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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CORNELIUS WALKER, Defendant and Appellant.	A128000 (Alameda County Super. Ct. No. 161979)

On appeal from a judgment of conviction following a jury trial, defendant Cornelius Walker contends insufficient evidence supports his conviction of criminal threats (Penal Code[1], § 422) and that the trial court erred in failing to instruct the jury on the offense of attempted criminal threats. Defendant also contends the trial court improperly imposed a one-year sentence enhancement pursuant to section 677.5, subdivision (b). We shall direct the trial court to strike the one-year enhancement and otherwise affirm the judgment.

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

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by information with one count of attempted murder causing great bodily injury while personally using a deadly weapon (§§187, subd. (a), 664, 12022.7, subd. (a), & 12022, subd. (b)(1)); one count of assault with a deadly weapon (§§ 245, subd. (a)(1) & 1192.7, subd. (c)); and one count of making criminal threats (§ 422). The information included various prior conviction and prison term enhancement allegations.

A jury found defendant guilty on all counts, and all enhancements were found true. In a bifurcated court trial, the trial court found defendant's prior conviction allegations to be true and sentenced defendant to 25 years and 4 months in state prison.

A. Prosecution Case

On June 11, 2009, Charanjit Kumar[2] was working as a cashier at the 7-Eleven on Buena Vista Avenue in Alameda, California. At approximately 6:00 p.m., defendant walked into the store after all the other customers had left. He told Kumar he was going to kill him and that it was time for defendant to "pay [Kumar] back." As he was saying this, defendant moved closer to Kumar, who was behind the cash register. Defendant was angry and shaking while he repeatedly said he was going to kill Kumar. In total, defendant said five or six times that he would kill Kumar. This made Kumar feel "scared" and "afraid." He also described himself as "worried to some extent but not too much." Defendant paid for his items and left, and Kumar told his boss's cousin that defendant had threatened him. His boss's cousin said " 'he's not going to do anything to you, just ignore it.' " Regardless, Kumar still felt afraid. Kumar told his boss's cousin to save the surveillance video in case anything happened to him in the near future.

Kumar next saw defendant on June 18, 2009, at approximately 8:00 p.m. Kumar was walking along Buena Vista Avenue with his girlfriend and saw defendant approaching them, carrying a black backpack. Defendant pushed Kumar and said " 'you remember what you did to me at the 7-Eleven?' " Kumar replied that he had done

[2] Mr. Kumar testified through a court certified Punjabi interpreter.

nothing wrong to him at the 7-Eleven. Defendant became angry and said " 'you remember, you remember, I'm going to show you right now,' " and " 'I will kill you.' " Kumar pleaded with defendant to leave him alone. Defendant then said " 'take your bitch and go home.' " Kumar became upset and moved toward the defendant. He said he was going to call the police, and took out his cell phone and tried to dial. Defendant hit Kumar's hand and knocked the phone to the ground. Defendant then reached into his bag, which he placed in the back of a nearby truck, brought something out, and began hitting Kumar on the left side of his body. While defendant was hitting Kumar, he repeatedly said he was going to kill him. When defendant finally stopped hitting Kumar, he said he had been unable to kill Kumar but successful in sending him to the hospital. Defendant then picked up his bag and took off.

Kumar was bleeding and said defendant had stabbed him, although neither Kumar nor his girlfriend saw a weapon. Kumar underwent surgery for his injuries, which included three puncture wounds on his side and damage to his stomach.

B. Defense Case

Defendant testified in his own defense. He claimed the videotape footage of the June 11th events at the 7-Eleven did not accurately reflect what happened between him and Kumar. Instead, defendant testified that when he went to the 7-Eleven that evening, Kumar grabbed his crotch three times and said " 'you faggot,' " and defendant said " 'man, you better be careful, somebody gonna hurt you.' " He denied threatening Kumar.

Defendant next saw Kumar on June 18th near the 7-Eleven. They spoke briefly before Kumar hit defendant in the face and continued punching him. Defendant pulled out a pocketknife and held it straight out in front of him while Kumar "kept coming" at him, running into his knife several times.

II. DISCUSSION

A. Sufficiency of Evidence Supporting Criminal Threat Conviction

Defendant contends the evidence is insufficient to support his conviction of making criminal threats on June 11, 2009. He argues that his statements were mere

"inflamed and vituperative utterances" that did not convey gravity of purpose and immediate prospect of execution, and that the evidence did not show Kumar was placed in sustained fear.

In considering a challenge to the sufficiency of the evidence, the appellate court must draw all inferences in support of the verdict that can reasonably be deduced and must uphold the judgment if, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. (*People v. Jackson* (1989) 49 Cal.3d 1170, 1199-1200.) The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. (*People v. Mosher* (1969) 1 Cal.3d 379, 395.) Substantial evidence is defined as "evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) An appellate court will not reverse on sufficiency of the evidence unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The California Supreme Court has made clear that "not all threats are criminal." (*In re George T.* (2004) 33 Cal.4th 620, 630.) In order for a defendant's actions to constitute a criminal threat, the prosecution must establish the following: "(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 . . .," and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228 (*Toledo*); see also § 422.) The determination of whether a defendant's words were

sufficiently "unequivocal, unconditional, immediate and specific" that they demonstrated defendant's " 'gravity of purpose' " and immediate " 'execution of the threat' " "can be based on all of the surrounding circumstances and not just on the words alone." (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340.) Moreover, "[a]lthough section 422 does not require an intent to actually carry out the threatened crime, if the defendant does carry out his threat, his actions might demonstrate what he meant when he made the threat, thereby giving meaning to the words spoken." (*People v. Martinez* (1997) 53 Cal.App.4th 1212, 1220-1221 (*Martinez*).)

The evidence easily supports a finding that defendant made criminal threats. Defendant's threats to kill Kumar were unambiguous. (Compare *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1138 [" 'I'm going to get you' " is ambiguous on its face].) Moreover, defendant followed up his threats by attacking and stabbing Kumar a week later. His words, particularly when viewed in light of his subsequent actions, are susceptible to an interpretation that he made a "grave threat to [Kumar's] personal safety." (See *Martinez, supra*, 53 Cal.App.4th at p. 1221.)

The evidence is also sufficient to support a conclusion that Kumar was placed in sustained fear for his safety. Sustained fear is fear that "extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) No specific time period is required, and the test is "not the duration of time so much as the extent of the reflection." (*Id.*, p. 1156, fn. 6.) It has been held that fifteen minutes may be sufficient to satisfy the " 'sustained' fear" element of section 422." (*Id.* at 1156.)

Defendant points out that at one point in his testimony, Kumar said he had been "worried to some extent but not too much." However, he also testified that he had been scared and afraid after defendant threatened to kill him, and that he was worried about what would happen in the future. Kumar waited for a short time after defendant left the store, then reported the threats to his supervisor and asked to have the security tape preserved, so that if anything happened to him in the near future there would be evidence of the encounter. A jury could properly conclude from this evidence that Kumar was placed in sustained fear. It could also conclude that his fear was reasonable. Defendant

repeatedly and angrily stated he wanted to kill Kumar. He was a regular patron at the 7-Eleven, lived nearby, and knew where to find Kumar if he wanted to carry out his threats. Under the circumstances, substantial evidence supports the conviction of making criminal threats.

B. Failure to Instruct on Attempted Criminal Threats

Defendant also contends that his conviction of making criminal threats must be reversed because the trial court failed to instruct sua sponte on the lesser included offense of attempted criminal threats.

The sua sponte duty to instruct on a lesser included offense arises if there is substantial evidence the defendant is guilty of the lesser offense, but not the charged offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 177.) "This standard requires instructions on a lesser included offense whenever ' "a jury composed of reasonable [persons] *could . . . conclude*[]" ' that the lesser, but not the greater, offense was committed. [Citation.] In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight." (*Ibid.*)

A defendant may be found to have committed an *attempted* criminal threat under several circumstances, including where the threat does not actually cause the threatened person to be in sustained fear for his or her safety. (*Toledo, supra,* 26 Cal.4th at 231.) Defendant contends the jury should have been instructed on attempted criminal threats because there was evidence from which it could conclude Kumar was not in sustained, reasonable fear. In particular, he points to Kumar's failure to call the police or to ask for an escort home after the June 11 incident and his testimony at trial that he was "worried to some extent but not too much."

In our view, this does not constitute substantial evidence that Kumar was not in sustained fear. Even in testifying that he was "worried to some extent but not too much," Kumar explained that he was worried about what would happen in the future. And although he did not call the police, he took the precaution of asking his supervisor to preserve the surveillance tape to be used as evidence in case anything happened to him. (Compare to *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 606-607 [attempted criminal

threats conviction appropriate where victim did not testify at trial to provide evidence of whether he was in "sustained fear"].) In light of Kumar's consistent testimony of his fear, the trial court was under no duty to instruct on attempted criminal threats.[3]

C. One-Year Sentence Enhancement

Finally, defendant contends that the trial court erroneously imposed a one-year enhancement under Penal Code § 667.5, subdivision (b). Section 667.5, subdivision (b) requires the trial court to impose a one-year sentence enhancement for each prior prison term served for a felony, "provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction."

The trial court imposed a one-year enhancement pursuant to section 667.5, subdivision (b). Defendant argues that there is no evidence he suffered prison confinement or committed a felony between 2003 and the commission of the offenses at issue here, and that the one-year enhancement should therefore be stricken. The Attorney General concedes this point. We have examined the probation officer's report and the records provided by the California Department of Corrections (§ 969b), and we agree that the enhancement should be stricken.

III. DISPOSITION

The case is remanded to the trial court with instructions to strike the one-year sentence enhancement pursuant to Penal Code section 667.5, subdivision (b). In all other respects, the judgment is affirmed.

[3] In any case, even if the trial court erred in not so instructing the jury, it was not reasonably probable that the error affected the jury's verdict. Any error was therefore harmless. (See *Breverman, supra*, 19 Cal.4th at pp. 177-178.)

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RIVERA, J.

We concur:

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RUVOLO, P.J.

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REARDON, J.