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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALFREDO SALOMON, Defendant and Appellant.	B232768 (Los Angeles County Super. Ct. No. MA046078)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed and remanded with directions.

James Koester, 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, Linda C. Johnson and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Alfredo Salomon, was convicted of: five counts of criminal threats (Pen. Code,[1] § 422); five counts of resisting an executive officer (§ 69); methamphetamine possession (Health & Saf., § 11377, subd. (a)); and firearm possession by a felon. (§ 12021, subd. (a)(1)). The trial court found defendant had: sustained two prior convictions within the meaning of sections 667, subdivision (b) through (i) and 1170.12; sustained one prior serious felony conviction within the meaning of section 667, subdivision (a)(1); and had served a prior separate prison term within the meaning of section 667.5, subdivision (b). Defendant was sentenced to 2 life terms, 30 years to life consecutive to 25 years to life. We affirm the judgment and remand with directions.

II. BACKGROUND

On June 24, 2009, Detectives Richard O'Neal, Edwin Barragan, Anthony Delia, and Tyrone Barry and Deputies Jason Howell and Robert Springer were conducting an investigation. A supervisor identified only as Sergeant Wilson was in command. They were wearing uniforms or raid jackets identifying them as members of the Los Angeles County Sheriff's Department. They went to Amanda Salomon's apartment to speak with her. Ms. Salomon is defendant's sister.

As Detective Barragan and Deputies Howell and Springer approached the apartment, defendant was standing outside. Defendant quickly entered the apartment, closed the door and locked it. A woman named Laura Tirado answered Detective Barragan's knock and opened the door. Ms. Tirado and defendant had a relationship that had ended six years earlier. They had a child together. As the deputies, detectives and Sergeant Wilson stepped inside, Ms. Salomon emerged from a rear bedroom. She agreed

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[1] All further statutory references are to the Penal Code except where otherwise noted.

to speak with the officers. Detective O'Neal escorted Ms. Salomon and her two children back into the rear bedroom and closed the door.

As they entered the apartment, they identified themselves as, "Sheriff's department." Defendant was standing in the living room with his left shoulder pointed toward the deputies, detectives and Sergeant Wilson. Defendant was sweating and appeared to be extremely nervous. He kept looking from side to side. There was an obvious bulge in defendant's basketball shorts. Detective Barragan decided to frisk defendant. Thereupon, defendant was directed to show his hands, place them behind his back, turn around and walk backwards.

Detective Barragan started to conduct a pat-down. Defendant was extremely sweaty and extremely nervous. Detective Barragan touched defendant who then tensed up. This heightened Detective Barragan's attention. Detective Barragan felt a gun on the inner portion of defendant's thigh but could not grab hold of it. According to Detective Barragan, the gun seemed to be underneath defendant's clothing. Detective Barragan was positive that it was a gun. He alerted the others that defendant had a gun by stating, "He's got 417." Defendant turned around, looked at Detective Barragan and said: "What? What?" Defendant tried to break free. Defendant began to struggle with Detective Barragan. Deputy Delia came to Detective Barragan's assistance. Sergeant Wilson told the others, "[T]ake him down to the ground."

Defendant was forced to the floor. Defendant continued to struggle violently. He reached for the gun. And he repeatedly yelled: "Get off of me. Get off of me. I'm going to fucking kill you." The deputies and detectives feared for their lives and the lives of the civilians present. Deputy Howell struck defendant's ankle with his flashlight. This was done to prevent defendant from reaching for the gun. Detective Delia managed to place a handcuff on defendant's right hand and pull hard. Detective Delia was trying to get defendant's arm away from the gun. Defendant's arm was pulled behind his back. Detective Barry reached inside defendant's pants and pulled out the gun. It was tethered to defendant's waist with a nylon cord. Detective Barry cut the cord with a knife.

Defendant was subdued and handcuffed. From 90 to 120 seconds passed from the time Detective Barragan discovered defendant was armed until the struggle ended.

Detective Barragan testified: "[When defendant began shouting], I was extremely afraid that he was going to actually take hold of that gun and harm either myself or one of my other partners. There were also children inside the house, and my fear level just went up the roof." Detective Delia "[a]bsolutely" took defendant's threat seriously. When Deputy Springer heard the threat, he felt "[v]ery intense" fear. Deputy Howell was terrified. Deputy Howell knew defendant had a gun. Defendant Howell testified he took the threat so seriously that, "The only reason I did not shoot him is because it wasn't safe with all the deputies around." Detective Barry also took the threat "[v]ery seriously" in his words. Detective Barry described defendant's actions: "He had his hand inside his shorts. He was wearing basketball shorts, the baggie type shorts. His hand was inside the shorts." Detective Barry knew defendant had a gun. Detective Barry saw defendant reaching for the gun. Detective Barry feared defendant would fire it. Detective Barry felt fear from the onset of the struggle until defendant was subdued.

The gun, a double-barreled pistol, was loaded with one live .22-caliber round. Defendant also was in possession of .89 grams of methamphetamine. There was a small digital scale on the kitchen table with what appeared to be methamphetamine residue on it. There was also a cellular telephone on the kitchen table. Defendant admitted owning the scale and the telephone. Deputy Barry saw two recent text messages on the telephone that related to narcotics transactions. Deputy Barry believed the methamphetamine was possessed for purposes of sale.

III. DISCUSSION

A. Sufficiency Of The Criminal Threat Evidence

Defendant challenges the sufficiency of the criminal threat evidence. We view the evidence in the light most favorable to the judgment to determine whether any rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 309; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) Our Supreme Court has divided the criminal threat crime into 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 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—which may be 'made verbally, in writing, or by means of an electronic communication device'—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 of for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]" (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228; accord, *In re George T.* (2004) 33 Cal.4th 620, 630.)

Defendant argues there was insufficient evidence as to the second and fourth elements. Defendant asserts the officers could not have taken his mere angry outburst seriously. Defendant further asserts the deputies and detectives did not suffer sustained fear because the struggle to subdue him and secure the weapon lasted, at most, two minutes.

There was substantial evidence defendant said the words, "I'm going to fucking kill you" with the specific intent that they be taken as a threat. We look to the words used and the surrounding circumstances. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1433; *People v. Butler* (2000) 85 Cal.App.4th 745, 753-754; *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340-1341.) Defendant, while armed, engaged in a violent struggle, resisting the authorities, and reaching for his gun, repeatedly and specifically said, "I'm going to fucking kill you." Defendant knew when he uttered those words that he was in possession of a loaded weapon and that Detective Barragan had felt the gun on

defendant's person. Defendant made an unconditional threat of death. (See, e.g., *People v. Toledo, supra,* 26 Cal.4th at p. 225 [defendant said to victim, "You know, death is going to become you tonight, I am going to kill you"]; *People v. Fierro* (2010) 180 Cal.App.4th 1342, 1348 [defendant displayed a weapon and said, "'I will kill you'" "'ahorita'" (right now)]; *People v. Hamlin, supra,* 170 Cal.App.4th at pp. 1433-1434 [defendant threatened to kill victim after demanding she "'just start answering these fucking questions'" and she "'better fucking come clean'"].) This was substantial evidence defendant made the statement, "I'm going to fucking kill you" with the specific intent that it be taken as a threat.

There was substantial evidence the threat actually caused the officers to be in sustained fear for their safety. Section 422 does not define "sustained" fear. (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) However, Division Three of the Court of Appeal for this appellate district has held, "Defining the word 'sustained' by its opposites, we find that it means a period of time that extends beyond what is momentary, fleeting, or transitory." (*People v. Allen, supra,* 33 Cal.App.4th at p. 1156; accord, *People v. Wilson* (2010) 186 Cal.App.4th 789, 808; *People v. Fierro, supra,* 180 Cal.App.4th at p. 1349; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1024.) Detectives Barragan, Delia and Barry, as well as Deputies Springer and Howell, each suffered intense fear during the 90 to 120 seconds of violent struggle. The requisite fear was sustained while defendant, who was armed and reaching for his weapon, repeatedly threatened to kill them. It was a highly charged situation. This was substantial evidence the officers were in *sustained* fear for their safety. (*People v. Fierro, supra,* 180 Cal.App.4th at p. 1349.)

B. The Jury's "Duress" Question

During deliberations, the jury sought clarification of CALJIC Nos. 2.02 (circumstantial evidence of specific intent)[2] and 9.94 (criminal threats).[3] The trial court asked the jury to be more specific. The jury subsequently inquired: "One juror is stating that they do not believe the statement, 'I'm going to f---- kill you,' was willfully stated. They believe it was stated under 'duress,' during the beating. The juror believes instruction 2.02 applies. Is this the correct application of instruction 2.02?"

The trial court gave the following response verbally and in writing: "It sounds as if the jury may be confusing a few of the legal concepts related to the crime of Criminal

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[2] The jury was instructed pursuant to CALJIC No. 2.02 as follows: "The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime[s] charged in Counts 1, 2, 3, 4 [criminal threats], and 7 [controlled substance possession], unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or mental state but (2) cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

[3] CALJIC No. 9.94 provided in part: "Defendant is accused in Counts 1, 2, 3, 4, and 5 of having violated section 422 of the Penal Code, a crime. [¶] Every 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 threat, 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, is guilty of a violation of Penal Code section 422, a crime. [¶] . . . In order to prove this crime, each of the following elements must be proved: [¶] . . . [¶] 2. The person who made the threat did so with the specific intent that the statement be taken as a threat[.]"

Threats. [¶] If you look at CALJIC 9.94, you will see a breakdown of the 5 elements that the People are required to prove beyond a reasonable doubt before you can find the defendant guilty of Making a Criminal Threat. [¶] Element 1 requires that the defendant willfully threatened to commit a crime which, if committed, would result in death or great bodily injury to another person. [¶] As you were instructed in CALJIC 1.20, the word 'willfully,' when applied to the intent with which an act is done, means with a purpose or *willingness to commit the act in question.* So, for example, if you are considering whether a statement was 'willfully made,' that simply means with a purpose of making the statement, as opposed to an accidental utterance. There is no specific intent required for one to act willfully. [¶] Element 2 requires that the defendant made the threat with the specific intent that the statement be taken as a threat. [¶] In deciding whether the defendant possessed the specific intent required in Element 2, you may consider all of the circumstantial evidence regarding the conditions under which the statement was made to determine whether or not he possessed the specific intent that the statement be taken as a threat. When considering circumstantial evidence regarding this specific intent, the jury should consider CALJIC 2.02. [¶] The last sentence of CALJIC 9.94 reads, 'it is immaterial whether the person who made the threat actually intended to carry it out.' [¶] You were not instructed on the defense of duress, because it does not apply in this case."

Defendant's counsel, Margis Matulionis, objected only to the last sentence stating: "I'm still worried about the last sentence. I think they need more clarification." The trial court responded: "And the last sentence simply reads, 'You are not instructed on the defense of duress because it does not apply in this case.' I really cannot state it any better or clearer than that. There is a legal defense of duress. It doesn't apply in this case. Because it doesn't apply, they weren't instructed. I don't want to confuse the issues any more by giving them the legal instruction that doesn't apply to the facts in this case. [¶] What we need to do is take their focus off of something that isn't before them. And by mentioning duress and putting it in quotes, it sounds to me like they're considering a legal theory that doesn't apply. So your objection's noted but I'm still going to instruct them accordingly."

Defendant argues the jury's question was whether his threat was "not willfully spoken" but "the result of 'duress.'" Defendant reasons the duress arose from the deputies' and detectives' sudden, overwhelming, excessive use of force. In other words, defendant asserts, the jurors were questioning whether the excessive force caused him to be under duress in the everyday sense of the word. Defendant contends the response to the jury's question not only misled them "in deciding the willful element of the criminal threats," but constituted a misinstruction on that point. This argument was not raised in the trial court. As a result, it cannot be raised on appeal. (*People v. Dykes* (2009) 46 Cal.4th 731, 802; see generally, e.g., *People v. Fuiava* (2012) 53 Cal.4th 622, 691; *People v. Riggs* (2008) 44 Cal.4th 248, 324.)

Even if defendant had not forfeited the argument, we would not find any abuse of discretion. Section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, *or if they desire to be informed on any point of law arising in the case,* they must require the officer to conduct them into court. Upon being brought into court, the information required must be given . . . ." (Italics added.) Our Supreme Court has explained, "The court is under a general obligation to 'clear up any instructional confusion expressed by the jury,' but '[w]here . . . the original instructions are themselves full and complete, the court has discretion . . . to determine what additional explanations are sufficient to satisfy the jury's request for information.' [Citations.]" (*People v. Dykes, supra,* 46 Cal.4th at p. 802; accord, *People v. Beardslee* (1991) 53 Cal.3d 68, 97; *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 316-317.) Here the trial court appropriately directed the jury's attention to the pertinent instructions. The trial court in its discretion could reasonably conclude any further discussion of the subject would be confusing and counterproductive as defendant's "duress" was not a relevant consideration.

And even if the trial court erred in responding to the jury's question, it is not reasonably probable the result would have been more favorable to defendant absent the error. (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1020; *People v. Eid* (2010) 187 Cal.App.4th 859, 882; *People v. Solis, supra,* 90 Cal.App.4th at p. 1015 [*Watson* test

applies]; see *People v. Beardslee, supra,* 53 Cal.3d at p. 97 ["A violation of section 1138 does not warrant reversal unless prejudice is shown"].) The jury was well aware defendant uttered the threat while engaged in a violent struggle. The jury was not required to find defendant intended to actually carry out his threat. (*In re George T., supra,* 33 Cal.4th at p. 630; *People v. Toledo, supra,* 26 Cal.4th at pp. 227-228.) Therefore, even if the jury concluded defendant only sought to stop the violent struggle, it would likely still find he intended his words be taken as a threat. Defendant has not shown further clarification of the instructions would have led the jury to conclude he did not specifically intend that his words be taken as a threat. We would reach the conclusion the alleged error was harmless if we applied the *Chapman v. California* (1967) 386 U.S. 18, 22 standard of review. (*People v. Flood* (1998) 18 Cal.4th 470, 502-503.)

C. The Trial Court's Section 1385, Subdivision (a) Discretion

Defendant argues the trial court abused its discretion when it declined to strike one of the two prior convictions alleged under sections 667, subdivisions (b) through (i) and 1170.12. Defendant reasons his two prior convictions were adjudicated in a single matter, case No. VA006602. Further, he committed those crimes in 1990, nearly 20 years prior to the present offenses, when he was only 16 years old. Our review is for an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 373-376; *People v. Smith* (2012) 203 Cal.App.4th 1051, 1062-1063.) No abuse of discretion occurred.

A trial court has discretion under section 1385, subdivision (a) to strike a prior felony conviction allegation in furtherance of justice. (*People v. Carmony, supra,* 33 Cal.4th at p. 373; *People v. Superior Court (Romero)*(1996) 13 Cal.4th 497, 529-530.) Our Supreme Court has directed that in exercising that discretion: "[The trial court] must consider whether, in light of the nature and circumstances of his 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 scheme's sprit, 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; accord, *People v. Carmony, supra,* 33 Cal.4th at p. 377.) On appeal, the burden is on defendant to clearly show the trial court's decision was irrational or arbitrary. (*People v. Carmony, supra*, 33 Cal.4th at pp. 376-377; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Defendant had a long criminal history dating from 1988 to 2009 when he was arrested for the offenses at issue here. As a juvenile, in May 1988, defendant had a sustained petition for possession, manufacture or sale of a dangerous weapon. (Pen. Code, § 12020, subd. (a).) He was ordered to camp community placement. Also as a juvenile, in July 1989, a petition alleging marijuana possession (Health & Saf. Code, § 11357, subd. (b)) was sustained and defendant was again ordered to camp community placement. In September 1992, defendant was convicted in case No. VA006602 of two counts of firearm assault. (Pen. Code, § 245, subd. (a)(2).) He was sentenced to nine years in state prison. At the time of his arrest, on September 13, 1990, defendant was 16 years old. In March 1996, defendant was convicted of being a felon in possession of a firearm. (Pen. Code, § 12021, subd. (a)(1).) He was sentenced to six years in prison. In December 2002 and again in October 2004, defendant was arrested on parole violations and ordered to finish his term. In July 2007, defendant was convicted of misdemeanor corporal injury infliction. (Pen. Code, § 273.5, subd. (a).) He was placed on three years' probation. A violation hearing was scheduled in the trial court for March 10, 2010. And in April 2009, defendant was convicted of driving with a suspended license (Veh. Code, § 14601.1, subd. (a)), a misdemeanor. He was placed on three years' summary probation. The matter was set for a violation hearing in the trial court on March 10, 2010. On June 24, 2009, however, defendant was arrested on the present charges.

Defendant's criminal history was repeated and continuous over a 21-year period. He was only 14 when he was first arrested on a dangerous weapon charge. He had previously been found to have committed two serious felonies. The serious and recidivist nature of his crimes demonstrate he is a danger to the public. Defendant has failed to

show that the trial court abused its discretion when it deemed him not outside the spirit of sections 667, subdivisions (b) through (i) and 1170.12.

D. The Abstract of Judgment

The abstract of judgment reflects that the sentences on counts 6 and 9 through 12 were stayed under section 654, subdivision (a). The parties agree that the abstract of judgment must be amended to also reflect that the sentence on each of those counts was 25 years-to-life. Additionally, the trial court orally imposed a $50 criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)) "plus penalty assessments." The use of the phrase "plus penalty assessments" reflects the trial court's intent that the mandatory penalties and surcharge be added to the criminal laboratory analysis fee. (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1372-1373; *People v. Sharret* (2011) 191 Cal.App.4th 859, 864.) The parties agree that the abstract of judgment must be amended to reflect both the $50 fee and $130 in penalty assessments, specifically: a $50 state penalty (§ 1464, subd. (a)(1)); a $35 county penalty (Gov. Code, § 76000, subd. (a)(1)); a $10 state surcharge (Pen. Code, § 1465.7, subd. (a)); a $15 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)); a $5 deoxyribonucleic acid penalty (Gov. Code, § 76104.6, subd. (a)(1)); a $5 state-only deoxyribonucleic acid penalty (Gov. Code, § 76104.7, subd. (a)); and a $10 emergency medical services penalty (Gov. Code, § 76000.5, subd. (a)(1)).

IV. DISPOSITION

The judgment is affirmed. Upon remittitur issuance, the abstract of judgment must be amended to reflect that the sentence on each of counts 6 and 9 through 12 was 25 years to life. Further, the abstract of judgment must be amended as discussed in part III (D) of this opinion to reflect imposition of the penalties and surcharge. The superior court clerk must then deliver a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

MOSK, J.

KRIEGLER, J.