

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ALLEN BAILON, JR.,

Defendant and Appellant.

E061994

(Super.Ct.No. FVI1400644)

OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed as modified.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant David Allen Bailon, Jr., guilty of assault with a deadly weapon (Pen. Code,<sup>1</sup> § 245, subd. (a)(1), count 1) and making criminal threats (§ 422, count 2). Defendant admitted that he had one prior strike conviction (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and that he had served one prior prison term (§ 667.5, subd. (b)). A trial court sentenced him to eight years on count 1, a consecutive one year four months on count 2, and one year on the prison prior, for a total term of 10 years four months in state prison.

On appeal, defendant contends: (1) there was insufficient evidence to support his conviction for making criminal threats; (2) the court should have stayed the sentence on count 2 pursuant to section 654; and (3) the court erred in giving a flight instruction to the jury. The People concede, and we agree, that the sentence on count 2 should be stayed under section 654. In all other respects, the judgment is affirmed.

#### FACTUAL BACKGROUND

On the night of February 13, 2014, Rafat Snoubar (the victim) and Michael Stevens pulled into a gas station. The victim was driving his 2008 BMW. Both men went into the gas station store. The victim paid for the gas, and Stevens waited in line to purchase something. The victim went back outside to pump the gas. A few minutes later, Stevens came out of the store looking terrified. Stevens told the victim that there was a man inside the store who was “talking smack” to him and trying to beat him up. The victim finished pumping gas, and they both got into his car. As the victim was

---

<sup>1</sup> All further statutory references will be to the Penal Code, unless otherwise noted.

pulling out of the station, he noticed defendant come out of the gas station store, yelling and raising his hands. Defendant came up to within three or four feet of the passenger side of the victim's car, yelling. The victim rolled down the windows and asked defendant if he could help him with something. Defendant came around to the driver's side. The victim opened his door and got out of the car to figure out what was going on. Defendant immediately pulled out a knife, pressed it into the victim's stomach, and stated, "Say one more f---ing word." The knife drew a little blood. The victim jumped back into his car, rolled up his window, and locked his car door. The victim testified that he got back into his car because he thought defendant wanted to kill him, in light of the fact that he just asked him one question, and defendant "stabbed [him] that quick." The victim testified that defendant's statement telling him not to say another word made him feel like defendant was "going to kill [him] with this knife," and that he was "going to stab [him] again to death." The victim said he was shocked when defendant stabbed him. When asked if defendant's statement placed him in fear, the victim said, "Big time." After the victim had gotten back into his car, defendant started knocking on the glass. The victim then pulled out his phone and called the police. Defendant saw him on the phone, jumped into his car, and drove away. The operator told the victim not to follow the car, but he did anyway because he felt that defendant "was taking off really fast." The victim testified that "there's a law in this country, and . . . [defendant] needed some kind of punishment." The victim followed defendant, who turned into a shopping center parking lot. The police arrived there and apprehended him.

On cross-examination, defense counsel asked the victim if he remembered telling the police that he only had a “tiny red dot” on his stomach. The victim said yes, and said he considered it “a stab.” On redirect examination, the victim testified that English was not his first language, and that the word “stabbed” meant to him the same as pointing a knife to his stomach.

The police officer who responded to the victim’s call, Officer Brenden Keim, also testified at trial. He said the description of the suspect he received was that he was a Hispanic male with tattoos on his face. When the officer arrived at the shopping center parking lot, he saw defendant, who matched the description. Defendant was standing next to a BMW, yelling at the occupants.<sup>2</sup> Officer Keim contacted defendant and found him wearing a holster with a folding knife in it.

Defendant testified on his own behalf at trial. He said he went to the gas station to buy cigarettes and lottery tickets. He was waiting in line and saw Stevens at the front of the line, talking to the clerk. He told him to hurry up, but Stevens cursed at him. Defendant cursed back, and left it at that. He bought his items, left the store, and got into his car. The victim’s car was blocking his, so he got out of the car. The victim confronted him and acted like he wanted to fight. Defendant pushed the victim to get him to back up, and the victim pushed back. The victim then got into his car. Defendant also got into his car to head home. However, he stopped at Walgreen’s when he saw a

---

<sup>2</sup> The record does not make clear that it was the victim’s BMW.

police car behind him. Defendant denied ever pulling out his knife or wielding it at the victim.

## ANALYSIS

### I. The Evidence Was Sufficient to Support the Criminal Threats Conviction

Defendant contends that the evidence showing that he pulled a knife, put it to the victim's stomach, and stated, "Say one more f---ing word" was insufficient to support the criminal threats conviction. He specifically argues that his statement did not amount to a criminal threat, since there was no evidence that he intended to physically harm the victim or that the victim was in sustained fear. We disagree.

#### A. *Standard of Review*

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

#### B. *The Evidence Was Sufficient*

The jury was instructed that, in order to find defendant guilty of making criminal threats, it had to find that: (1) defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to the victim; (2) defendant made the threat orally;

(3) defendant intended “that this understanding be as a threat”; (4) that the threat was “so clear, immediate, unconditional, and specific that it communicated to [the victim] a serious intention and the immediate prospect that the threat would be carried out”; (5) the threat actually caused the victim to “be in sustained fear for his own safety”; and (6) the victim’s fear was reasonable under the circumstances.

We agree that the words themselves—“Say one more f---ing word”—did not articulate a threat to commit a specific crime resulting in death or great bodily injury. “However, the determination whether a defendant intended his words to be taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate and specific they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone.” (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340, superseded by statute on other grounds, as stated in *People v. Franz* (2001) 88 Cal.App.4th 1426, 1442.) Moreover, “the meaning of the threat by defendant must be gleaned from the words and all of the surrounding circumstances.” (*People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218 (*Martinez*)). Thus, in this case, the jury was free to interpret the words spoken from all of the surrounding circumstances. The evidence showed that, after having an angry verbal altercation with defendant in the gas station store, Stevens came out of the store looking terrified. Then, defendant came out of the store yelling and raising his arms. He confronted the victim, quickly pulled out a knife, pressed it to the victim’s stomach, and said, “Say one more f---ing word.” After the

victim got back into his car, defendant started knocking on the glass. The victim then pulled out his phone and called the police. Defendant was clearly angry, and he was pointing a knife in the victim's stomach, drawing a little blood. Defendant's actions implicitly communicated to the victim that if he said another word, defendant would use the knife to cause great bodily injury to him. In view of the circumstances, a rational juror could easily conclude that defendant made a grave threat to the victim's personal safety.

“Section 422 also requires that the threat be such as to cause a reasonable person to be in *sustained fear* for his personal safety. 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.) Based on the evidence here, a rational juror could find that defendant's threat placed the victim in a state of sustained fear. The victim testified at trial that he was in fear for his life. He specifically said that defendant's statement made him feel like defendant was “going to kill [him] with this knife,” and that he was “going to stab [him] again to death.” When directly asked if defendant's statement placed him in fear, the victim said, “Big time.” He was so fearful that he got back into his car and called the police right away. Defendant claims the fact that the victim followed him to the shopping center parking lot shows that the victim was not in

sustained fear. However, we note that the victim followed him from the safety of his own car, knowing that the police were on their way. Moreover, such conduct did not negate the evidence that the victim was in sustained fear when defendant threatened him with the knife. Given the circumstances that an angry stranger with tattoos on his face put a knife to a person's stomach and told him not to say another word, the sustained fear was reasonable.

Accordingly, we conclude that substantial evidence supports defendant's conviction for making criminal threats.

## II. The Sentence on Count 2 Should Be Stayed Under Section 654

Defendant argues that the sentences on counts 1 and 2 violated section 654, since his actions constituted a single act with a single intent. The People correctly concede.

“Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct. [Citations.]” (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) “Whether a course of criminal conduct is a divisible transaction which could be punished under more than one statute within the meaning of section 654 depends on the intent and objective of the actor.” (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

Defendant was sentenced to eight years on count 1 (assault with a deadly weapon) and a consecutive one year four months on count 2 (making criminal threats). The evidence shows that the assault and criminal threat were part of the same transaction, with the same criminal objective. Defendant wanted to prevent the victim from speaking and to intimidate him by threatening physical harm with the knife. The threat and the

assault with the knife were done with the objective of frightening and controlling the victim. In other words, defendant used the knife to threaten the victim, along with the words spoken. Therefore, the one year four month sentence on count 2 should be stayed pursuant to section 654.

### III. The Court Properly Gave the Flight Instruction

Defendant argues that there was no evidence to support the jury instruction on flight (CALCRIM No. 372). He claims the instruction was prejudicial and violated his right to a fair trial.

#### *A. Procedural Background*

During the discussion of jury instructions, defense counsel objected to the flight instruction, arguing that the evidence did not show defendant fled the scene or tried to evade the police. The prosecutor responded that the People's theory was that defendant tried to flee, but failed, and that if the prosecution was relying on that theory, the court had a sua sponte duty to give the flight instruction. The court agreed, noting that CALCRIM No. 372 started with the words, "If the defendant fled." The court commented that the instruction allowed the jury to determine whether defendant fled. Thereafter, the court instructed the jury as follows: "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide its meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

*B. The Court Properly Instructed the Jury on Flight*

Section 1127c provides: “In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.” Thus, section 1127c mandates a rule that “if there is evidence identifying the person who fled as the defendant, and if such evidence is relied on as tending to show guilt, then a flight instruction is proper.” (*People v. Roberts* (1992) 2 Cal.4th 271, 310 (*Roberts*).

Here, the prosecutor indicated to the trial court that he planned to argue that defendant fled from the gas station. Once the prosecutor indicated he would rely on evidence of flight to establish guilt, the court was required to give the flight instruction. (*People v. Elliott* (2012) 53 Cal.4th 535, 584 (*Elliott*).

Defendant contends that the giving of the instruction was error because there was no evidence of flight, and he notes that his testimony differed substantially from that of the victim. He further claims that the error was prejudicial because “[t]he giving of the flight instruction could very easily have tipped the balance where the evidence was otherwise equal.” However, “By its terms, the instruction applied only if the jurors found that the described flight had been shown. In the absence of any evidence of flight . . . the

jury would have understood that the instruction was to that extent inapplicable. The superfluous reference to flight after accusation caused defendant no prejudice.” (*Elliott, supra*, 53 Cal.4th at p. 584.)

Ultimately, the evidence showed that defendant left the gas station after the altercation with the victim. Furthermore, as the prosecutor indicated, he argued that defendant tried to flee because he knew what he did was wrong. Thus, the court properly instructed the jury. (*Roberts, supra*, 2 Cal.4th at p. 310.)

DISPOSITION

The judgment is modified to stay the sentence imposed on count 2 under section 654. The trial court is directed to amend the abstract of judgment to reflect this modification and to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST  
J.

We concur:

RAMIREZ  
P. J.

McKINSTER  
J.