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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GUSTAVO SOTO QUINONEZ,

Defendant and Appellant.

D062463

(Super. Ct. No. JCF28432)

APPEAL from a judgment of the Superior Court of Imperial County, Christopher J. Plourd, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Melissa Mandel and Scott C. Taylor, Deputies Attorney General, for Plaintiff and Respondent.

A jury found Gustavo Soto Quinonez guilty of making criminal threats (Pen. Code,¹ § 422) while armed with a firearm (§ 12022, subd. (a)(1)) and with personal use of a firearm (§ 12022.5, subd. (a)) (count 2). The jury deadlocked on a charge of burglary (§ 459) (count 1), and the court declared a mistrial on that count. The court sentenced Quinonez to prison for four years four months: the 16-month lower term for the substantive offense; the three-year lower term for personal firearm use; and a stayed term for the remaining enhancement (§ 654). Quinonez appeals, contending the finding he personally used a firearm is unsupported by substantial evidence. We affirm.

BACKGROUND

Quinonez's ex-wife, Erin Benefield, lived with their two daughters (the children) and Benefield's grandparents in the grandparents' house. Benefield had sole custody of the children. She and Quinonez had verbally agreed that neither parent would "bring another man or woman around [the children]."

On March 18, 2011, Quinonez had a visit with the oldest child, four-year-old T. Around 8:30 p.m., Quinonez returned T. to Benefield. T. told Benefield she did not have fun because Quinonez "took that girl and her boy" with them on the visit. Benefield believed this was a reference to Quinonez's girlfriend. Benefield sent Quinonez a text message stating, "Why the fuck would you take my child around that home wrecking cunt? And you wonder why I hate you." Quinonez telephoned Benefield and said T. "doesn't know what she's talking about" and "made it all up." Quinonez told Benefield "if

¹ All further statutory references are to the Penal Code.

[she] continued acting this way [the children] would not grow up with a mother or father." Benefield took this to mean Quinonez would kill her and then himself. After this telephone conversation, Quinonez tried to call Benefield 11 times. She did not answer. He sent her a text message telling her to answer the telephone.

At around 9:30 p.m., Quinonez walked up to Benefield's house saying, "I know you're in there. Open the fucking door." Quinonez tried to open the front door but it was locked. He shook the door. He continued to tell Benefield he knew she was inside and to "open the fucking door." He kicked the door several times. The children were holding onto Benefield. Quinonez opened a window and climbed through it into the house. He walked quickly toward Benefield, stood approximately three inches from her and yelled repeatedly, "Who are you fucking?" and "you don't know me." He looked very angry. He was pale and shaking, his mouth was dry and his eyes were bloodshot.

Benefield asked Quinonez to leave. He said he would leave as soon as he got something. He walked down the hall into Benefield's grandparents' bedroom and bent over toward the dresser. Benefield heard one of the drawers open. She knew her grandfather kept a handgun in the dresser. She had never seen the gun and did not know if it was loaded.

Quinonez placed an object in the waistband of his pants, in the front, and pulled his shirt over his pants. He walked toward Benefield and the children. When he reached them he pulled up his shirt, revealing the top of his pants. He put his hand on a hard object inside a sock at his belt line. Benefield believed the object was her grandfather's gun. Quinonez's grip on the object was consistent with the way a person would hold a

gun. As he held up his shirt and gripped the object, Quinonez repeatedly told Benefield to tell him who she was fucking and said he was not going to ask her again. He repeatedly said he would kill her if she did not tell him.

Benefield envisioned Quinonez shooting her. She was scared. She believed he was going to kill her because he had taken the gun from her grandfather's room and had told her their "kids were going to grow up without a mother and father." Benefield told Quinonez she loved him and there was nobody else. She let him know the children were scared. Quinonez calmed down for a second. Benefield told him to leave.

Quinonez walked toward the garage and returned carrying two boxes of bullets in one hand and a handful of bullets in the other hand. He said he was taking the bullets in case Benefield decided to act up. He angrily told her that if the incident interfered with his aspirations to become a law enforcement officer, he would come back and kill her. He said if he found out she had called anyone, he would come back and "blow [her] fucking head off." Benefield believed Quinonez was going to kill her.

Quinonez left the house, got in his car and drove away. Benefield was scared and in shock. She called her mother and they spoke for a few seconds. Benefield then called 911.²

Police officers arrived and while Benefield was speaking with them, Quinonez called her. The police told Benefield to put the call on speaker phone and told her what to say by writing notes and whispering to her. Quinonez made several comments about

² A recording of the 911 call was played for the jury.

the gun: he never took the gun; it was just a sock; he was kidding; he had taken the gun a month earlier; and he had thrown the gun out the window. He did not deny threatening to kill Benefield. He claimed he was in Brawley.³

In two instances, Benefield spoke to Quinonez figuratively. First, because the police had directed her to push him to admit having the gun, she said, "you find it acceptable to wave a gun in my face and your daughter's face." Second, when Quinonez said he did not want to deal with their younger daughter's crying, and would not know what to do if she had another seizure, Benefield said, "when their mother is pinned up against the wall, scared the father is going to kill her, that's what I'm talking about." Benefield acknowledged that Quinonez had not touched or pushed her against the wall, although she had been backed up against the wall. She acknowledged that he had not waved a gun in her face.⁴

After the police took Quinonez into custody, he claimed he had thrown the gun out a window. He later said the gun was at his house, in a kitchen drawer, behind a piece of plywood, inside a sock. The police found the gun there, inside a sock.

Quinonez told the police he had not threatened Benefield. He claimed that several months earlier, her grandfather had given him permission to take the gun. Quinonez took

³ Later, Quinonez again told the police he was in Brawley, as did his girlfriend. Quinonez was actually with his girlfriend in the home they shared.

⁴ A recording of the conversation between Quinonez and Benefield was played for the jury.

the gun because he wanted to go shooting in the desert the next day. He lifted up his shirt and showed Benefield the gun. He took bullets from the garage.

Quinonez testified he yelled at Benefield but did not threaten her or ask "who are you fucking." He went into the bedroom and grabbed the gun because Benefield had threatened to kill herself. He put the gun in his pants but did not show it to Benefield. She saw the gun because it was over his shirt. He grabbed the ammunition from the garage because there were numerous guns in the house. As he drove home, he threw the bullets out the window because Benefield had said she was going to call the police.

DISCUSSION

Section 12022.5, subdivision (a), proscribes "personal[] use[] [of] a firearm in the commission of a felony." "The evidence is sufficient to prove the use of a firearm where there is some type of display of the weapon, coupled with a threat to use it which produces fear of harm in the victim. ' . . . [A] firearm is displayed when, by sensory perception, the victim is made aware of its presence. Once displayed in such fashion, the threat of use sufficient to produce fear of harm becomes a use of that firearm proscribed by . . . section[] 12022' [Citation.] There is no requirement the victim actually see the gun. [Citation.]" (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 421.) There is no requirement the defendant actually fire the gun. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

" 'Although the use of a firearm connotes something more than a bare potential for use, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of a firearm in aiding the

commission of one of the specified felonies. . . . The obvious legislative intent to deter the use of firearms in the commission of the specified felonies requires that "uses" be broadly construed.' [Citation.] 'Thus when a defendant deliberately shows a gun, or otherwise makes its presence known, and there is no evidence to suggest any purpose other than intimidating the victim (or others) so as to successfully complete the underlying offense, the jury is entitled to find a facilitative use rather than an incidental or inadvertent exposure. The defense may freely urge the jury not to draw such an inference, but a failure to actually point the gun, or to issue explicit threats of harm, does not entitle the defendant to a judicial exemption from section 12022.5[, subdivision] (a).' [Citations.]" (*People v. Wilson, supra*, 44 Cal.4th at pp. 806-807.)

We review the gun use finding for substantial evidence. (*People v. Wilson, supra*, 44 Cal.4th at p. 806.) We view the evidence in the light most favorable to the judgment, defer to the jury's evaluation of the credibility of witnesses (*People v. Barnes* (1986) 42 Cal.3d 284, 303) and "accept logical inferences that the jury might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396).

Quinonez expressly, impliedly and repeatedly told Benefield he would kill her. He continued threatening her after forcing his way into her home and positioning himself a few inches away from her, in their children's presence. He went to a bedroom, removed an object from a dresser where a handgun was kept, placed the object in the waistband of his pants, and returned to Benefield and the children. He pulled up his shirt and gripped the object in the manner one would grip a gun. Benefield believed the object was her grandfather's gun, and did not know if it was loaded. Quinonez made conflicting

statements about the gun and lied to the police. The police found the gun in a sock, as Benefield had described.

Substantial evidence supports the gun use finding.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

AARON, J.