of some future negative consequences, the evidence that those consequences involved the requisite force or violence was not "overwhelming." (See *Merritt*, *supra*, 2 Cal.5th at p. 832 [where omitted element is not contested and is supported by "overwhelming" evidence, erroneous jury instruction may properly be found harmless].) The police did not appear to be worried about David's safety and David's conduct suggested he was not worried either. Although there was expert testimony that gangs do not like witnesses or "snitches" and can take action to intimidate them, the expert did not describe any specific acts of witness intimidation committed by the DAF gang. David himself testified he could not recall a specific situation during the ten years he associated with DAF when someone told him the consequences of snitching.

At the same time, there was evidence from which a reasonable jury could have concluded the rock-throwing was not an implied threat of future force or violence. The evidence showed David was very proud of his car, and his immediate reaction to the rock-throwing was anger rather than fear. He chased after the thrower in an attempt to catch him. When David reached the Civic, he was met with an obscene remark and gesture, not more force or violence. The gang expert had testified that respect was very important to gang members, and a properly instructed jury might have concluded the rock-throwing incident, particularly coupled with the obscene words and gestures, was at its core an act of disrespect more than of violence and, as such, implied only the consequence of future (nonviolent) disrespect.

The jury made no other findings that could be understood as resolving the issue of threats. The vandalism conviction

showed force but not threats. The only mention of threats on the verdict form is found in the description of the offense in count 1 as "dissuading a witness by force *or* threat" in violation of section 136.1, subdivision (c)(1). (Italics added.)

Given the lack of argument on the threat requirement for section 186.22, subdivision (b)(4)(C), the defense argument that neither the police nor David appeared to fear future harm to David, and the fact that the jury did not otherwise make a finding which would establish defendant made implied threats against David, we cannot conclude the instructional error was harmless beyond a reasonable doubt.

To the extent the jury is deemed to have found that defendant was convicted of a felony involving threats to victims and witnesses within the meaning of section 186.22, subdivision (b)(4)(C), that finding is reversed. The sentence imposed pursuant to that subdivision is vacated and this matter is remanded for further proceedings.

DISPOSITION

We affirm defendant's conviction for violating section 136.1, subdivision (c)(1) by force. We also affirm the finding that defendant committed this offense for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1).

We reverse any finding that defendant was convicted of a felony involving threats to victims and witnesses within the meaning of section 186.22, subdivision (b)(4)(C), and vacate the sentence imposed pursuant to that subdivision. We remand this matter to permit the People to retry this issue of whether defendant's conduct constituted an implied threat of force or violence under sections 136.1 and 186.22, subdivision (b)(4)(C). If the People elect not to retry this matter, the trial court is directed to resentence defendant.

GOODMAN, J.*

We concur:

BIGELOW, P. J.

RUBIN, J.

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.