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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
CHAD HOLZHAUSER,  
Defendant and Appellant.

A107420  
(Del Norte County  
Super. Ct. No. CRF 03-9593)

Defendant was convicted following a jury trial of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), misdemeanor assault (Pen. Code, § 240), and making a criminal threat (Pen. Code, § 422).<sup>1</sup> He received a four-year upper term for assault with a deadly weapon, a three-year concurrent upper term for the conviction of making a criminal threat, and 180 days in county jail for the misdemeanor assault conviction. In this appeal he argues that the trial court erred by failing to give a unanimity instruction related to the offense of making a criminal threat, the conviction for that offense is not supported by adequate evidence, and the imposition of upper term sentences based upon a finding of aggravating factors related to the crimes violated his right to a jury trial and finding of guilt beyond a reasonable doubt under *Blakely v. Washington* (2004) 542 U.S.

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<sup>1</sup> The conviction of misdemeanor assault was the lesser included offense of the charge (Count 1) of assault with a deadly weapon, a knife. Defendant was also acquitted of a second charge of making a criminal threat (Count 4). All further statutory references are to the Penal Code.

296 (*Blakely*). We reverse the conviction of making a criminal threat for lack of supporting evidence of the victim's sustained fear, but otherwise affirm the judgment.

### STATEMENT OF FACTS

Over the course of a few weeks, defendant and the victim of the offenses, Sonny Downs, engaged in a heated conflict which apparently began with defendant "spinning doughnuts" in the Yurok tribal parking lot of the Requa boat docks. Downs was the caretaker or manager of a trailer park at the boat docks, and was annoyed that the parking lot he had "just rolled" smooth had been damaged by defendant. He reported the incident to the tribal police. Defendant, in turn, expressed resentment that Downs filed a "false report" that he had been "tearing up the parking lot." In a manner apparently reminiscent of boys on a playground, defendant and Downs thereafter both repeatedly declared that "they were going to kick each other's butt." Witnesses testified that defendant harassed Downs with daily demands to "fight with him."<sup>2</sup> Downs stated he was reluctant to fight while he remained on parole, but grew increasingly annoyed with "being shoved around" persistently by defendant.

By August 9, 2003, Downs was "off parole" and told to defendant that he was "ready to fight" when they encountered each other that morning at the boat docks. Defendant replied that he "had promised the reservation police" he would not engage in a fight on reservation land, and suggested they "take it up the road." Downs agreed to meet defendant "down the road," and both of them left.

About 20 minutes later, Downs and defendant reappeared at the boat docks. According to witnesses, defendant was "real belligerent" with Downs, and complained to him, "Well, I was down the road. Why weren't you there?" While swinging a T-shaped metal pipe in his hand defendant continued to implore Downs to "get out there and fight." Defendant also warned Downs: "You're going to the hospital. I'm going to put you in the hospital, and you don't even know it yet." Downs briefly made an effort to ignore

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<sup>2</sup> Downs did not testify at trial.

defendant, and “was making kind of fun of it.” He said to defendant: “You – you’re not a man, because you need a pipe, or something like that.” At Downs’s request, defendant’s father Ron,<sup>3</sup> who was one of the witnesses present at the scene of the altercation, called 911 to report that “two guys” were fighting and his son had “a steel pipe.”

Downs then approached defendant and exclaimed, “Okay, I’m here. What are you going to do about it?” Defendant swung the pipe at Downs, who twisted defendant’s wrist, took the pipe out of his hand, and threw it to the ground. Downs also threw defendant onto the rocks, and they “started wrestling around.” Downs managed to place a “headlock” on defendant and “hold him down” with his head against the rocks. Witnesses testified that Downs “could have pounded” defendant’s face into the rocks and “hurt him bad,” but did not even attempt to hit him, and instead “was just trying to get him calmed down.”

After no more than a few minutes, defendant “got away” from the headlock, but Downs grabbed him by the back of his hair to control him. Defendant pulled a fishing knife from his pants pocket and yelled, “Let go of my hair or I’m going to cut your arm off.” Downs released defendant’s hair. Defendant then “took two swipes” at Downs with the knife and said, “See I could have got you.” When Ron saw defendant swipe the knife at Downs he pulled a loaded .45 pistol from his truck and shouted, “If you don’t put the knife away, I’m going to shoot you.” Defendant “put the knife away,” and the fight with Downs ended.

Defendant turned to Ron and yelled, “If you’re going to shoot me, shoot me.” Defendant threatened to take the gun away from Ron and shoot him. Everyone then “calmed down” and remained at the scene until a California Highway Patrol officer arrived two or three minutes after he received a dispatch from the Sheriff’s Department.

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<sup>3</sup> For the sake of clarity and convenience we will refer to defendant’s father Ron Holzhauser by his first name. Defendant’s uncle Richard Holzhauser and cousin Steven Holzhauser were also witnesses to the incident and testified at trial.

As instructed by the Sheriff's Department, Ron placed his gun on the ground, where it was seized by the officer. Defendant turned the knife over to the officer as requested.

Defendant testified that Downs's wife made false accusations to the Yurok Public Safety Officer that he endangered a child while "spinning donut gravel" at the boat dock parking lot. Defendant called Downs's wife "a liar," which angered Downs and prompted him to challenge defendant to fight. For the next two weeks defendant claimed that Downs "consistently harassed" him with threats to fight.

On the morning of August 9th, Downs confronted defendant at the boat docks and again asked him "to fight." Defendant replied, "I can't fight on tribal land," and proposed that they fight "at the end of the road." Apparently due to the intervention of someone, the fight did not occur when they met near the 101 highway, whereupon defendant returned to the boat docks.

Downs approached defendant near one of the boat trailers and grabbed him by the shirt. Defendant testified that as they pulled each other across the rocks Downs tripped him, and he momentarily lost consciousness. When he awoke, Downs was dragging him by the hair and threatening to drown him in the river. Defendant warned Downs to release him or he "was going to cut his arm." Downs did not let him go, so defendant pulled his knife from his pocket. Downs then released him, and defendant put his knife away.

As defendant and Downs continued to yell at each other, Ron put a gun in defendant's face and told him to "quit fighting" or he would shoot him. Defendant said that if Ron did not kill him he would "shoot him back in self-defense." Downs "walked off," and two or three minutes later Ron "finally put the gun away."

## **DISCUSSION**

### ***I. The Evidence to Support the Conviction of Making a Terrorist Threat.***

Defendant argues that the evidence does not support the conviction for making a terrorist threat pursuant to section 422. Specifically, he complains that the evidence fails to establish the essential element that the victim "actually experienced sustained fear" as a result of threats by defendant. He asks us to reverse the conviction.

“Defendant’s claim of insufficient evidence requires us to determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*People v. Frye* (1998) 18 Cal.4th 894, 953.) “ ‘We examine the record to determine “whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” . . . ’ [Citations.]” (*People v. Moon* (2005) 37 Cal.4th 1, 22.) “ ‘In making this determination, the appellate court “ ‘must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ . . . ‘Our task . . . is twofold. First, we must resolve the issue in the light of the whole record . . . . Second, we must judge whether the evidence . . . is substantial . . . .’ ” ’ [Citation.]” (*People v. Proby* (1998) 60 Cal.App.4th 922, 928, italics omitted.) “Where, as here, the jury’s findings rest to some degree upon circumstantial evidence, we must decide whether the circumstances reasonably justify those findings, ‘but our opinion that the circumstances also might reasonably be reconciled with a contrary finding’ does not render the evidence insubstantial. [Citation.]” (*People v. Earp* (1999) 20 Cal.4th 826, 887-888.) Further, if the record contains substantial evidence from which a reasonable trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt “the possibility that the trier of fact might reasonably have reached a different conclusion does not warrant reversal.” (*People v. Taylor* (2004) 119 Cal.App.4th 628, 639.)

“As with all challenges to the sufficiency of the evidence, we must begin with a legal question, the minimum factual showing to establish the offense” of making criminal threats under section 422. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 859.) “[N]ot all threats are criminal.” (*In re George T.* (2004) 33 Cal.4th 620, 630.) “To prove a violation of section 422, the prosecution [must prove] that (1) the [defendant] ‘ ‘willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person’ ’; (2) 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) 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) *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) *the threatened person’s fear was* ‘ “reasonabl[e]” ’ under the circumstances.” (*In re Ryan D.*, *supra*, at pp. 859-860, italics added, fn. omitted; see also *In re George T.*, *supra*, at p. 630; *People v. Butler* (2000) 85 Cal.App.4th 745, 753.)

We are concerned here with the element of sustained fear for safety suffered by the victim. Section 422 requires, in addition to the element of the defendant’s specific intent, that the statement be taken as a threat, “proof of a mental element in the victim.” (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156; see also *People v. Garrett* (1994) 30 Cal.App.4th 962, 966.) “The statute is specific as to what actions and reactions fall within its definition of a terrorist threat. The phrase to ‘cause[] that person reasonably to be in sustained fear for his or her own safety’ has a subjective and an objective component. A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances.” (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139-1140.) The statutory element of “sustained fear” requires proof that “the threat has ‘a gravity of purpose and an immediate prospect of execution of the threat’ such as to cause the person reasonably to be in sustained fear for his or her own safety . . . .” (*In re Ernesto H.* (2004) 125 Cal.App.4th 298, 312.)

Although section 422 does not further define the element of “sustained fear,” cases have found that inclusion of the term “sustained” in the statute means the victim must experience fear for “a period of time that extends beyond what is momentary, fleeting, or transitory.” (*People v. Allen*, *supra*, 33 Cal.App.4th 1149, 1156; see also *In re Ricky T.*, *supra*, 87 Cal.App.4th 1132, 1140.) To determine “ ‘whether a defendant intended his words to be taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate and specific’ ” to convey to the victim an immediate prospect of execution of the threat and a sustained fear of personal safety we examine all the

surrounding circumstances, and even the personal history of the parties, not just the words alone. (*People v. Butler*, *supra*, 85 Cal.App.4th 745, 754; see also *People v. Bolin* (1998) 18 Cal.4th 297, 339-340; *In re Ryan D.*, *supra*, 100 Cal.App.4th 854, 859-860; *People v. Franz* (2001) 88 Cal.App.4th 1426, 1446; *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340-1341.) Further, the victim's failure to testify or express his fear is not an impediment to a finding that defendant's threats engendered sustained fear in the victim. The element of sustained fear may be inferred from circumstantial evidence. (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 417.)

Upon review of the record before us in its entirety, however, we do not find any solid, credible evidence that defendant's threats caused the victim to experience sustained fear. The prosecution relied upon two specified threats by defendant to support the conviction for a violation of section 422: the first occurred at the commencement of the fight when defendant advised Downs, "I'm going to put you in the hospital," as he brandished a metal bar; the second, when defendant pulled a knife during the fight and warned Downs, "Let go of my hair or I'm going to cut your arm off." Both of the threats were made in the context of a physical altercation in progress that no doubt had already placed the victim in some fear for his safety, particularly when defendant escalated the conflict by producing weapons.

Nothing in the victim's response to the first threat indicates that he suffered fear apart from or in addition to the fear associated with the impending physical altercation. The testimony from witnesses portrayed the victim as attempting to ignore defendant's threat to put him in the hospital, and "making kind of fun of it." Downs also made a disparaging remark that by using a pipe defendant was "not a man." Rather than retreat or otherwise demonstrate any fear from the threat, Downs approached defendant and remarked: "Okay, I'm here. What are you going to do about it." The victim did not exhibit any fear due to the threat with the metal bar.

We cannot tell from the testimony how Downs perceived defendant's threat with the knife, as the fight was then in full force. But whatever fear was engendered by either of the threats was entirely transitory. After defendant swung the pipe, Downs

immediately grabbed it from him and discarded it. And when the knife was exhibited by defendant in conjunction with his threat to cut the victim, Downs released defendant and the fight abruptly ended. Whatever fear or apprehension Downs experienced from the threats was fleeting rather than sustained within the meaning of section 422. (*In re Ricky T.*, *supra*, 87 Cal.App.4th 1132, 1140.) The element of sustained fear essential to a finding of making a criminal threat is not established by substantial evidence, and therefore we are compelled to reverse the conviction. (*Id.* at p. 1141.)

## ***II. The Imposition of an Upper Term for Assault with a Deadly Weapon.***<sup>4</sup>

Defendant relies upon the United States Supreme Court decision in *Blakely*, *supra*, 542 U.S. 296, to also argue that imposition of an upper term sentence for the assault conviction “violated [his] right to a jury trial and due process.” He claims that under the California Determinate Sentencing law “the finding of guilt by jury verdict or admission alone permits only the imposition of the middle term set out by statute.” He thus complains that by imposing the upper term “based on facts not reflected in the jury’s verdict” in accordance with the California sentencing scheme, the trial court contravened “the dictates of *Blakely*.”

Defendant recognizes that his argument was recently rejected by the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*). The court in *Black* held “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; see also *People v. Buser* (2005) 132 Cal.App.4th 1188, 1191.) We must adhere to the decision of our Supreme Court in *Black*, and conclude that defendant was not denied his due process rights to a jury trial and finding of guilt beyond a reasonable doubt under *Blakely* by the trial court’s imposition of an upper term. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Scott* (2000) 85 Cal.App.4th 905, 915-916.)

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<sup>4</sup> In light of our reversal of the conviction for making a terrorist threat, we need not address defendant’s arguments that the trial court erred by failing to give a unanimity instruction and imposing an upper term sentence related to that offense.

**DISPOSITION**

The conviction for making a criminal threat (§ 422) as charged in Count 3 is reversed. In all other respects, the judgment is affirmed.

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Swager, J.

We concur:

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Marchiano, P. J.

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Stein, J.