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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. DOUGLAS ALLEN SCHNATHORST, Defendant and Appellant.	C043505 (Super. Ct. No. CR022045)

APPEAL from a judgment of the Superior Court of Yolo County, Michael W. Sweet, J. Affirmed as modified.

Richard D. Miggins under appointment by the Court of Appeal for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, John G. McLean and R. Todd Marshall, Deputy Attorneys General for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts II through IV, inclusive, of the DISCUSSION.

A jury convicted defendant Douglas Allen Schnathorst of assault with a deadly weapon upon a peace officer (Pen. Code, § 245, subd. (c); count 1; undesignated statutory references are to the Penal Code), theft of an emergency vehicle (Veh. Code, § 10851, subd. (b); count 3), resisting an executive officer by threat, force or violence (§ 69; count 5), threatening to commit a crime resulting in death or great bodily injury (§ 422; count 6), misdemeanor elder abuse (§ 368, subd. (c); count 7), misdemeanor battery on a peace officer (§ 243, subd. (b); count 10), exhibiting a weapon against a peace officer with intent to resist arrest (§ 417.8; count 12), and misdemeanor vandalism (§ 594, subds. (a), (b)(2)(A); count 13).[1] He was sentenced to state prison for five years eight months, and to county jail for 180 days with 180 days of presentence credit.

On appeal, defendant contends (1) his count 6 conviction must be reversed because section 422 does not criminalize threats made to a peace officer, (2) the evidence on count 6 was insufficient, (3) counts 3, 5, and 12 must be stayed pursuant to section 654, and (4) the jail term on count 13 must run concurrently with the prison sentence, thus entitling him to 180 days of presentence credit. In the published portion of the

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[1] Defendant was acquitted of carjacking (§ 215, subd. (a); count 2), second degree robbery (§§ 211, 212.5, subd. (c); count 4), and removing or injuring a telegraph, telephone, cable television or electrical line (§ 591; count 9). The trial court dismissed charges of elder abuse (§ 368, subd. (c); count 8) and exhibiting a deadly weapon (§ 417, subd. (a)(1); count 11).

opinion, we conclude that section 422 criminalizes threats against a police officer. In the unpublished portion, we reject defendant's other contentions, except that we conclude defendant's sentence on count 5 must be stayed pursuant to section 654. We shall therefore modify the judgment by staying the sentence on count 5 pursuant to section 654. We shall then affirm the judgment as modified.

FACTS

Prosecution Case-in-Chief

Defendant is the youngest child of William and Rosemarie Schnathorst.[2] He resided in their home off and on for 10 years. Defendant and Rosemarie had arguments because he would violate house rules. The Schnathorsts wanted defendant to move out because he did not obey their rules and it was time for him to move on.

On March 31, 2002, Rosemarie arose early to begin preparing a family dinner in honor of defendant's 41st birthday. Defendant became upset because Rosemarie did not want him to eat some food she had prepared for her six-year-old grandson. Defendant was ranting and raving about the food, and William became involved in the argument. Defendant said, "I've got heat," and made reference to a hostage situation. In response, William telephoned 911. Shortly thereafter, Rosemarie tried to

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[2] For clarity, we shall refer to defendant's parents by their first names.

use a telephone but defendant took the receiver from her hand and pulled out the wire.

Davis Police Officer Matt Franti was the first officer on the scene. As Franti stepped out of his patrol car, he saw defendant running toward him at full speed. Defendant had an object in his hand and was yelling, "I will kill you, you fucking nigger. I will kill you." (Count 6.) Franti got back into his car, closed the door and drove forward, correctly perceiving that defendant would throw the object at the car. The object, identified by Rosemarie as a soft drink container, struck the patrol car between the front and rear doors. Defendant chased Franti as he drove away.

Officer Franti parked his patrol car a few houses away from the Schnathorst residence. He stepped out and told defendant to calm down. Defendant climbed into his own car, got back out and assumed a crouching stance, holding an object that he pointed in Franti's direction. Franti feared for his safety because he was worried that defendant had a gun. Eventually, defendant popped up out of the crouching stance, turned around, and walked in the opposite direction. William testified that defendant used the object, described as a "flexible car part," to break several windows in the Schnathorst residence. (Count 13.)

Davis Police Officer Gary Chudamelka responded to the disturbance and saw defendant brandishing a metal object in a threatening manner. (Count 12.) Defendant charged at Chudamelka's patrol car, yelling racial epithets and threatening to kill Chudamelka. (Count 5.) Chudamelka alit from his car

and yelled, “Davis Police, you are under arrest. Get down on the ground. Stop. Police.”

Officer Chudamelka trained his weapon and pepper spray on defendant. Defendant ran back toward his parents, and Chudamelka gave chase. At that point, defendant hit his father with the metal object. (Count 7.) Then defendant ran at Chudamelka again, carrying the object and saying that he was going to kill him. (Count 1.) Defendant threw the metal object at Chudamelka, striking his head and causing a cut above his left eye. (Count 10.) Chudamelka responded by spraying defendant with pepper spray.

Defendant dove into Officer Chudamelka’s patrol car and sped away. (Count 3.) As defendant left, Chudamelka was able to shoot holes in two of the car’s tires. Chudamelka was concerned because a fully loaded shotgun was in the car.

Yolo County Sheriff’s Deputy Rafael Vicente was driving southbound on Highway 113 when he noticed defendant in Officer Chudamelka’s patrol car. Although he was off duty, Vicente followed the patrol car to a point south of Davis where defendant abandoned the car. Vicente took defendant to the ground, identified himself as a deputy, and repeatedly told him to stop resisting. Defendant kept kicking his legs and swinging his arms.

University of California Police Officer Rolland Bryant responded to Deputy Vicente’s location and took defendant into custody. Defendant continued to flail about and resist while he was being handcuffed. He said, “Let me go, you assholes. You

are all going to die, as soon as I get a chance, I'm going to murder you bastards." On the way to the hospital, defendant said that he stole a police car for his birthday. Defendant also said, "'I was trashing the house and they shot at me, so I took the car and left. My attorney is going to get you guys again, just like last time. He always gets me out of this kind of shit.'" After arriving at the hospital, defendant continued, "I'm sorry for all the trouble I caused, but I'm a member of the clan [*sic*] and we handle our business, so I'm going to get your car next time. I'm going to make sure you are unconscious, kick your nigger ass, you nigger." Defendant also made further references to stealing a police car for his birthday.

Later, Officer Franti saw defendant at the hospital. Defendant called Franti a "nigger" and repeated his comments about stealing a police car for his birthday.

A search of defendant's bedroom, car, and garage revealed nine hypodermic needles and two glass smoking pipes.

Defense

Defendant testified on his own behalf. He acknowledged that for three days preceding his arrest, he had used large quantities of methamphetamine and cocaine and had not slept at all.

Defendant admitted that he argued with Rosemarie about food and that his father telephoned the police. He claimed that it was she, not he, who pulled the cord out of the telephone handset.

Defendant admitted confronting Officer Franti and throwing a soda at him after he tried to hit defendant with the patrol car. Defendant admitted making racial slurs toward Franti and threatening to kill Franti. However, defendant had no weapon and had no ability or intention of carrying out the threat. Defendant claimed he took a crouching stance and acted as if he had a gun in order to get Franti out of the immediate area. When Franti saw him leaning into his car, he was putting a syringe into the back seat.

Defendant admitted breaking windows in his parents' house. He was mad because the police had been called.

Defendant also admitted that he ran toward Officer Chudamelka and used racial slurs. He admitted throwing an object, identified as a speedometer cable, at the officer but he claimed that it missed him. Defendant claimed he jumped into the patrol car because the officer was shooting at him, and he drove away because he was in fear for his life.

Defendant admitted that he resisted Deputy Vicente. He did so because he was in fear for his life.

Defendant admitted making racial slurs at the hospital, and claimed he was only responding to threats the officers made to him.

DISCUSSION

I

Defendant contends his count 6 conviction for making a criminal threat must be reversed because section 422, which applies to threats made against "another person," does not

extend to threats made against a police officer.[3] He claims the phrase is ambiguous and must be construed in light of its legislative history and the objects to be achieved. In particular, he relies on section 186.21, which declares that the Street Terrorism Enforcement and Protection Act of 1988, of which section 422 is a part, was directed at "violent street gangs whose members *threaten, terrorize*, and commit a multitude of crimes against *the peaceful citizens of their neighborhoods*." (§ 186.21; italics added.) Thus, he claims section 422 protects "the local citizenry, . . . not police officers," and the trial court lacked jurisdiction over him with respect to count 6. The claim has no merit.

"Our role in construing a statute is to ascertain the intent of the Legislature in order to effectuate the purpose of the law. [Citation.] Because the statutory language is generally the most reliable indicator of that intent, we look first at the words themselves, giving them their usual and

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[3] Section 422 provides in relevant part: "Any 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, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

ordinary meaning and construing them in context. [Citation.] If the plain language of the statute is clear and unambiguous, our inquiry ends, and we need not embark on judicial construction. [Citations.] If the statutory language contains no ambiguity, the Legislature is presumed to have meant what it said, and the plain meaning of the statute governs. [Citations.]" (*People v. Johnson* (2002) 28 Cal.4th 240, 244.)

There is nothing unclear or ambiguous about section 422's reference to threats of crimes that "will result in death or great bodily injury to another person." (Fn. 3, *ante*.) Thus, judicial construction is not necessary. (*People v. Johnson, supra,* 28 Cal.4th 240, 244.)

The fact that some crimes can be committed *only* against peace officers (e.g., § 69), and other crimes are punished *more severely* when committed against peace officers (e.g., § 243, subd. (b)), does not mean that peace officers are excluded from the protection of laws that apply to persons generally. (See *In re Marcus T.* (2001) 89 Cal.App.4th 468, 473 [juvenile petition identified victim school police officer as "'officer . . . of any public or private educational institution'" for purposes of section 71 allegation and as "'another person'" for purposes of section 422 allegation].) Officer Franti and Officer Chudamelka were entitled to the protection of section 422. Defendant was properly convicted of making a criminal threat to a peace officer.

II

Defendant contends his count 6 conviction for making a criminal threat must be reversed because there was insufficient evidence of an immediate prospect of execution of the threat, and insufficient evidence that Officer Franti was in sustained fear. Neither point has merit.

"'To determine sufficiency of the evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 387, quoting *People v. Johnson* (1993) 6 Cal.4th 1, 38; see *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560].)

"Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." (Evid. Code, § 411; see *People v. Cuevas* (1995) 12 Cal.4th 252, 262; *People v. Scott* (2002) 100 Cal.App.4th 1060, 1064.)

In order to prove a violation of section 422, the prosecution had to show "(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 or 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.)

“‘The use of the word “so” indicates that unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim.’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 340.)

The record contains substantial evidence of a threat that sufficed to convey to Officer Franti a gravity of purpose and an immediate prospect of execution. As Franti stepped out of his patrol car, he saw defendant running toward him at full speed, wielding an object and yelling, “I will kill you, you fucking nigger. I will kill you.” Defendant voiced this threat in anger while carrying an object that Franti could not identify

but could, under the circumstances, reasonably believe was some sort of weapon. The threat was not conditional, nonspecific or vague. Franti testified that he was "in fear of getting hit with" the unknown object, and he was "in fear that it was going to hurt me do damage me [*sic*] if it hit me." Because Franti did not know the nature of the object, he reasonably perceived that defendant was a threat and reasonably feared for his safety. The fact that Franti approached defendant without a drawn weapon or protective cover *after* defendant threw what turned out to be a soda cup does not mean that Franti's earlier fear was unreasonable.

Defendant responded to Officer Franti's approach by climbing into his own car, getting back out and assuming a crouching stance, holding an object that he pointed in Franti's direction. At that point, Franti feared for his safety because he was worried that *defendant had a gun*. Defendant's resort to these further threatening measures extended the period of reasonable fear. His argument that each incident gave rise to no more than a "momentary, fleeting or transitory" fear (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156), rather than the "sustained" fear required by section 422, has no merit. Defendant's count 6 conviction is supported by substantial evidence. (*People v. Carpenter, supra,* 15 Cal.4th 312, 387.)

III

Defendant contends the trial court erred by failing to stay the sentences on counts 3 (theft of an emergency vehicle), 5 (resisting Officer Chudamelka by threat, force or violence), and

12 (exhibiting a weapon against Chudamelka with intent to resist arrest), pursuant to section 654. He reasons that count 1 (assault on Officer Chudamelka with a deadly weapon) and the disputed counts were part of a continuous course of conduct committed with a unitary intent and purpose, to "scare the police away, in order to avoid confrontation and arrest." We agree with this contention in part.

"'The proscription against double punishment in section 654 is applicable where there is a course of conduct which . . . comprises an indivisible transaction punishable under more than one statute . . . . The divisibility of a course of conduct depends upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one.' [Citation.] 'The defendant's intent and objective are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced.' [Citation.]" (*People v. Coleman* (1989) 48 Cal.3d 112, 162; see *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

Moreover, "'[i]t seems clear that a course of conduct *divisible in time*, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]' [Citation.] Thus, a finding that multiple offenses were aimed at one intent and objective does not necessarily mean that they constituted 'one indivisible course of conduct' for purposes of

section 654. If the offenses were committed on different occasions, they may be punished separately.” (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253.)

The record supports an implied finding that counts 5 and 12 were committed *before* defendant attacked his father in count 7, whereas count 1 was committed *after* the count 7 attack. (*People v. Coleman, supra,* 48 Cal.3d 112, 162.) Thus, counts 5 and 12 may be punished separately from count 1. (*People v. Kwok*, *supra*, 63 Cal.App.4th 1236, 1253.) The record also supports an implied finding that defendant committed count 3 *after* count 1, for an entirely separate purpose: by his own admission, to protect himself from being shot. Thus, count 3 may be punished separately from count 1. (*People v. Coleman, supra,* 48 Cal.3d at p. 162.)

However, the record does not suggest that defendant resisted Officer Chudamelka in count 5, and exhibited a weapon against him in count 12, with materially differing intents and objectives or at materially different times.[4] Because both counts were committed at the same time with the same intent, punishment for both is not permissible. We shall modify the judgment to stay sentence on count 5 pursuant to section 654.

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[4] The People suggest defendant had two relevant objectives: to hurt, injure or kill police officers; and to avoid arrest on his birthday. However, the evidence does not establish the relative extent to which each objective operated on count 5 and count 12.

IV

Defendant contends the trial court erred at sentencing when it failed to state whether the 180-day jail term on count 13 was to run consecutively or concurrently to the felony counts; thus, by operation of law (§ 669), the term must run concurrently and the 180 days of presentence credit that was used to satisfy the sentence on count 13 must instead be applied against the prison sentence. This claim has no merit.

The trial court found that defendant was entitled to 501 days of presentence credit. Then, on count 13 (misdemeanor vandalism), the court imposed "a 180 day jail sentence and award[ed] 180 days credits." The court then calculated the remaining presentence credit, which it ultimately determined to be 321 days.

By using defendant's presentence credit to satisfy the 180-day term on count 13, the trial court effectively determined that the sentence was to be served consecutively. Had the court intended a concurrent sentence, there would have been no reason to apply defendant's presentence credit to the misdemeanor term. On this record, section 669 has no application.

DISPOSITION

The judgment is modified to stay sentence on count 5 pursuant to Penal Code section 654. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to

the Department of Corrections.

SIMS, J.

We concur:

SCOTLAND, P.J.

RAYE, J.