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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. CARL DUANE GOODSBY, Defendant and Appellant.	C052534 (Sup. Ct. No. 05F1064)

The trial court found defendant Carl Duane Goodsby guilty and sentenced him to five years in state prison for stalking and making criminal threats against E.K. and her family. The court denied defense counsel's request pursuant to Penal Code section 646.9, subdivision (m), for a recommendation to the Department of Corrections and Rehabilitation that defendant be certified for mental health treatment at a state hospital.[1]

[1] Further undesignated statutory references are to the Penal Code.

Defendant contends, on appeal, that (1) there was insufficient evidence to prove he made a criminal threat, (2) the court abused its discretion by denying his section 646.9, subdivision (m) request, and (3) the court's imposition of the upper term violated his Sixth and Fourteenth Amendment rights based on the holding in *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] (*Cunningham*). We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2001, defendant was charged with stalking (§ 646.9, subd. (a)) and making criminal threats (§ 422) towards E.K. and her children.

In September 2002, pursuant to a plea agreement, defendant pled no contest to one count of stalking. Imposition of sentence was suspended for three years, and defendant was placed on formal probation pursuant to specified terms and conditions which included an order prohibiting him from contacting E.K. or her sons and directing him to stay away from their home, her job and school.

On December 3, 2004, defendant entered the store where E.K. and her sister, A.P., were both working. Defendant approached A.P., pulled out his wallet, he told her, "My son is dead because of the [K.] boys, and now it's their turn." A.P. was concerned for the safety of her nephews. E.K. overheard the statement and was fearful. When she asked defendant, "What did you say?" defendant lunged at her. She struck him in an attempt

to defend herself. Defendant then refused to leave the store until E.K.'s brother "came after him."

E.K. testified at trial that, in the weeks prior to the December 3d incident, defendant showed up at her place of employment "many, many days" and stared at her from a distance. Defendant also approached E.K. and one of her sons at a department store, told her it was nice to see her again and offered her young son a cigarette. When E.K. told him to leave, defendant walked away, but turned around and stared at them both. According to E.K., she often saw the defendant standing outside the fence surrounding the schoolyard of her son's elementary school and at the coffee shop she went to every morning.

Defendant was arrested and charged with criminal threats in violation of section 422 (Count 1), stalking in violation of section 646.9, subdivision (a) (Count 2), stalking in violation of section 646.9, subdivision (b) (Count 3), and stalking with a prior stalking conviction in violation of section 646.9, subdivision (c)(2) (Count 4), all felonies, and one count of misdemeanor contempt of court in violation of section 166, subdivision (a)(4) regarding the 2002 stay-away order (Count 5). Defendant pled not guilty to all charges and waived his right to trial by jury.

Prior to trial, defense counsel requested a mental competency evaluation pursuant to section 1368. The court granted the request, appointed two psychologists (David Wilson, Ph.D., and Ray Carlson, Ph.D.) to examine defendant and

suspended the proceedings for 30 days to complete the evaluation.

Carlson's report noted that defendant had "antisocial and schizotypal personality features," but concluded that defendant was competent to stand trial. Wilson reported that defendant was a paranoid schizophrenic, but also concluded he was competent to stand trial. The matter was submitted by the parties and, based upon those reports, the court found defendant competent to stand trial.

Defendant testified on his own behalf, claiming he never committed the acts he was accused of and asserting a case of mistaken identity.

The court found defendant guilty of all counts. At sentencing, defendant's motion to substitute new counsel pursuant to *People v. Marsden* (1970) 2 Cal. 3d 118 was denied. Prior to imposition of the sentence, defense counsel requested that the court consider making a recommendation under section 646.9, subdivision (m) that the Department of Corrections and Rehabilitation certify defendant for mental health treatment at a state hospital pursuant to section 2684. The People did not oppose that request, leaving it to the discretion of the court. The court opined that it was "not real optimistic [defendant] would ever benefit from mental health counseling," and noted that the director of the Department of Corrections and Rehabilitation "can also make that determination." After considering the probation report and argument from counsel, the court denied probation and imposed the aggravated term of five

years as to Count 4. The three-year sentences as to Counts 1 and 2 and the four-year sentence as to Count 3 were all stayed pursuant to section 654. The pending misdemeanor charge was dismissed. Finding that defendant would not be amenable to or benefit from a mental health recommendation, the court denied defendant's section 646.9, subdivision (m) request.

Defendant filed a timely notice of appeal.

DISCUSSION

I

Defendant asserts that the alleged threat was ambiguous and, given the surrounding circumstances, was insufficient to prove a criminal threat. We disagree.

As a preliminary matter, defendant asserts that, although a challenge to the sufficiency of the evidence would normally require us to review the record for substantial evidence (*In re George T.* (2004) 33 Cal.4th 620, 632), his defense at trial was based upon his rights under the First Amendment and we must therefore review the record independently. Not so. Defendant did not object on First Amendment grounds at trial. Instead, he testified that he never made the alleged threat at all. He urges that his counsel's closing statement raised a First Amendment issue by arguing that the evidence was insufficient to prove defendant made a credible threat. We are not persuaded that counsel's closing argument rose to the level of an objection based on defendant's constitutional rights, nor do we construe it as such. (*People v. Kennedy* (2005) 36 Cal.4th 595, 612 [failure to state specific ground for objection at trial,

including objection based on constitutional grounds, relieves reviewing court of obligation to consider error on appeal].) We conclude that defendant did not raise a First Amendment issue at trial, and he therefore cannot raise it now.

We will review defendant's claim challenging the sufficiency of the evidence under the substantial evidence standard. (*In re George T., supra,* 33 Cal.4th at pp. 630-631.) Under that standard, we review the entire record "'in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find [the elements of the crime] beyond a reasonable doubt.'" (*People v. Bolden* (2002) 29 Cal.4th 515, 553.)

"In order to prove a violation of section 422, the prosecution must establish all of 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 -- 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. (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228, citing *People v. Bolin* (1998) 18 Cal.4th 297, 337-340 & fn. 13.)

Defendant approached A.P. at work and said, "My son is dead because of the K. boys, and now it's their turn." He argues the statement is ambiguous because there was no evidence to show that he had a son or, if he did, that his son had ever been harmed or had any interaction with the K. children. Given that, he urges, the second part of the threat -- that the K. boys would be harmed -- was "unbelievable" and the statement therefore cannot be construed to be a threat to commit death or great bodily injury. The People correctly point out, however, that the test under section 422 is not whether the threat was rational, but whether it was made with the specific intent that it be taken as a threat, regardless of defendant's intent to carry it out. (*People v. Toledo, supra,* 26 Cal.4th at p. 228.) Defendant made the threat to Pollard, the aunt of the intended victims, and within earshot of E.K., the intended victims' mother. When E.K. questioned him, he lunged at her. Given that, in conjunction with defendant's prior conviction for stalking these same victims in 2002 and the recent incidents of stalking E.K. and her children at school and at work despite the stay-away order, it was reasonable to infer that defendant intended that the threat be taken as such, regardless of whether or not he intended to carry it out.

Defendant next contends that the absence of any actual violence in the past by defendant against E.K. or her children casts doubt on whether the threat was unconditional, immediate or specific enough to demonstrate a serious threat of immediate harm. Indeed, the record shows quite the opposite. Over the course of approximately four years, defendant engaged in stalking behaviors which, over time, escalated in seriousness and gradually brought defendant and E.K. and her family in closer contact. On numerous occasions, defendant peered into the children's bedroom windows, and once had to be chased out of E.K.'s backyard; he watched the children from the perimeter of the school property; he chased the children into the house and, when they tried to close the door, he kept them from doing so with his arm; he approached E.K. at work and told her he knew where her children were; he watched E.K. at the coffee shop, and approached her in an aggressive manner at a department store, offering her young son a cigarette and laughing; he displayed a knife to J. and, on another occasion, threw a butter knife at him. In spite of the stay-away order, defendant watched E.K. and her children while they went about their daily lives, stalking them at school, in a department store, at home and at work. Defendant's stalking culminated in a confrontation at E.K.'s place of employment, where defendant threatened the children, lunged at E.K. and refused to leave the store until A.P.'s six-foot tall, 400-pound brother chased him out.

Defendant further contends that the alleged threat was equivocal because it was unclear what was meant by "now it's

their turn," that the threat was not unconditional because "[t]here was no reason to think [he] would carry through" with it, and that he would not have made the threat to someone who he knew would report it to police if he really intended to follow through. We are not persuaded by any of these arguments. Given the first part of the threat -- that defendant's son was dead -- it was reasonable to infer that "now it's their turn" meant it was E.K.'s children's turn to die. With defendant's behavior towards E.K. and her family becoming increasingly menacing, it was also reasonable to infer that defendant had every intention of following through with his threat. As for fear of a potential call to police, defendant's violation of the stay-away order on countless prior occasions confirmed that he was not concerned with whether or not his actions were reported to law enforcement.

Defendant also contends the threat was not intended to be conveyed to E.K.'s children because it was not made directly to them or in their presence. We reject that contention as well. Section 422 does not require the threat to have been made directly to the children themselves, only that defendant intended that the threat be conveyed to them. Given the numerous prior instances when defendant watched, followed and even chased the children, it was reasonable to infer that defendant made the threat to A.P. and E.K. intending to place them in fear for their children, and further intending that they would then convey the threat to the children.

As for the remaining two elements of section 422, there is sufficient evidence in the record to prove that the threat actually caused E.K., A.P. and the children to fear for their safety. Against the backdrop of defendant's continuing and escalating stalking behavior, we find those fears to be reasonable under the circumstances.

The record contains sufficient evidence from which the trial court could reasonably have found the elements of the crime of making a criminal threat beyond a reasonable doubt.

II

Defendant next contends the trial court abused its discretion by refusing to recommend that the Department of Corrections and Rehabilitation certify him for treatment in a state hospital. We disagree.

Where a defendant has been convicted of stalking, the court "shall consider whether the defendant would benefit from treatment pursuant to Section 2684" and, if appropriate, "shall recommend that the Department of Corrections [and Rehabilitation] make a certification" as provided in that section. (§ 646.9, subd. (m).)

The trial court did just that, despite the absence of any evidence from defendant in support of his request. The court made a specific finding that defendant would not "benefit from mental health [treatment]," and that he would not be "amenable" to such treatment. Defendant has provided no authority for the proposition that the court is required to state its reasons underlying its determination in that regard, and we find no such

obligation in the statute. However, we can infer from the record that the court's consideration was based on the prior findings of competency, as well as defendant's general behavior at trial and the fact that the court found defendant was not "amenable" to probation and "doesn't follow directions[.]"

We conclude the trial court did not abuse its discretion in denying defendant's section 646.9, subdivision (m) request.

III

Finally, defendant claims the trial court's imposition of the upper term as to all four counts denied him his constitutional right to due process and to have a jury determine factors in aggravation beyond a reasonable doubt. We disagree.

Applying the Sixth Amendment to the federal Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490.) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant; thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely v. Washington* (2004) 542 U.S. 296, 302-304 [159 L.Ed.2d at pp. 413-414] (*Blakely*).)

Accordingly, in *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856, 864], the United States Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Ibid.*, overruling *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*) on this point, vacated in *Black v. California* (2007) ___ U.S. ___ [167 L.Ed.2d 36].) Thus, except for a prior conviction, any fact that increases the penalty for a crime beyond the middle term must be tried to the jury and proved beyond a reasonable doubt.

Applying *Cunningham*, in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), this state's highest court recently held that "imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions."

In deciding to impose the upper term for each of the four counts, the trial court cited the fact that defendant was on probation when the offenses were committed, as well as the fact that defendant's prior performance on probation "was not just poor, it was abysmal" and "he continues to be a danger to the victims[.]"

As pointed out in *Apprendi*, *Blakely*, *Cunningham* and *Black II*, the Sixth Amendment jury-trial guarantee does not apply to prior convictions that are used to impose greater punishment. (See, e.g., *Cunningham, supra*, 549 U.S. at p. ___ [166 L.Ed.2d at p. 864]; *Black II, supra*, 41 Cal.4th 799, 817-818.) The reasons underlying the exemption of prior convictions are as follows: (1) the fact of a prior conviction "'does not relate to the commission of the offense'" for which the defendant is being sentenced (*Apprendi, supra*, 530 U.S. at p. 496 [147 L.Ed.2d at p. 458]), and (2) "the certainty that procedural safeguards attached to any 'fact' of prior conviction . . . mitigate[s] the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." (*Id.* at p. 488, fn. omitted.) It follows that the exception applies not only to the fact of a prior conviction, but also to "an issue of recidivism which enhances a sentence and is unrelated to an element of a crime." (*People v. Thomas* (2001) 91 Cal.App.4th 212, 223.) Therefore, "'the fact of a prior conviction,' and related facts . . . may be judicially found at sentencing." (*U.S. v. Cordero* (5th Cir. 2006) 465 F.3d 626, 632-633, fns. omitted.) For instance, the trial court may determine and rely on the defendant's probation or parole status to impose the upper term. (Cf. *U.S. v. Fagans* (2d Cir. 2005) 406 F.3d 138, 141-142; *U.S. v. Corchado* (10th Cir. 2005) 427 F.3d 815, 820 ["the 'prior conviction' exception extends to 'subsidiary findings' such as whether a defendant was under

court supervision when he or she committed a subsequent crime"].)

Here, it was proper for the trial court to impose the upper term based on defendant's probationary status at the time of the crimes, an aggravating factor that did not have to be submitted to a jury. (*U.S. v. Corchado, supra*, 427 F. 3d at p. 820.) Accordingly, the trial court's reliance on that factor did not run afoul of the Sixth Amendment. The fact that the trial court relied on defendant's "abysmyl" prior performance on probation and the fact that defendant "continues to be a danger to the victims" is of no consequence because it relied on one aggravating circumstance that was established by means that satisfy the requirements of the Sixth Amendment. (*Black II, supra,* 41 Cal.4th at p. 816.) Because defendant's probationary status at the time he committed the offenses render him eligible for the upper term, he "was not legally entitled to the middle term, and his *Sixth Amendment* right to jury trial was not violated by imposition of the upper term sentence for" the crimes of which he was convicted. (*Id.* at p. 820, italics in original.)

DISPOSITION

The judgment is affirmed.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.