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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO ALEXANDER KEMP,

Defendant and Appellant.

F068919

(Super. Ct. No. F12907322)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Gregory T. Fain, John F. Vogt, and W. Kent Hamlin, Judges.†

Hayes H. Gable III, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Poochigian, J. and Franson, J.

† Judge Fain ruled on the *Pitchess* motion; Judge Vogt presided over the jury trial; Judge Hamlin accepted the admission and imposed sentencing.

INTRODUCTION

Appellant Antonio Alexander Kemp was convicted by a jury of resisting an executive officer, a violation of Penal Code¹ section 69; dissuading a witness by force or fear, a violation of section 136.1, subdivision (c)(1); and criminal threats, a violation of section 422. Kemp admitted suffering a prior strike conviction. Kemp also admitted a section 186.22, subdivision (b)(1) enhancement in exchange for dismissal of section 186.22, subdivision (b)(4)(C) and section 667.5 allegations and a stipulated total term of imprisonment of 18 years. The trial court sentenced Kemp in accordance with the agreement. Kemp filed a notice of appeal. Appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We affirm the judgment, but direct the abstract of judgment be corrected.

FACTUAL AND PROCEDURAL SUMMARY

On September 16, 2012, around 11:24 p.m., Fresno Police Officers James Barnum and Joshua Bowling were dispatched to investigate a report of a robbery in progress. They received updates on their way to the scene, including that the suspect was a Black male, medium build, in his mid-20's. While proceeding to the location they had been informed the suspect fled, Huntington and Peach Avenues in Fresno, the officers received word that the suspect had been seen running into an apartment complex.

When Barnum and Bowling arrived at the apartment complex, their attention was drawn to a woman in a second story apartment trying to communicate with them. Bowling went to speak with the woman and then came back to where Barnum was waiting. The two officers began moving toward the center of the complex, where their information indicated the suspect was hiding. When they arrived at the center of the complex, they saw Kemp on the second story landing. Kemp matched the description of the suspect.

¹ References to code sections are to the Penal Code unless otherwise specified.

The two officers shouted “Fresno Police Department” and told Kemp to keep his hands where the officers could see them and stand up; they were concerned about a possible weapon as dispatch had reported an armed robbery in progress. Kemp did not comply and began arguing with the officers. The officers gave numerous commands to Kemp to show his hands, stand up, and walk down the stairs to meet with the officers. Eventually, Kemp began walking down the stairs; he appeared angry.

As Kemp walked down the stairs, he yelled profanities at the officers and asked why they were harassing him; Kemp stopped before reaching the bottom of the stairs. Because the officers were possibly dealing with an armed suspect, they had their service weapons drawn and pointed at Kemp. When the officers took hold of Kemp’s arm and instructed him to come with them, Kemp tried to pull away. Eventually, Kemp was placed in a control hold and handcuffed. Barnum sustained injuries trying to place Kemp in handcuffs.

After Kemp was handcuffed, he was taken to the patrol vehicle and an in-field show-up was conducted. Kemp was informed he was under arrest for resisting arrest. Kemp was then driven to the police station for processing and placed in a holding cell. While there, Bowling heard Kemp make numerous threats against Barnum, and Bowling wrote down many of the threats. Kemp threatened Barnum’s children and his wife, and Kemp indicated he had a weapon. Kemp stated, “I’m going to kill your wife, and I’m going to kill you.”

Barnum took the threats seriously. He filled out a VINE form: victim’s information notification of inmates. The form allows law enforcement to notify a victim whenever an inmate is released from custody.

Kemp was charged with three felonies: (1) resisting an executive officer; (2) dissuading a witness by force or threat; and (3) criminal threats. Barnum was identified as the victim in all three counts. It also was alleged that Kemp had suffered two prior strike convictions, served a prior prison term, and as to counts 2 and 3, that he

committed the offenses for the benefit of a criminal street gang. Kemp pled not guilty to all charges and denied the allegations.

Prior to trial, Kemp filed a motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535 (*Pitchess*) seeking the personnel files of Barnum and Bowling. The People filed opposition to the motion. An in camera hearing on the *Pitchess* motion was held on January 31, 2013, and the trial court ordered documents provided to the defense.

Trial commenced on July 31, 2013. Barnum and Bowling both testified at Kemp's trial.

Dominique Mendoza, the woman from the apartment complex who beckoned to the officers, testified that she had been sitting on her second floor landing when Kemp came up and asked if he could "kick it" or "chill" there with her. Mendoza did not recognize Kemp as a resident of the apartment complex and she said "no" and went inside her apartment. She was looking out her window and flagged the officers down when she saw them arrive. Mendoza told them Kemp was on the landing near her front door.

Kemp had admitted North Side gang membership when booked into the jail on five separate occasions. He also was asked when booked if he was a street gang drop-out and Kemp indicated "no."

George Flowers testified as a gang expert on the North Side criminal street gang in Fresno. Flowers testified regarding the primary activities of the North Side gang. Flowers also testified regarding the convictions of three other validated North Side members. Based upon Kemp's tattoos, the color of clothing worn by Kemp in his numerous prior contacts with police, Kemp's association with known gang members, the credible sources identifying Kemp as a gang member, and Kemp's admitted gang membership on several prior occasions, Flowers opined that Kemp was an active North Side gang member. When given a hypothetical involving the facts of this case, Flowers

opined that the offenses were committed for the benefit of a criminal street gang because threats against law enforcement disrupt the department and tax their resources.

Johnny Ruiz, Mendoza's significant other, testified for the defense. He recalled that Kemp was cooperative and complied with the officers' demands when at the apartment complex.

The jury found Kemp guilty of all three counts, but deadlocked on the gang enhancement allegations. The trial court declared a mistrial on the gang enhancement allegations. In a court trial, Kemp admitted the prior conviction and prior prison term allegations on August 12, 2013.

On December 12, 2013, Kemp admitted the section 186.22, subdivision (b)(1) enhancement as to count 3, criminal threats. In exchange, the prosecution agreed to the striking of the enhancement as to count 2 and a prison prior and a maximum term of 18 years in prison.

Kemp was sentenced on January 13, 2014. In accordance with the plea agreement, Kemp was sentenced to a maximum aggregate term of 18 years in prison. Count 3 was designated the principal term and Kemp was sentenced to the upper term doubled, or six years, plus five years for the gang enhancement. On count 2, the trial court imposed one-third the midterm doubled, or two years, plus five years for the section 667, subdivision (a)(1) enhancement. On count 1, the trial court imposed the upper term doubled, or six years, but stayed the term pursuant to section 654.

Kemp filed a timely notice of appeal on February 19, 2014. Appellate counsel was appointed on June 4, 2014.

DISCUSSION

Counsel filed a *Wende* brief on April 2, 2015. Our letter inviting Kemp to submit a supplemental brief was issued that day. Kemp submitted a supplemental brief on April 14, 2015, asking this court to examine the evidence supporting the dissuading a witness charge and the gang enhancement; contending the criminal threat conviction

cannot stand because there was no audio recording of the threat; and asserting the *Pitchess* records should be reviewed.

Kemp pled to the gang enhancement. A plea of guilty or no contest forecloses an appellate challenge to the factual basis for the plea; the same is true of an admission of an enhancement. (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1364.)

As for the sufficiency of the evidence of dissuading a witness and criminal threats, the record discloses sufficient evidence. The dissuading a witness conviction is based on Kemp's statement to Barnum that was coupled with a threat. At one point, Kemp stated to Barnum "let me go or else." Barnum took that to mean that Kemp meant Barnum "was making a mistake by arresting him" for resisting an executive officer and Barnum "should let him go" and stop "doing [my] job."

When Barnum continued to do his job, and instead refused to release Kemp, Kemp commenced making multiple criminal threats. While Kemp was in a holding cell after his arrest, Bowling heard Kemp make numerous threats against Barnum and Bowling wrote down many of the threats. Kemp threatened Barnum's children and his wife, and Kemp indicated he had a weapon. Kemp stated, "I'm going to kill your wife, and I'm going to kill you."

This is more than sufficient evidence supporting the dissuading a witness and criminal threats convictions. Despite Kemp's contention, there is no requirement the threats be recorded on audio in order to sustain a conviction for criminal threats. (*People v. Wilson* (2010) 186 Cal.App.4th 789, 807.) That Barnum was not dissuaded from arresting Kemp and filing charges against him does not mean the offense of dissuading a witness has not been committed; the offense is committed without regard to the success or failure of the attempt to dissuade. (*People v. Foster* (2007) 155 Cal.App.4th 331, 335-336.)

As for the *Pitchess* motion, the trial court ordered some information regarding Barnum produced to the defense at the time of trial. That information was produced in

accordance with the trial court's order. Our independent review of the records does not disclose any other relevant material that should have been produced.²

We will, however, direct that a corrected abstract of judgment be prepared. Kemp was convicted of the count 1 offense, a violation of section 69, but it is not reflected in the abstract of judgment. The trial court imposed the aggravated term of six years for the count 1 offense, but stayed the term. Even though the term is stayed, the conviction and term should be reflected in the abstract of judgment.

DISPOSITION

The judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment that includes the count 1 conviction and to disseminate the corrected abstract to the appropriate authorities.

² The confidential reporter's transcript indicates that some records had been destroyed, pursuant to the department's five-year policy, prior to receipt of this court's April 2016 order. The trial court noted, however, that there was some information ordered produced from those files and there was proof it had been provided to the defense.