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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

KELON DARYL JOHNSON,

Defendant and Appellant.

A107062

**(Lake County
Super. Ct. No. CR035568)**

Kelon Daryl Johnson appeals his conviction by jury verdict of criminal threats. (Pen. Code, § 422.)¹ In a bifurcated proceeding he admitted a prior serious felony conviction. He asserts insufficient evidence to support the criminal threats conviction and instructional and sentencing error.

BACKGROUND

At approximately 8:45 p.m. on November 3, 2003, a quarrel arose between appellant and his wife, April, then seven weeks pregnant with their second child, over her wish to use an electric heater.² During the argument, appellant threatened to kill her. April telephoned her mother-in-law, told her appellant was threatening to kill her, and asked her mother-in-law to come get her or tell appellant to let her leave the house. She also told her mother-in-law that that she was telephoning her because she did not want to

¹ All further statutory references are to the Penal Code, unless otherwise indicated. Appellant was also convicted of misdemeanor spousal battery (§ 243, subd. (e)(1)), and misdemeanor malicious obstruction of a telephone line (§ 591). He does not challenge these convictions.

call the police. Her mother-in-law replied, “[W]ell, do what you have to do,” and hung up. Appellant then snatched the phone and unplugged it. He held her against the wall, lifting her off the ground, and again said he would kill her and break her neck. April screamed for help; appellant replied that no one would hear her. When she said she would call the police, he responded that he was “not going back to jail,” and that if she called the police he would kill her. When appellant released her, she called “911.” Appellant unplugged the telephone, and the call was disconnected. April, who was hyperventilating, locked herself in the bathroom, and stayed there until the police arrived. Appellant was not in the house when she came out of the bathroom, and the front door was wide open.

The disconnected “911” call was long enough to convey sufficient information for a police response. At approximately 9:00 p.m. Officer Tim Hobbs was dispatched to the house in response to a “911 hangup call.” Such a call is consistent with the call being disconnected because the telephone is unplugged or with the caller hanging up. April accompanied him to the police station, where she gave a statement. Hobbs testified that she appeared afraid and nervous, she did not appear angry or vindictive, and there were no signs of intoxication. He did not observe any injuries, and her clothing did not indicate a struggle. When he returned April to the house, appellant was lying on the living room couch. Hobbs arrested him and looked around the house. He saw no visible signs of a struggle.

After Hobbs departed April saw a dent in the bedroom wall where appellant had been forcibly holding her.

April would not have called the police had she not believed appellant would kill her. He had never previously threatened to kill her. However, on one occasion during an argument five and a half years earlier, when April was pregnant with their first child, he grabbed her by the throat and left marks on her neck. She called the police, who

² The victim signed her police statement as April Stroud, and the information identifies her as April Stroud, but she was sworn as April Johnson when she testified during trial.

responded and took photos of her injuries. On a second occasion a month later, while she was still pregnant, appellant shoved her against the wall during a quarrel, threw her onto the floor, held her arms behind her back and shoved his knee into her back, causing her pain. The police responded.

DISCUSSION

I. *Substantial Evidence of Criminal Threats*

To prove the offense of making criminal threats under section 422, the prosecution must prove: (1) the defendant willfully threatened to commit a crime that will result in the death or great bodily injury of another person; (2) the defendant made the threat with the specific intent that the statement be taken as a threat, even if he had no intention of actually carrying out the threat; (3) 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 immediate prospect of execution of the threat; (4) the threat actually caused the person threatened to be in sustained fear for her own safety; and (5) the threatened person's fear was reasonable under the circumstances. (*In re George T.* (2004) 33 Cal.4th 620, 630.)

Appellant contends there was insufficient evidence, either direct or circumstantial, of element four: that his threats actually caused April to be in sustained fear for her safety.

A claim challenging the sufficiency of the evidence to uphold a judgment is reviewed under the substantial evidence standard. The appellate court reviews the entire record in the light most favorable to the People to determine whether it contains evidence that is reasonable, credible and of solid value, from which a rational jury could find each element of the crime beyond a reasonable doubt. (*People v. Bolden* (2002) 29 Cal.4th 515, 553.) If the jury's findings are reasonably justified by the circumstances, the reviewing court's opinion that the circumstances might also be reasonably reconciled

with a contrary finding does not warrant reversal. (*In re George T.*, *supra*, 33 Cal.4th at p. 631.)³

Neither case law nor statute has fixed the length of time required for a finding of “sustained” fear under section 422. It is generally described as a period of time beyond what is “momentary, fleeting, or transitory.” (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) Although there was no direct evidence of the duration of April’s fear, there was substantial evidence from which the jury could reasonably conclude it was more than momentary. After April telephoned her mother-in-law to say appellant was threatening to kill her, appellant snatched the phone and unplugged it, held her against the wall so that her feet were off the ground, and again threatened to kill her. In response to her subsequent announcement that she was calling the police, he threatened to kill her if she did so and said he was “not going back to jail.” When she screamed, he replied no one would hear her. Appellant again unplugged the telephone during April’s call to “911,” and April locked herself in the bathroom, where she was having trouble breathing. From April’s reactions to appellant’s threats--calling her mother-in-law, screaming, calling the police, locking herself in the bathroom, hyperventilating--the jury could find that her fear from his threats was real and sustained, particularly given the reasonable inference that during this physical and verbal assault she was mindful of his two previous episodes of violent behavior during her first pregnancy.

CALJIC 17.01

Appellant contends the trial court erred in failing to instruct sua sponte on CALJIC 17.01, the unanimity instruction. This instruction requires the jurors to agree on the act that forms the basis of their conviction when the People introduce evidence of more than

³ *George T.* held that when a defendant raises a plausible First Amendment defense to a charge of violation of section 422, the reviewing court is to make an independent examination of the record to ensure that a speaker’s free speech rights have not been infringed by a trier of fact’s determination that the communication at issue constituted a criminal threat. (*In re George T.*, *supra*, 33 Cal.4th at p. 632.) Appellant does not make such a claim.

one act on which a conviction can be based.⁴ Unless the People elect among the criminal acts, the court is required to give the unanimity instruction sua sponte if the circumstances warrant. (*People v. Davis* (2005) 36 Cal.4th 510, 561; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Appellant contends the instruction was required because the People did not designate which of his threats was the act on which they were relying to prove the crime of criminal threat.

“The unanimity instruction is not required when the acts alleged are so closely connected as to form part of one transaction. [Citation.] The ‘continuous conduct’ rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. [Citation.]” (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) The circumstances of this case demonstrate such continuous conduct. Appellant made his threats during a single ongoing domestic dispute of approximately 15 minutes duration. Although he did not testify or present other witnesses in his behalf, his essential defense to all charges, as manifested by his attorney’s closing argument, was April’s lack of credibility, given the inconsistencies in her statements, her lack of physical injury, and the absence of disarray in the house. This closing argument did not suggest different defenses to the different threats.

Appellant relies on *People v. Salvato* (1991) 234 Cal.App.3d 872 to support his contention that the unanimity instruction was required. In *Salvato*, the defendant was charged with and convicted of, inter alia, one count of section 422. The charge was based on a series of threats to defendant’s former wife and her attorney over a nine-month period. (*Salvato, supra*, at pp. 877, 878.) His pretrial motion to require the

⁴ CALJIC No. 17.01 states: “The defendant is accused of having committed the crime of ____ [in Count ____]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count ____] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] . . . committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count ____], all jurors must agree that [he] . . . committed the same [act] [or] [omission] [or] [acts] [or] [omissions.] It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict.”

prosecution to elect the specific acts on which it would rely for this charge was denied. The prosecution made no election, but a unanimity instruction was given. (*Id.* at p. 878.)

On appeal the defendant contended that, despite the unanimity instruction, he was entitled to a prosecutorial election and was prejudiced by the refusal. (*Salvato, supra*, 234 Cal.App.3d at p. 878.) This court agreed. (*Ibid.*) As we explained, the “language of section 422 focuses on an individual act--a threat--although an effect (fear) is also required. The criminal action is denoted by a verb--‘threaten’--which ordinarily refers to an act taken at a particular moment in time rather than as a continuous course. The outcome, instilling of fear in the victim, does not come within the statute unless it is produced by a specific means, the ‘unequivocal, unconditional, immediate, and specific’ threat. Thus section 422 does not come within the continuous course of conduct exception.” (*Salvato, supra*, at p. 883.) We held the erroneous refusal to order an election was prejudicial because there were numerous acts occurring on separate dates that could have been the basis for the section 422 charge, and because the defendant had different defenses to the discrete acts. (*Salvato, supra*, at p. 884.)

These facts distinguish *Salvato* from the instant case. Unlike *Salvato*, where the defendant made distinctly different threats on distinctly different dates, e.g., on March 3 miming shooting a gun at the victims, on March 9 sending gun and ammunition receipts to the victims and saying he had purchased them for his new found hobby of target practice, on March 10 sending a letter to his former wife saying that even if she won in court in their property settlement dispute he would win in the court of nature, appellant’s identical threats to kill April were made in a narrow time frame on the same day. Additionally, unlike *Salvato*, appellant did not have different defenses to the different threats. *Salvato* does not assist appellant under the circumstances of this case.

CALJIC No. 2.20

Appellant contends the court erred in giving a modified version of CALJIC No. 2.20. As relevant to his contention, CALJIC No. 2.20 states:

“Every person who testifies under oath . . . is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

“In determining the believability of a witness you may consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:

“The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified;

“The ability of the witness to remember or to communicate any matter about which the witness has testified;

“The character and quality of that testimony;

“The demeanor and manner of the witness while testifying;

“The existence or nonexistence of a bias, interest, or other motive;

“The existence or nonexistence of any fact testified to by the witness;

“The attitude of the witness toward this action or toward the giving of testimony;

“[A statement *[previously] made by the witness that is . . . [inconsistent] with . . . [her] testimony*].” (Italics added.)

The trial court omitted the italicized provision when it gave CALJIC No. 2.20. Appellant argues that April’s statement to the police was inconsistent with her trial testimony. Therefore, he argues, this omission, coupled with the giving of CALJIC No. 2.21.1,⁵ effectively told the jury not to consider his only defense: April’s questionable credibility in light of the inconsistencies in her testimony.

A trial court is required to instruct sua sponte on all applicable portions of CALJIC No. 2.20 when the victim testifies for the People. (*People v. Galloway* (1979) 100 Cal.App.3d 551, 566.) It may omit those portions of the instruction that are inapplicable under the evidence. (*Ibid.*) Appellant argues the omitted provision concerning inconsistent statements was required because April’s statement to Officer Hobbs differed

⁵ As given to the jury CALJIC No. 2.21.1 states: “Discrepancies in a witness’s testimony or between a witness’s testimony and that of other witnesses, if there were any, do not necessarily mean that a witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. You should consider whether a discrepancy relates to an important matter or only to something trivial.”

from her trial testimony in three particulars: the manner in which he touched her, the physical injury to her hand, and the indentation in the bedroom wall.

In her statement to Officer Hobbs, April said that appellant “grabbed me by the neck with both of his hands” and said “I’ll kill you.” He “then lifted me off the ground and said I’ll break your neck.” At trial she testified that appellant “picked me up by the neck and the waist” and he “held me up against the wall by my neck and around my waist.”

April’s statement to Officer Hobbs contains no reference to damage to her hand. When asked during cross-examination if she sustained any injury as a result of appellant’s grabbing her, she replied, “No. He had grabbed me on the hand. And I remember some of my rings dug down into my finger, but that was it.” She also testified that she showed the police her finger, they took no photographs, and she did not remember whether the officers said anything when she showed them her hand. Officer Hobbs testified that he checked April for visible signs of injury, he saw no injury to her hand or fingers, and had she shown him any injury, he would have so noted in his report.

April’s statement to Officer Hobbs contains no reference to any property damage. Asked during cross-examination where she was when appellant picked her up by the throat, she testified: “In the bedroom. And there’s an indent in the wall by the closet where I was.” She also testified that she did not tell the police about the dent because she did not discover it until she returned to the house after giving her statement at the police station.

Although appellant does not specifically articulate the inconsistencies between April’s statement to Officer Hobbs and her trial testimony, he appears to refer to facts she recited in her testimony that were absent in her statement.

“[I]nconsistency in effect rather than contradiction in express terms is the test” for determining whether one statement is clearly inconsistent with another. (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 328, p. 410.) If the general meaning of the testimony is compared with the extrajudicial statement, and they appear to be the result of inconsistent beliefs, the statement and the testimony are inconsistent. (*Ibid.*) An

inconsistency may also exist when the witness failed to assert a fact in her extrajudicial statement when it would have been natural for her to have asserted it. In such circumstances, the failure may amount in effect to an assertion of the nonexistence of a fact. (*Id.* at p. 411; *People v. Brophy* (1954) 122 Cal.App.2d 638, 649.)

Under this test, there was no inconsistency between April's trial testimony concerning the dent in the bedroom wall and the absence of any reference thereto in her police statement. She did not see the dent until she returned home so she would have had no reason to tell the police about it.

Nor was there any effective inconsistency between April's statement to the police and her testimony regarding her hand. Her statement does not refer to any injury to her hand, and she testified that, although her rings dug into her fingers when appellant grabbed her hand, there was no resulting injury.

There is arguably an inconsistency between her statement and her testimony regarding the manner in which appellant picked her up. In describing appellant's actions to the police, April could have been expected to describe how he picked her up in the same particulars she described at trial, i.e., not only by the neck (police statement) but by the neck and waist (trial testimony). However, even assuming this inconsistency was sufficient to warrant including in CALJIC No. 2.20 the provision that a previous inconsistent statement by a witness may be considered as a factor in assessing witness credibility, any error in failing to give the provision was harmless. (*People v. Carpenter* (1997) 15 Cal.4th 312, 393: in determining whether instructional error under state law as to how the jury should consider evidence was prejudicial, the reviewing court asks whether it is reasonably probable the jury would have reached a more favorable result absent the error.)

The omission of the provision did not deprive the jury of a tool for assessing April's credibility. CALJIC No. 2.20, as given to the jury, was nonexclusive. It instructed that the jury could consider "*anything*" having a tendency to prove or disprove truthfulness, "*including but not limited to any of the following.*" (Italics added.) The jury was instructed that it could weigh discrepancies in a witness's testimony and that it

could reject the whole testimony of a witness who willfully testified falsely as to a material point. The jury could reasonably conclude that the discrepancy in the details of how appellant lifted April was trivial compared to the consistency in her statement to the police and her trial testimony of the fact that he forcibly did so. Given this record, it is not reasonably probable the jury would have reached a more favorable result had the omitted provision of CALJIC No. 2.20 been given.

CALJIC No. 2.52

Appellant contends there was insufficient evidence to justify an instruction that flight could be considered in the determination of guilt.⁶

Generally, a flight instruction is proper when the evidence shows that the defendant departed the crime scene under circumstances suggesting his movement was motivated by a consciousness of guilt. (*People v. Smithey* (1999) 20 Cal.4th 936, 982.) Flight does not require the physical act of running or reaching a far-away haven, but it does require a purpose of avoiding observation or arrest. (*Ibid.*) Furthermore, the mere return to familiar environs from the crime scene does not warrant an inference of consciousness of guilt, but the circumstances of the departure may do so. (*Ibid.*)

The evidence in this case warranted the instruction. After April told appellant she was going to call “911,” appellant stated he was “not going back to jail,” would kill her if she called the police, and he unplugged the telephone. Defying appellant, April contacted the police. Appellant left the house before they arrived, leaving the front door wide open on a November night. When Officer Hobbs brought April back to the house approximately two hours after he had first responded to the 911 call, he knocked at the front door several times, announcing himself as a police officer in a loud and authoritative voice. Receiving no response, he used April’s key to enter. Appellant was

⁶ CALJIC No. 2.52, as given to the jury, states: “The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.”

lying on a couch next to the front door; a blanket was pulled up to his chin and his eyes were closed.

This evidence is sufficient to imply appellant was attempting to avoid observation or arrest. The wide open front door after April telephoned the police suggested a hurried departure so he would not be present when the police arrived. The refusal to answer the door, despite being in obvious earshot of Officer Hobbs's knock/notice, suggested a ploy to imply he was not home so the police would depart without seeing him. The court did not err in giving a flight instruction.

Aggravated Sentence

Appellant was sentenced to a total prison term of 12 years: the upper term of three years for his conviction of section 422, doubled because of a prior felony conviction (§ 1170.12, subd. (c)(1)), a five-year "habitual offender" enhancement for a prior conviction of a serious felony (§ 667, subd. (a)(1)), and a one-year enhancement for serving a prior prison term (§ 667.5, subd. (b)).

In imposing the upper term, the court found the following factors in aggravation: appellant engaged in violent conduct indicating a serious danger to society (Cal. Rules of Court, rule 4.421(b)(1) (hereafter rule)); he had numerous prior juvenile sustained petitions and adult convictions (rule 4.421(b)(2)); he was on parole at the time of the current conviction (rule 4.421(b)(4)); and his prior performance on probation and parole was unsatisfactory (rule 4.421(b)(5)). The court found no circumstances in mitigation. Appellant contends the upper term violated *Blakely* (*Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531]) and that the enumerated factors were not supported by the evidence.

Blakely held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (*Blakely, supra*, 124 S.Ct. at p. 2536.) It explained that the relevant "statutory maximum" is not the maximum sentence a court may impose after finding additional facts, but the maximum it may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. (*Id.* at p. 2537.) This language provoked

conflicting California Court of Appeal opinions that endeavored to determine its effect on California's determinate sentencing scheme, which provides a statutory maximum for most offenses, but a maximum based on aggravating factors found by the judge, not the jury.

Our Supreme Court recently resolved the issue of *Blakely's* effect on California's determinate sentencing law. *People v. Black* (2005) 35 Cal.4th 1238 concluded "that the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id.*, at p. 1244.) Given this holding, we must conclude there was no constitutional infirmity in the imposition of the upper term based on an application of *Blakely*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Furthermore, there is substantial evidence in the record to support the factors in aggravation on which the trial court based its sentence. The court could reasonably conclude that appellant's conduct in making his criminal threats to April was violent. Not only was he on parole for a robbery conviction at the time of this offense, he had been convicted of five misdemeanors over a 21-month period prior to the robbery conviction, including two convictions for spousal abuse and one conviction of driving under the influence, and he had been placed on multi-year probations for these three misdemeanors. There was no abuse of discretion in the imposition of the upper term.

Section 667.5, subdivision (b)

The trial court imposed the section 667, subdivision (a)(1), five-year enhancement and the consecutive section 667.5, subdivision (1), one-year enhancement based on the same prior 2002 Alameda County robbery conviction. Relying on *People v. Jones* (1993) 5 Cal.4th 1142, 1149-1150 appellant correctly contends, and the People agree, that the court erred in imposing these two enhancements based on the same conviction, and the remedy for the error is striking the one-year enhancement.

DISPOSITION

The case is remanded to the trial court with directions to strike the one-year enhancement of appellant's sentence under section 667.5, subdivision (b), for his prior robbery conviction and to forward to the Department of Corrections a corrected abstract of judgment. In all other respects the judgment is affirmed.

Jones, P.J.

We concur:

Stevens, J.

Gemello, J.