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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO SOTO,

Defendant and Appellant.

D058820

(Super. Ct. No. JCF23534)

APPEAL from a judgment of the Superior Court of Imperial County, Donal B. Donnelly, Judge. Affirmed.

INTRODUCTION

A jury convicted Mario Soto of one count of making a criminal threat (Pen. Code, § 422, subd. (a))¹ and three counts of resisting an executive officer (§ 69). The trial court sentenced him to aggregate term of two years in prison.

¹ Further statutory references are also to the Penal Code unless otherwise stated.

Soto appeals, contending there is insufficient evidence to support his conviction for making a criminal threat. He also requests we independently review the transcript of an in camera proceeding conducted by the trial court under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess* proceeding)² to determine whether the trial court erred in finding an internal affairs report contained no discoverable information.

We conclude there is no merit to Soto's first contention. Additionally, we have reviewed the transcript of the *Pitchess* proceeding and conclude the trial court did not err in finding the internal affairs report contained no discoverable information. We, therefore, affirm the judgment.

BACKGROUND

While on patrol, El Centro Police Officer Aaron Messick, who had Special Weapons and Tactical (SWAT) training and was a member of the SWAT team, responded to a dispatch reporting Soto was suicidal and possibly armed with a knife. On the way to Soto's house, Messick received Soto's arrest history. He learned Soto had prior arrests for being in possession of a dangerous weapon and for being under the influence.

When Messick arrived at Soto's house, Soto's sister and mother approached him. They were hysterical. Soto's sister told Messick that Soto was in the house, was armed with a knife, had locked her and her mother out of the house, and had threatened to burn

² The Legislature essentially codified *Pitchess* in sections 832.5, 832.7, 832.8 and Evidence Code sections 1043 through 1047. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225, fn. 3, 1226.)

the house down. There was a security screen door on the front of house preventing Messick from seeing into the house; however, he heard items being broken and tossed around inside.

From approximately 25 yards away, Messick called out to Soto, identified himself, and asked to speak with Soto. Soto yelled back, "Come in here." He then yelled, "I have a knife. I will kill you." Because of the reports that Soto was armed with a knife and Soto's claim to being armed with a knife, Messick opted not to go inside and stayed behind a fence. He was afraid that if he went inside the house, Soto would try to kill him. He explained that it was common for people who are suicidal to harm others at the same time they harm themselves. In addition, he knew from his training that people who are suicidal may purposely act in a way that would prompt a third person to harm them. The distance between Messick and Soto did not allay Messick's concerns because the distance did not change Soto's state of mind or what Soto wanted Messick to think.

Messick requested Officer Jesus Viesca, who was en route and also a member of the SWAT team, to expedite his travel. Viesca arrived seconds later. They were subsequently joined by Officer Efram Coronel. Messick continued to ask Soto to come outside so they could talk to him. Soto responded by indicating he had a knife and challenging Messick to come inside and get him.

Viesca stayed on the east side of the house and Messick and Coronel went to the west side of the house, positioning themselves behind a palm tree. Coronel, who had hostage negotiation training, took over the task of trying to persuade Soto to come out of the house. Soto cursed in a continual stream and again stated, "I will kill you." He

pushed opened the security door and said, "[C]ome on." Messick did not go into the house because it appeared Soto had barricaded the door with a couch. In addition, he believed Soto would carry out his threats to kill, although he did not see a knife or other weapon at that point. Coronel did not go into the house for essentially the same reasons.

As Coronel continued to try to talk to Soto, the inside of the house became silent and Messick thought Soto may have committed suicide. Messick continued watching the house and heard a loud noise coming from a bedroom window. Messick looked at the window and saw the screen pop off of it. He saw Soto extend an arm out the window holding what appeared to be a semiautomatic firearm. Soto waved the firearm from side to side toward the front of the house where Messick, Coronel and Viesca were standing. Soto cursed and yelled, "[C]ome on."

Messick informed other responding officers that Soto was armed with a handgun, requested less lethal ammunition, and requested a sergeant to attempt to establish phone contact with Soto. Messick then noticed smoke coming out from the front door and what appeared to be flames coming from inside the living room. Consequently, he also requested the fire department to respond and stand by.

Soto pulled his arm back inside and, once he did, Messick requested additional resources, including activation of the SWAT team. This did not occur, however, because the incident unfolded extremely fast.

Meanwhile, Soto came out from the side of the house and started walking toward the front with his arm raised to shoulder level, holding what appeared to be a firearm, while cursing and saying, "[C]ome on." Believing Soto was going to shoot at Viesca,

Messick and Coronel shot at Soto. Viesca, believing Soto was going to shoot at Messick and Coronel, shot at Soto as well.

Soto retreated to the side of house still holding up the firearm. Viesca and Messick followed Soto. Soto turned around and started to approach Viesca and Messick. Coronel yelled out to Viesca and Messick, "He still has the gun. He still has the gun. He still has the gun." Soto went to Viesca and Messick's location and pointed the gun at them. Because Soto had ignored all of the commands the officers had given and had approached them with what appeared to be a firearm even after they had shot at him, Messick believed Soto was determined to kill one of them. Viesca and Cornel believed the same thing.

All three officers fired their weapons at Soto. At the same time Messick fired his weapon, Viesca backed into Messick, tripping him. When Messick got up, he saw Soto lying facedown on the ground in a different location about five feet away. One of the gunshots hit Soto's lower back. One of the gunshots also apparently hit Soto's gun. Soto's gun exploded in midair and part of it landed in the grass. At that point, Messick and Viesca realized it was a replica rather than a real gun.

By then, a detective had arrived and he took Soto into custody. A wallet found in Soto's pants after his arrest contained a tattered letter in which Soto mourned a failed relationship and apologized to his family for hurting them and not living up to their expectations. The letter started off with the statement, "I hope the only reason you are reading this is because it was taken from my cold dead body."

Messick, Viesca, and Coronel helped clear the house. The house looked as if it had been ransacked. There were steak knives on the ground just inside the front door. There were couches blocking the front door and a small fire on the kitchen stove. In addition, there was substantial smoke damage in the kitchen. There was also smoke damage on a curtain in Soto's bedroom and matches nearby.

Throughout the incident, Messick was afraid he was going to die or at least be wounded. Viesca was also afraid he was going to die and would never see his unborn son.

DISCUSSION

I

Sufficiency of Evidence for Making a Criminal Threat Conviction

Soto contends there is insufficient evidence to support his conviction for making a criminal threat to Messick. "When a defendant challenges the sufficiency of the evidence, '[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] [Citations.] 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.] [Citation.] We ' "'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " " (*People v. Clark* (2011) 52 Cal.4th 856, 942-943.) " 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a

judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.] [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

To prove a defendant made a criminal threat in violation of section 422, subdivision (a),³ "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,

³ Section 422, subdivision (a), provides: "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."

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.)

Soto argues the prosecutor did not establish the third and fifth elements. To support his position, Soto relies solely on the circumstances appearing the moment he indicated to Messick he was not coming out of the house and he would kill Messick if Messick came into the house. He asserts his statements to Messick did not convey an immediate prospect of execution since he was in the house barricaded behind a security door, Messick was some distance away and had no intention of going into the house, and Messick could not see him to know whether he was actually armed or making threatening gestures. He further asserts based on these facts and Messick's SWAT training and status as a SWAT team member, it was unreasonable for his statements to have caused Messick sustained fear. While he acknowledges the circumstances escalated after his statements to Messick, he asserts consideration of the subsequent circumstances would be improper as they distort the context of his statements.

Nothing in the language of section 422 or the cases interpreting the statute supports taking such a narrow view of the surrounding circumstances in determining whether a statement constitutes a criminal threat. To the contrary, the cases interpreting the statute have consistently held this determination requires consideration of *all* the surrounding circumstances. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1433;

People v. Solis (2001) 90 Cal.App.4th 1002, 1014). Moreover, because the events occurring from Messick's arrival at Soto's home to Soto's arrest were fluid and fast-paced, we disagree that consideration of them all would distort the context of Soto's statements to Messick. Rather, we conclude the converse would be true.

Further, after considering *all* of the surrounding circumstances, we conclude there is ample evidence to support Soto's conviction for making a criminal threat to Messick. The surrounding circumstances include: the nature of the call, Messick's training and past experience with similar calls, Soto's arrest history, Soto's conduct before Messick's arrival as reported by his sister, and Soto's conduct after Messick's arrival. Of particular relevance in the latter category was Soto's admission to being armed with a knife, his efforts to goad Messick by words and actions into coming inside the house despite indicating he would kill Messick if Messick did so, his initial escalation of the matter by waving what appeared to be a firearm at the officers through an open window, his further escalation of the matter by coming out the side of house with the firearm raised and pointed at the officers, and his final escalation of the matter by advancing on the officers a second time with the firearm raised and pointed.

The jury could reasonably find from these circumstances Soto conveyed to Messick a gravity of purpose and an immediate prospect he would carry out his threat to kill Messick. All indications from the record are that Soto was determined to engage Messick and the other officers in a weapons fight on that day.

In addition, the jury could reasonably find from these circumstances Soto actually caused Messick to be in sustained fear for his own safety. Messick's fear was palpable

even from a cold record. He knew the situation was dangerous, he urgently requested resources to help counter the danger, and he tried to remain in a place of relative safety until those resources arrived. However, Soto continued to escalate the situation and Messick was compelled to leave his place of relative safety to prevent Soto from using what appeared to be a firearm.

The jury could also find Messick's fear was reasonable. It requires no special insight to appreciate the extreme volatility of the situation and the high likelihood Soto's conduct would cause someone to die. It is remarkable no one did. Any reasonable person in the same situation would have shared Messick's fear. Messick's SWAT training does not alter this conclusion. Although there is evidence SWAT training prepares officers to handle situations like the one Soto created, there is no evidence the training prevents officers from being afraid of dying or being seriously injured in such situations. Accordingly, we conclude there is no merit to Soto's insufficient evidence claim.

II

Pitchess Proceeding

Before trial, Soto moved for discovery of information in the victim officers' personnel records under *Pitchess v. Superior Court, supra*, 11 Cal.3d 531 (*Pitchess*). Although the trial court denied the motion, it nonetheless agreed to conduct an in camera review of a separately subpoenaed internal affairs report about the incident to determine

whether it contained any discoverable information.⁴ After reviewing the report in camera, the trial court determined it did not contain any discoverable information.

At Soto's request, we have independently reviewed the sealed transcript of the trial court's in camera proceeding. The transcript provided an adequate record for our review and we conclude the trial court did not err in finding there was no discoverable information in the report.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

IRION, J.

⁴ The trial court conducted the in camera review because the City of El Centro objected to disclosure of the internal affairs report on *Pitchess*-related grounds. The parties agree the *Pitchess* line of authorities applies to our review of the matter.