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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE FRANCISCO PEREZ, Defendant and Appellant.	F050907 (Super. Ct. No. BF113857A) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Syda Kosofsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Kathleen A. McKenna and Kelly C. Fincher, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Harris, Acting P.J.; Levy, J.; and Gomes, J.

INTRODUCTION

Appellant Jose Francisco Perez was convicted after jury trial of misdemeanor assault with a great bodily injury enhancement, battery resulting in serious bodily injury and making a criminal threat. (Pen. Code, §§ 240; 12022.7; 243, subd. (d); 422.)[1] The court reduced the criminal threat conviction to a misdemeanor. It sentenced appellant to the upper term of four years for the battery, citing recidivism-based aggravating factors. Concurrent jail terms of one year for the misdemeanor criminal threat and 180 days for the misdemeanor assault were imposed and stayed.

Appellant contends that the evidence is insufficient to support the misdemeanor threat conviction and assigns imposition of the upper term as prejudicial *Blakely/Crawford* error.[2] Both arguments fail; we will affirm.

FACTS

During the late evening hours of March 5, 2005, appellant and Clifford Parks were drinking and socializing at the Rockin' Rodeo nightclub. An altercation ensued between Parks and appellant. Appellant was escorted out of the club.

Johnny Stanley and Ricardo Rojas were security officers employed by the club. Stanley and other security officers were walking near appellant and asking him to leave the premises. Appellant was irate. He yelled and swore at the security officers. He turned around multiple times and approached them. Stanley interpreted this behavior as threatening. Stanley heard appellant threaten to return with a machine gun, shoot up the place and kill them. Rojas heard appellant say that he was going to come back and shoot them. In making this threat, appellant used the Spanish word for a machine gun. Appellant also threatened to punch the security officers in the face and to knock them out.

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1 Unless otherwise specified, all statutory references are to the Penal Code.

2 *Blakely v. Washington* (2004) 542 U.S. 296; *Cunningham v. California* (2007) __ U.S. __ [127 S.Ct. 856].

About 10 minutes later, Parks also was escorted out. At this time, appellant was standing at the end of the parking lot talking on a cell phone. As Parks walked toward a nearby Shell gas station, appellant ran up and hit Parks in the face, knocking out several of his teeth. Parks fell to the ground. Appellant ran across the street and was subsequently apprehended by two police officers, who were nearby.

Stanley reported to the police officers appellant's threat to return with a machine gun and kill them. Stanley testified that he took this threat "very seriously." Although aggressive statements by angry drunks are not an unexpected feature of his job, he "hardly [ever] get[s] threatened with a machine gun." In his experience, some of the people who made threats have carried them out.

Rojas testified that in his three years of working as a security officer at the nightclub, no one had made "very serious threats like the one we got that night." No one before had threatened to "come back with a gun to shoot [him]." However, he did not take the threat seriously because it is common for angry drunks to "talk smack on the way to their car."

DISCUSSION

I. The misdemeanor threat conviction is supported by substantial evidence.

When assessing the sufficiency of the evidence, a reviewing court considers the entire record in the light most favorable to the judgment below to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People. v. Hawkins* (1995) 10 Cal.4th 920, 955.) The reviewing court presumes in support of the judgment the existence of every fact the trier reasonably could deduce from the evidence, including reasonable inferences based on the evidence. (*People v. Tran* (1996) 47 Cal.App.4th 764, 793.) We do not reweigh evidence or determine if other inferences more favorable to the defendant could have been drawn from it. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

To prove violation of section 422, the People must establish the following five elements: (1) willful threat to commit a crime which will result in death or great bodily injury to another person; (2) specific intent that the statement be taken as a threat, even if there is no intent to actually carry it out; (3) that the threat was so unequivocal, unconditional, immediate and specific that it conveys to the person threatened a gravity of purpose and an immediate prospect of execution; (4) that the threat caused the threatened person 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 reasonable under the circumstances. (*People v. Maciel* (2003) 113 Cal.App.4th 679, 682-683.)

Appellant argues that the threat lacked immediacy because neither Stanley nor any other security guard called the police immediately after appellant made the threat. Rather, Stanley reported the threat to the police when they investigated appellant's assault on Parks. Also, appellant lingered in the parking lot after making the threat. Finally, Stanley and Rojas testified that drunken patrons often make threats that are not carried out. We are not persuaded. Stanley was concerned with watching the parking lot and escorting appellant, who displayed a hostile and threatening demeanor, off the property. It was not unreasonable for Stanley to wait to report the threat until after appellant had been apprehended by the police. Furthermore, both Stanley and Rojas testified that while angry patrons often threaten to beat them up, never before has anyone threatened to return with a machine gun and shoot them. Finally, it is not necessary to prove that appellant actually intended to return and shoot the security guards or to prove that the threat conveyed a specific time or place. Rather, the term immediate means "that degree of seriousness and imminence which is understood by the victim to be attached to the *future prospect* of the threat being carried out, should the conditions not be met." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1538.) In this instance, appellant's threat to return with a machine gun and kill the security officers is unequivocal, specific and immediate.

Appellant contends that the record lacks proof of the sustained fear element because Stanley did not directly testify that he feared appellant or that he was afraid for his safety. The totality of the evidence supports a reasonable inference that the threat placed Stanley in sustained fear for his safety. Stanley testified that he took the threat seriously and he reported it to the police officers who arrested appellant. Both Stanley and Rojas testified that threats to shoot and kill them are uncommon. When appellant made the threat, he was irate and he verbally harassed Stanley and the other security officers. Appellant repeated turned and walked toward Stanley and the other officers in an aggressive manner. Shortly after appellant made this threat, he violently assaulted Parks. From the totality of this evidence, a trier of fact reasonably could deduce that Stanley experienced sustained fear as a result of appellant's threat to return with a machine gun and kill the security officers.

Appellant's reliance on *In re Ricky T.* (2001) 87 Cal.App.4th 1132 (*Ricky T.*) is misplaced; *Ricky T.* is factually distinguishable. There, the minor cursed at his teacher and said, "'I'm going to get you.'" (*Id.* at p. 1135.) The appellate court concluded that the evidence was insufficient to support the true finding on the criminal threat allegation. There was no evidence offered that appellant's angry words were accompanied by any show of physical violence. The threat was not specific. The teacher did not call the police to report the threat until the following day. Thus, the threat lacked immediacy and gravity of purpose. (*Id.* at p. 1139.) In sharp contrast to *Ricky T.*, appellant's threat was specific and it was made in a context that supports the conclusion that it had gravity of purpose and immediacy. Appellant declared that he was going to get a machine gun, shoot up the place and kill the security officers. The threat was accompanied by hostile gestures and threatening physical movements towards the security officers. Shortly after making this threat, appellant punched Parks. Finally, Stanley reported the threat to the police soon after appellant was apprehended.

Having considered the evidence in the light most favorable to the judgment, we conclude that there is substantial proof from which a reasonable trier of fact could conclude beyond a reasonable doubt that the People proved all of the elements necessary to establish that appellant made a criminal threat.

II. Imposition of the upper term for count 2 was not prejudicial Blakely/Cunningham error.

The court selected the upper term for the battery with serious bodily injury conviction based on numerous recidivism-based aggravating factors, including: (1) appellant has suffered numerous prior convictions; and (2) appellant was on probation when he committed the current offenses. Appellant challenges this sentencing decision, arguing that it constitutes prejudicial *Blakely/Cunningham* error. We disagree.

Apprendi v. New Jersey (2000) 530 U.S. 466 (*Apprendi*) held, "Other than the fact of a prior conviction, 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." (*Id*. at p. 490.) *Blakely* held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citations.]" (*Blakely v. Washington*, *supra*, 542 U.S. at p. 303, italics omitted.) In *Cunningham*, the court held that, under California's determinant sentencing scheme, the upper term can only be imposed if the factors relied upon comport with the requirements of *Apprendi* and *Blakely*. (*Cunningham v. California, supra*, 549 U.S. ___ [127 S.Ct. 856].)

Blakely describes three types of facts that a trial judge can properly use to impose an aggravated sentence: (1) a prior conviction; (2) facts reflected in the jury verdict; and (3) facts admitted by the defendant. (*Blakely v. Washington, supra*, 542 U.S. at pp. 301, 303.) In this case, the court relied on appellant's criminal history -- his prior convictions and probation status -- to justify selection of the upper term. This is constitutionally permissible.

Nevertheless, any possible error in considering any remaining factor not falling in one of the permissible categories identified in *Blakely* was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18). Also, it is not reasonably probable that it impacted the outcome (*People v. Watson* (1956) 46 Cal.2d 818). Under California law, a single factor is sufficient to justify imposition of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) The court relied on appellant's recidivism to support the upper term. Under these circumstances, remand for resentencing is unnecessary.

DISPOSITION

The judgment is affirmed.