Filed 12/21/16 P. v. Diaz CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DONATY ANTHONY DIAZ, Defendant and Appellant.	2d Crim. No. B271370 (Super. Ct. No. VA138933) (Los Angeles County)

Donaty Anthony Diaz appeals his conviction by jury of first degree residential burglary (count 1; Pen. Code, § 459)[1] and making criminal threats (count 2; § 422, subd. (a)). In a bifurcated proceeding, appellant admitted a prior serious felony conviction for attempted murder (§ 667, subd. (a)(1)) and a prior strike conviction (§§ 667, subd. (d); 1170.12, subd. (b)). The trial

[1] All statutory references are to the Penal Code unless otherwise stated.

court sentenced appellant to 17 years state prison on the burglary count and a concurrent two year term on the criminal threats count. We modify the judgment to stay the sentence on the criminal threats conviction pursuant to section 654 and affirm the judgment as modified. (§ 1260.) The sentence remains the same: 17 years state prison.

Facts and Procedural History

In 2015, Valerie Herrera *broke off* a tumultuous nine-year relationship with appellant and changed the locks on her apartment door. Appellant was the father of Herrera's two youngest children: R.D. (eight years old) and G.D. (18 months old). Herrera's oldest daughter, R.C. (age 16), lived with Herrera and her half-siblings in a one bedroom apartment in Pico Rivera. In March 2015, appellant entered the apartment and twice choked Herrera in front of their son, R.D. A county social services agency told appellant to stay away from the children and limited appellant's contacts to supervised visits. In April 2015, Herrera was in the process of obtaining a restraining order but could not locate appellant for purposes of serving the order.

On the evening of April 10, 2015, appellant drove by Herrera's apartment several times and shined a flashlight through the window. Appellant drove up to the apartment balcony, exchanged words with Herrera, and said "watch, watch."

Scared, Herrera called 911 but was told that the police could not do anything until appellant was served with the restraining order. Herrera's friend, Brittney Gamboa, stayed the night to support her.

The next morning, at 8:00 a.m., appellant scaled the apartment balcony with the help of two men dressed in black.

Herrera saw black shadows jump over the balcony ledge, which was eight feet off the ground. Herrera tried to lock the balcony door but appellant forced his way in. Brandishing what appeared to be a handgun, appellant said, "'I fucking told you you're going to make me hurt you.'" Appellant pointed the replica handgun at Herrera, kicked her in the leg, and said "I'm going to fucking hurt you."

Hysterical, Herrera pushed appellant out the balcony door and, with Gamboa's help, shoved appellant over the balcony ledge. Appellant fell to the ground and fled with the two men, leaving his hat and gun holster behind.

Herrera's son, R.D., saw Herrera push appellant off the balcony and woke up 16-year-old R.C. who helped Herrera call 911. Los Angeles County Deputy Sheriff Gisel Del Real responded to the call and spoke to Herrera who was very upset. The deputy photographed Herrera's leg which was red and swollen.

On April 13, 2015, the apartment manager, Candy Rodarte, reviewed the apartment surveillance video footage which showed three individuals scaling Herrera's balcony. One person pushed the other one up to access the balcony. Rodarte tried to make a copy of the video for the police but later discovered that the video surveillance system had erased the original recording.

On April 15, 2015, appellant was stopped for driving with expired registration tags and arrested on an outstanding warrant. Inside the vehicle, officers found a silver replica handgun.

Evidence Code Section 1109

Prior Domestic Violence Evidence

Before the April 11, 2015 burglary, appellant told Herrera that he had a handgun and warned her "'[i]f you're ever with another man I'll kill [you] both,' 'I have . . . enough money I can kill you and go on the run.'" Herrera feared for her life and had seen appellant with a handgun on prior occasions. A few weeks before the burglary, Herrera told appellant that she did not want to be with him. Appellant entered Herrera's apartment and choked her in front of their son.

The trial court ruled that the prior threats, the firearm evidence, and the prior acts of domestic violence were admissible to show Herrera's subjective fear of appellant. The trial court explained that "the fact there have been previous threats or previous acts of physical violence would be admissible under [Evidence Code section] 1109 with respect to the state of mind, the reasonableness of the apprehension, and the intent of the defendant in making such threats."

Appellant argues that the prior physical violence evidence was inadmissible because the criminal threats statute (§ 422) punishes verbal threats, not physical acts. Appellant claims the error was compounded when the trial court dismissed a domestic violence count (count 3; § 273.5) midtrial and instructed that the jury could consider prior acts of domestic violence in determining whether appellant was guilty of making criminal threats. (CALCRIM No. 852.)

Evidence of prior crimes is inadmissible to prove propensity or to prove conduct on a specific occasion. (Evid. Code, § 1101, subd. (a).) Where, however, the defendant is accused of an offense involving domestic violence, evidence that defendant

committed other acts of domestic violence "is not made inadmissible by [Evidence Code] Section 1101 if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." (Evid. Code, § 1109, subd. (a)(1).) In determining the admissibility of prior domestic violence evidence, the trial court weighs a variety of factors including the similarity of the uncharged acts to the charged offense, the nature of the prior acts and whether they are more inflammatory than the charged offense, the remoteness in time of the prior acts, and whether the defendant was convicted of the prior acts. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) Because the trial court enjoys broad discretion in making this determination, "the court's exercise of discretion will not be disturbed on appeal except upon a showing that it was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233.)

Here the prior acts of domestic violence were highly probative and involved similar threats against the same victim. It showed a pattern of domestic violence which is precisely what the Legislature was concerned with in enacting Evidence Code section 1109. (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1028.) It was uncontroverted that appellant choked Herrera a few weeks before the burglary and threatened to kill or hurt her on prior occasions. In October 2012, appellant threatened to kill Herrera when she tried to break off the relationship. The trial court reasonably found that the prior physical abuse (i.e., the choking incident) was probative of appellant's propensity to engage in domestic violence and

Herrera's on-going fear that appellant would hurt or kill her. (See, e.g., *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139.)

Appellant argues that the probative value of the domestic violence evidence was substantially outweighed by its prejudicial impact. The argument fails because "[t]he evidence of past offenses was not inflammatory, and there was no risk of confusion because the prior acts of domestic violence were less serious than the charged act." (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1338.) The pattern of abuse was unmistakable and properly admitted to show that appellant's threats caused Herrera to be in sustained fear. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1316; *People v. Fruits* (2016) 247 Cal.App.4th 188, 204.) The testimony describing the uncharged acts of domestic violence was no stronger or more inflammatory than the testimony concerning the charged offenses. (*People v. Tran* (2011) 51 Cal.4th 1040, 1047.)

Appellant claims that the choking incident was no longer relevant after the trial court dismissed the domestic violence count (count 3; § 273.5) at the close of the prosecution's case in chief. All the remaining uncharged acts of domestic violence involved verbal abuse. The trial court gave a CALCRIM No. 852 limiting instruction that the jury could, but was not required to conclude that appellant was disposed or inclined to commit domestic violence and based on that decision, also conclude that appellant was likely to and did make criminal threats as charged.[2] There was no instructional error.

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[2] The CALCRIM No. 852 instruction stated in pertinent part: "The People presented evidence that the defendant committed domestic violence that was not charged in this case. [¶] . . . You may consider this evidence only if the People have

"CALCRIM No. 852 clarifies that even if the jury concludes the defendant committed the uncharged acts, that evidence is only one factor to consider, along with all the other evidence and specifies that such evidence alone is insufficient to prove the defendant's guilt on the charged offenses." (*People v. Reyes* (2008) 160 Cal.App.4th 246, 252.)

Appellant argues that Evidence Code section 1109 does not expressly apply to the criminal threats statute (§ 422) or authorize the admission of physical abuse evidence in a criminal threats case. Evidence Code section 1109, however, permits the trial court in its discretion to utilize the definitions of domestic

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proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit Count 2, Criminal Threats, as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Count 2, Criminal Threats. The People must still prove each charge beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose except for the limited purpose of determining if [Herrera's] fear when threatened by the defendant was reasonable."

violence and abuse set forth in Penal Code section 13700.[3] The trial court correctly found that the physical and verbal abuse overlapped and that the domestic violence charge (count 3) and criminal threats charge (count 2) "fold[ed] into the other." Evidence of past acts of domestic violence was properly admitted to show that appellant's criminal threats put Herrera in sustained fear. (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1430-1432 [past physical abuse of domestic violence victim probative of whether victim was reasonably in fear, an element of terrorists threats]; *People v. Ogle* (2010) 185 Cal.App.4th 1138, 1142-1143 [stalking is an act of domestic violence and admissible to prove propensity to commit the crime of making criminal threats]; *People v. McCray* (1997) 58 Cal.App.4th 159, 172 [same].) "'Appellant was not entitled to have the jury determine his guilt or innocence on a false presentation that his and the victim's relationship . . . [was] peaceful and friendly.' [Citation]." (*People v. McCray*, *supra*, 58 Cal.App.4th at p. 172.)

The trial court did not err in giving CALCRIM No. 852 which instructs that domestic violence means "abuse" and "[a]buse means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to

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[3] Evidence Code section 1109, subdivision (d)(3) refers to Penal Code section 13700, subdivision (b) which provides that "'[d]omestic violence' means abuse committed against an adult" with whom the defendant had a child or a dating relationship. Section 13700, subdivision (a) states: "'Abuse' means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another."

someone else." Relying on section 13700, the trial court correctly found that "domestic violence is a form of abuse, and abuse is defined in part, 'by placing another person in reasonable apprehension of imminent serious bodily injury'. That is a paraphrase of criminal threats." The jury was instructed that the uncharged domestic violence could only be considered for the limited purpose of determining whether Herrera's fear was reasonable. (CALCRIM No. 852.) It is presumed that the jury understood and followed the instruction. (*People v. Homick* (2012) 55 Cal.4th 816, 867.)

Apartment Surveillance Video

Appellant contends that the trial court erred in permitting the apartment manager to testify about the contents of the apartment surveillance video. Rodarte watched the video with a police detective two days after the incident, tried to make a copy of the video and later discovered that the original video was automatically erased by the video surveillance system. Rodarte stated that the surveillance video showed two individuals boost a third person up to Herrera's balcony. Rodarte did not have the original video because the video surveillance system "is not designed to save the video for more than two weeks[,] so after two weeks it just deletes it."

Appellant complains that Rodarte's testimony violates the secondary evidence rule. (Evid. Code, § 1521, subds. (a) & (b).) Oral testimony of the content of a writing or a video is admissible "if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence." (Evid. Code, § 1523, subd. (b).) "A corollary of

the rule that the contents of lost documents may be proved by secondary evidence is that the law does not require the contents . . . be proven verbatim." (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1069.) Rodarte's testimony about the video's contents did not violate the secondary evidence rule. (*People v. Myers* (2014) 227 Cal.App.4th 1219, 1226, fn. 1 [testimony about video's contents did not violate secondary evidence rule where detective accidentally erased video while attempting to copy it]; *People v. Hovarter* (2008) 44 Cal.4th 983, 1014 [secondary evidence admissible where original destroyed in the normal course of business].) We reject the argument that the trial court erred in not conducting further inquiry about how the video was inadvertently erased. Appellant makes no showing that there was a genuine dispute about how the video was lost, the contents of the video, or that justice and fairness required its exclusion. (Evid. Code, § 1521, subds. (a)(1) & (2).)

The alleged error, if any, in receiving Rodarte's testimony was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Rodarte did not identify anyone in the video and her testimony about the contents of the video was cumulative of what was already established by eyewitness testimony. Herrera saw appellant climb over the balcony and testified that "the other two guys were on each edge of my balcony." With the help of Brittany Gamboa, Herrera managed to push appellant off the balcony. Appellant's eight-year-old son, R.D, said that appellant was "grabbing on to my mom" when he was pushed off the balcony and fell to the ground.

Appellant speculates that, but for Rodarte's testimony, the jury would have acquitted on the burglary count

because there was no unlawful entry. The evidence, as previously described, is to the contrary.

Sustained Fear

Appellant argues that the evidence does not show that Herrera suffered *sustained fear* which is an element of the criminal threats statute. (§ 422.) As in any sufficiency of the evidence case, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

In order to convict for making a criminal threat, the prosecution must prove, "(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 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." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

The sustained fear element has a subjective and objective component. The victim must actually be in sustained fear, and the sustained fear must be reasonable under the circumstances. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139-1140.) The sustained fear element is satisfied "where there is evidence that the victim's fear is more than fleeting, momentary or transitory. [Citation.]" (*People v. Culbert* (2013) 218 Cal.App.4th 184, 190.)

Herrera was so afraid of appellant that she called 911 when appellant shined a flashlight in the apartment the night before the burglary. Appellant scaled the balcony the next morning, forced his way into the apartment, and threatened to kill Herrera with what appeared to be a real handgun. Herrera screamed and managed to push appellant off the balcony before making a frantic 911 call. A recording of the 911 call was played to the jury. When Deputy Del Real responded to the call, Herrera was "very distraught, very upset," and still shaking. The evidence clearly shows that Herrera suffered sustained fear. "When one believes [s]he is about to die, a minute is longer than 'momentary, fleeting, or transitory.'" For purposes of establishing sustained fear under section 422. (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349.)

The objective element of sustained fear was satisfied based on the prior acts of domestic violence and threats to kill or harm Herrera. (See, e.g., *In re Ryan D.* (2002) 100 Cal.App.4th 854, 860; *People v. Wilson* (2010) 186 Cal.App.4th 789, 808.) Despite prior police contacts, appellant continued to threaten Herrera and twice choked Herrera in front of their son. The oldest daughter, R.C., witnessed another violent incident in which appellant shut a door on Herrera's arm. Substantial

evidence supports the finding that the April 11, 2015 threat to kill Herrera caused Herrera to be in sustained fear for her safety and the safety of her children. (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.)

Two-Year Sentence for Criminal Threats

Appellant was sentenced to 17 years state prison on the burglary count and a concurrent two years on count 2 for making criminal threats.[4] Appellant asserts, and the Attorney General agrees, that the two-year sentence should be stayed because the criminal threat was made during the commission of the burglary. (See *People v. Centers* (1999) 73 Cal.App.4th 84, 98.) The prosecution's case was based on the theory that appellant burglarized the apartment for the sole purpose of threatening Herrera. Where the defendant commits both burglary and the underlying felony pursuant to a single intent and objective, section 654 permits punishment for one or the other, but not for both. (*Ibid*.) Section 654's prohibition of double punishment requires that the sentence on count 2 for criminal threats be stayed.

Motion to Strike Prior Strike Conviction

Appellant claims that the trial court abused its discretion in denying his *Romero* motion (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497) to strike the 2001 conviction for attempted murder. Appellant argues that the prior strike conviction is remote in time, that he committed no serious

[4] Selecting count 1 for burglary as the principal term, the trial court imposed an upper six-year term, doubled the sentence based on the prior strike, and added five years on the serious felony conviction enhancement for an aggregate sentence of 17 years state prison.

or violent offenses after he was released from prison in 2006, and that he falls outside the spirit of the Three Strikes law. In reviewing the trial court's ruling, we "must consider whether, in light of the nature and circumstances of [defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [spirit of the Three Strikes law], in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The failure to strike a prior strike conviction constitutes an abuse of discretion only in an extraordinary case and requires a showing that the trial court's decision is so irrational or arbitrary that no reasonable person could agree with it. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

The trial court found that the current offenses, like the prior conviction for attempted murder, were *quite serious*. The violent nature of the offense was consistent with the prior conviction for attempted murder, an egregious crime that showed a high level of violence and callousness.

With respect to appellant's background, character, and prospects, the record shows that appellant continued to reoffend after he served his prison sentence for attempted murder.[5] The trial court found that appellant had "run-ins with

[5] The probation report states that appellant is a gang member, uses methamphetamine and alcohol on a daily basis, and has multiple convictions for driving under the influence of a controlled substance. Appellant's criminal record as a juvenile includes possession of marijuana, possession of a firearm with priors (1995) and taking a vehicle (1998). Appellant's adult criminal history includes convictions for being under the

the law" and "problems with drugs." Based on appellant's age and recidivism, his history of domestic violence, the prior conviction for attempted murder, and appellant's failed attempts at parole and probation, the trial court did not abuse its discretion in denying the *Romero* motion. (See, e.g., *People v. Williams*, *supra*, 17 Cal.4th at p. 164; *People v. Carmony*, *supra*, 33 Cal.4th at pp. 378-379.)

Disposition

The judgment is modified to stay the two-year sentence on the criminal threats count (count 2) pursuant to section 654. The superior court clerk is directed to modify the abstract of judgment to so reflect and to forward a certified copy of the abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment as modified is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

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influence of a controlled substance (1999 & 2000), driving with a suspended license (2000), attempted murder (2001), two counts of driving with a suspended license (2008 & 2009), and contempt of court (2015).

Michael A. Cowell, Judge

Superior Court County of Los Angeles

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