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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID LAVAR YOUNG,

Defendant and Appellant.

G046395

(Super. Ct. No. 11NF3009)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James E. Rogan, Judge. Affirmed.

David R. Greifinger, 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, Assistant Attorney General, Melissa Mandel, Scott C. Taylor, and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

David Laver Young appeals from a judgment after a jury convicted him of attempting to make a criminal threat and resisting and deterring a police officer. Young argues: (1) the trial court erred in instructing the jury on the offense of attempted criminal threats; (2) the court erred in failing to instruct the jury on unanimity; and (3) the court erred in imposing a fine pursuant to Penal Code section 3000, subdivision (b)(1). None of his contentions have merit, and we affirm the judgment.

FACTS

About 1:00 a.m. one October morning, 14-year-old Jasmine B. (Jasmine) and her sister's ex-boyfriend, 25-year-old Xavier¹ were drinking at a bus stop on Katella Avenue. Jasmine called her sister, 21-year-old Paulette,² to come to the bus stop because she did not want to be alone with Xavier. Young approached the group and tried to hit Xavier in the face for not repaying a debt. Jasmine was afraid Young would hit her so she returned to a nearby motel where she lived. From in front of her motel room, Jasmine saw Xavier hit Young. She went inside and told her mother, Sue Dady, what had happened. Dady told her daughters to walk Xavier, who had walked to the motel, back to the bus stop.

As Dady sat in a chair outside waiting for her daughters to return, Young got within five feet of Dady and threatened to kill Jasmine. Young then said he was going to kill everyone in the complex. Young sat down on a concrete wall about 20 to 25 feet away. Dady called Jasmine and told them to return. About 10 minutes later, Jasmine, Paulette, and Xavier returned. When Xavier asked Young to leave, Young threatened to blow up the complex and he attacked Xavier. Dady told Paulette and

¹ Xavier's last name was not reflected in the record.

² Paulette's last name was not reflected in the record

Jasmine to go to the motel room of Megan Chestnut. Young threatened to kill everyone. Chestnut called the police.

Officer Jason Smith responded to the scene and saw Young chasing Xavier around a car. On Smith's third command, Young finally sat on the ground. As Smith tried to frisk Young, Young attempted to pull away from Smith. Smith and two other officers subdued Young. Young repeatedly threatened to kill Smith and his family.

An information charged Young with two counts of making criminal threats (Pen. Code, § 422)³ (count 1-Dady & count 2-Jasmine), and resisting and deterring a police officer (§ 69) (count 3). The information alleged Young had been convicted of two or more violent and serious felonies (§§ 667, subs. (a)(1), (d) & (e)(2)(A), 1170.12, subs. (b) & (c)(2)(A)).

At trial, on direct examination, Dady testified that after the girls went to Chestnut's room, Young threatened to kill her and blow up the complex. Dady testified she was scared for herself and her daughters. Dady stated she later told Jasmine that Young had threatened to kill her. On redirect examination, however, Dady stated Young did not specifically threaten her.

Jasmine testified she did not hear Young threaten her but that Dady later told her what Young had said. Jasmine stated she was not scared "because [she] [doesn't] get scared."

As relevant to the issues before us, the trial court instructed the jury with CALCRIM No. 1300, "Criminal Threat," as follows: "The defendant is charged in [c]ounts 1 [and] 2 with having made a criminal threat in violation of . . . section 422. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to the alleged victim or members of the alleged victim's immediate family; [¶]

³ All further statutory references are to the Penal Code.

2. The defendant made the threat orally; [¶] 3. The defendant intended that his statement be understood as a threat and intended that it be communicated to the alleged victim; [¶] 4. The threat was so clear, immediate, unconditional, and specific that it communicated to the alleged victim a serious intention and the immediate prospect that the threat would be carried out; [¶] 5. The threat actually caused the alleged victim to be in sustained fear for her own safety or for the safety of her immediate family; [¶] [and] 6. The alleged victim's fear was reasonable under the circumstances. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. [¶] In deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves, as well as the surrounding circumstances. [¶] Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] Sustained fear means fear for a period of time that is more than momentary, fleeting, or transitory. [¶] An immediate ability to carry out the threat is not required. [¶] Immediate family means any spouse, parents, and children; or any person who regularly lives in the other person's household."

The court also instructed the jury with CALCRIM No. 460, "Attempt Other Than Attempted Murder," as follows: "The lesser included offense to counts 1 [and] 2 is attempted criminal threat. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took a direct but ineffective step toward committing the criminal threat. [¶] AND [¶] 2. The defendant intended to commit the criminal threat. [¶] A *direct step* requires more than merely planning or preparing to commit the crime or obtaining or arranging for something needed to commit it. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to commit the crime. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the

plan would have been completed if some circumstance outside the plan had not interrupted the attempt. [¶] A person who attempts to commit a criminal threat is guilty of an attempted criminal threat even if, after taking a direct step towards committing the crime, he or she abandoned further efforts to complete the crime or of his or her attempt failed or was interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing the crime, then that person is not guilty of attempted criminal threat. [¶] To decide whether the defendant intended to commit a criminal threat, please refer to the separate instructions that I have given you on that crime. [¶] The defendant may be guilty of attempt even if you conclude that the crime itself was actually completed.”

The jury acquitted Young of count 2 but convicted him of the lesser included offense of attempted criminal threats on count 1 and on count 3. After the trial court found true one prior conviction, the court sentenced Young to prison for nine years, double the middle term of two years on count 3, plus five years for the prior conviction. The court imposed a \$1,000 fine pursuant to section 3000, subdivision (b)(1).

DISCUSSION

I. Jury Instructions

A. Attempted Criminal Threat

Young contends the trial court erred in instructing the jury on the lesser included offense of attempted criminal threat. The Attorney General asserts Young forfeited appellate review of this issue and Young was not prejudiced by the instructional error. Because Young contends the trial court’s instruction excluded one necessary element of the offense, his claim is preserved for appellate review. (*People v. Jackson* (2009) 178 Cal.App.4th 590 (*Jackson*) [trial court must instruct on all elements of offense sua sponte].) We will address the merits of Young’s claim.

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.”

The elements of the criminal threat offense are: “(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, 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. [Citation.]” (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228 (*Toledo*).

1. People v. Toledo

In *Toledo*, the jury returned a verdict on the lesser included offense of attempted criminal threat. The issue on appeal was whether there was, under California law, such a crime. The Supreme Court found there was, and that the jury properly

convicted defendant of that offense. (*Toledo, supra*, 26 Cal.4th at p. 224.) Defendant and his wife got in an argument on their drive home from her work. When they arrived home the dispute escalated. Defendant threw a telephone, tossed a chair, and punched a hole in a door. Wife told defendant she did not care if he destroyed their apartment and, to demonstrate, she picked up a lamp and dropped it to the floor. After defendant told her, ““You know, death is going to become you tonight. I am going to kill you,”” wife said she did not care and walked away. (*Id.* at p. 225.) Defendant then approached her holding scissors over his shoulder. He plunged the scissors towards her neck and she moved back. Defendant stopped the motion of the scissors before they touched wife and said, ““You don’t want to die tonight, do you? You’re not worth going to jail for.”” (*Ibid.*) Wife left and went to a neighbor’s apartment. She was crying, shaking, and appeared frightened. Later, the neighbor began to escort wife back to her apartment. When defendant saw them, he chased after wife and screamed at her. Wife and the neighbor returned to the neighbor’s apartment. They heard a loud noise, which was an iron hitting a wall and shattering into pieces. When questioned by an investigating officer, wife said she was afraid defendant was going to kill her. At trial, however, wife “denied that she had entertained any fear of defendant on the evening in question.” (*Ibid.*)

The *Toledo* court provided section 422’s statutory language, the elements of the offense, and sections 664 and 21a, the statutory provisions relating to attempts, and the court concluded there is a crime of attempted criminal threats in California. (*Toledo, supra*, 26 Cal.4th at p. 230.) The court opined: “[A] defendant properly may be found guilty of attempted criminal threat whenever, acting with the specific intent to commit the offense of criminal threat, the defendant performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action. Furthermore, in view of the elements of the offense of criminal threat, a defendant acts with the specific intent to commit the offense of criminal threat only if he or she specifically intends to

threaten to commit a crime resulting in death or great bodily injury with the further intent that the threat be taken as a threat, under circumstances sufficient to convey to the person threatened a gravity of purpose and an immediate prospect of execution so as to reasonably cause the person to be in sustained fear for his or her own safety or for his or her family's safety. (*Toledo, supra*, 26 Cal.4th at pp. 230-231.)

The *Toledo* court provided a few examples: “A variety of potential circumstances fall within the reach of the offense of attempted criminal threat. For example, if a defendant takes all steps necessary to perpetrate the completed crime of criminal threat by means of a written threat, but the crime is not completed only because the written threat is intercepted before delivery to the threatened person, the defendant properly may be found guilty of attempted criminal threat. Similarly, if a defendant, with the requisite intent, orally makes a sufficient threat directly to the threatened person, but for some reason the threatened person does not understand the threat, an attempted criminal threat also would occur. Further, if a defendant, again acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat. In each of these situations, only a fortuity, not intended by the defendant, has prevented the defendant from perpetrating the completed offense of criminal threat itself.” (*Toledo, supra*, 26 Cal.4th at p. 231.)

After rejecting defendant's claim section 422 was unconstitutionally overbroad on its face, the court also rejected his claim the offense was unconstitutional as applied to him. (*Toledo, supra*, 26 Cal.4th at pp. 233-235.) The *Toledo* court explained: “[T]he jury in this case properly could have found that defendant's threat to [wife]—‘You know, death is going to become you tonight. I am going to kill

you[]’—was made with the requisite intent and was the type of threat that satisfied the provisions of section 422 and reasonably could have caused [wife] to be in sustained fear for her own safety. At the same time, however, the jury might have entertained a reasonable doubt . . . as to whether the threat *actually* caused [wife] to be in such fear. Thus, the jury evidently found defendant guilty only of attempted criminal threat rather than the completed crime of criminal threat, not because defendant’s conduct fell short of that required by the criminal threat provision, but simply because defendant’s threat happened not to have as frightening an impact upon [wife] as defendant in fact had intended. Under these circumstances, it is clear that defendant’s conviction of attempted criminal threat was not based upon constitutionally protected speech.” (*Id.* at p. 235.)

2. *People v. Jackson*

In *Jackson, supra*, 178 Cal.App.4th at page 594, landlords asked defendant to leave the apartment where he had been staying. In response, defendant threatened to both blow up and chop off their heads. After making the threats, defendant ranted and raved outside until the police arrived. A victim testified she “‘feared for everybody’s safety who was at the house. I didn’t know what he was going to do.’” (*Ibid.*) When asked if she believed the defendant was going to kill her, she said: “‘I didn’t think anything one way or the other, other than I didn’t know what he was going to do next.’” (*Ibid.*) The jury acquitted defendant of two counts of the substantive offense and convicted him of two counts of attempted criminal threats. (*Id.* at p. 595.) On appeal, defendant claimed the trial court erred by failing to instruct the jury sua sponte that, “in order to find him guilty of attempted criminal threat, it must find that ‘it would have been reasonable for a person to have suffered sustained fear as a result of the threat under the circumstances of this case.’” (*Id.* at p. 595.) The Attorney General responded that, when a defendant has done everything he needs to do to complete the crime of criminal threat, but he has not achieved his intended result, he has committed an attempted criminal threat regardless of whether the intended threat reasonably could have caused the target

to suffer sustained fear. (*Id.* at pp. 595-596.) The *Jackson* court rejected the Attorney General's argument because the *Toledo* court's "definition of the crime of attempted criminal threat expressly includes a reasonableness element." (*Id.* at pp. 596-597.)

The *Jackson* court held the jury instructions were erroneous because the reasonableness element was included only in the substantive offense instruction and not in the attempt instruction. (*Jackson, supra*, 178 Cal.App.4th at pp. 599-600.) Thus, the court reasoned the "jury was not instructed to consider whether the intended threat *reasonably could have* caused sustained fear under the circumstances." (*Id.* at p. 599, italics added.) In concluding the instructional error was prejudicial, the court noted counsel's arguments did not fill the gaps left by the trial court's instructions. The court stated the prosecutor argued the jury could find defendant guilty of attempted criminal threats if it concluded the victims were not afraid and defense counsel simply urged the jury to find defendant not guilty based on the victims' actions. The court concluded, "In short, there was nothing in the instructions or the argument of counsel that told the jury that to be guilty of attempted criminal threat defendant's intended threat had to be one that reasonably could have caused the person to suffer sustained fear." (*Id.* at p. 599.)

The *Jackson* court noted the jury must have found defendant made threats, and had intended them to be taken as threats, but, in acquitting him on the substantive offense, the jury must also have found "that one or both of the last two elements of the completed crime was missing." (*Jackson, supra*, 178 Cal.App.4th at p. 600.) The court noted the evidence would have supported findings that one or both elements were missing. (*Ibid.*) Thus, the court explained the jury could have concluded the victims did not suffer sustained fear, i.e., the jury might not have believed the victims' testimony that they feared for their lives. This scenario is sufficient to support a conviction of attempted criminal threats only upon a finding that a reasonable person could have suffered fear in those circumstances, something the jury was not asked to decide. (*Ibid.*) Alternatively, the court stated the jury could have concluded the victims'

fear was unreasonable under the circumstances, i.e., the victims were safely inside the house with a telephone to call the police while the defendant sat out front. This scenario is legally insufficient to support an attempted criminal threat conviction. (*Ibid.*)⁴

3. Analysis

Here, the trial court instructed the jury with CALCRIM No. 1300, “Criminal Threat,” in relevant part, as follows: “5. The threat actually caused the alleged victim to be in sustained fear for her own safety or for the safety of her immediate family; [¶] [and] 6. The alleged victim’s fear was reasonable under the circumstances.”

The court also instructed the jury with CALCRIM No. 460, “Attempt Other Than Attempted Murder,” in relevant part, as follows: “The lesser included offense to counts 1 [and] 2 is attempted criminal threat. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took a direct but ineffective step toward committing the criminal threat. [¶] AND [¶] 2. The defendant intended to commit the criminal threat. [¶] . . . [¶] To decide whether the defendant intended to commit a criminal threat, please refer to the separate instructions that I have given you on that crime. [¶] The defendant may be guilty of attempt even if you conclude that the crime itself was actually completed.”

As the *Toledo* court explained sections 664 and 21a, the general attempt principles, apply to section 422 just as they do any other crime. (*Toledo, supra*, 26 Cal.4th at p. 230.) Thus, attempting to make a criminal threat requires only that

⁴ In *People v. Chandler* (2012) 211 Cal.App.4th 114, 118 (Nov. 19, 2012, E054154), the Fourth District, Division Two, rejected the *Jackson* court’s reasoning and held “that the crime of attempting to make a criminal threat can be committed even if, under the actual circumstances, it would not be reasonable for the victim to be in fear” As the appellant in *Chandler* has filed a petition for review (*Chandler, supra*, 211 Cal.App.4th 114, petn. for review pending, petn. filed Dec. 24, 2012), we will not discuss *Chandler*.

(1) the defendant took a direct but ineffectual step toward making a criminal threat, and (2) the defendant had the specific intent to make a criminal threat, including the specific intent that the victim be in fear and that the victim's fear be reasonable under the circumstances. These standard instructions on making a criminal threat and attempt when read together adequately informed the jury the defendant intended the victim to reasonably be in fear.

Young relies on *Jackson, supra*, 178 Cal.App.4th 590, to argue the trial court should have instructed the jury sua sponte that to convict him of attempting to make a criminal threat the jury had to find it would have been reasonable for a person to have suffered sustained fear as a result of the threat under the circumstances of this case. We do not find *Jackson* persuasive.

As discussed above, the *Jackson* court concluded that when instructing on the elements of attempted criminal threats, the trial court erred in directing the jury to refer back to the elements of the completed crime of criminal threat. The court held the instructions were deficient because reasonableness was only discussed as part of the result of the completed crime. The instructions directed the jury to determine whether the specific victim's fear was reasonable under the circumstances. The *Jackson* court held it was error for the trial court to not separately instruct the jury in the context of an attempted criminal threat that the jury must determine whether the intended threat reasonably could have caused sustained fear under the circumstances. Essentially, the *Jackson* court concluded that when referring back to the instruction on the completed crime, the jury likely ignored the reasonableness element.

Jackson conflated the fourth and fifth element of the completed crime of criminal threat to create a new instructional requirement when instructing on attempting to make a criminal threat. The fourth element requires the jury to determine whether the victim subjectively experienced the requisite fear. The fifth element requires the jury to make an objective determination as to whether the fear was reasonable under the

circumstances. An objective determination is not based on the reaction of a unique individual, but on the reaction one would expect from a reasonable person under the same circumstances. We do not conclude the jury would have overlooked its duty to make an objective determination as to the fear experienced because the definition of the completed crime focused on the specific victims. Also, we note that to commit an attempted criminal threat, the prosecutor must prove the defendant took a direct but ineffective step toward committing the criminal threat. Reasonableness cannot be defeated by a fortuitous event over which the defendant has no control.

We conclude a trial court satisfies its sua sponte duty to instruct on all the elements of the offense when it instructs the jury with CALCRIM Nos. 1300 and 460. Thus, the trial court here properly instructed the jury on the lesser included offense of attempting to make a criminal threat.

4. Miscellaneous Claim

Finally, Young claims the jury could not convict him on count 1, making a criminal threat to Dady, based on his threat to kill Jasmine. He asserts section 422 requires the named victim be a target of the threatened danger. Not so.

“We begin with the familiar canon that, when construing statutes, our goal is ““to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law.”” [Citation.] “We first examine the words of the statute, “giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent.” [Citation.] ““If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature’s intent is unnecessary.” [Citation.]” (*People v. Albillar* (2010) 51 Cal.4th 47, 54-55.)

Section 422 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, . . . is to be taken as a threat, . . . 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” (Italics added.) The first element of CALCRIM No. 1300 requires the prosecutor to prove: “1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to the alleged victim or members of the alleged victim's immediate family[.]”

Young asserts the first element of CALCRIM No. 1300 conflicts with the plain language of section 422 because the instruction permits the jury to convict a defendant of a criminal threat based on a threat to the victim's immediate family and not the victim. He claims the phrase “another person” refers only to the victim, and not the victim's immediate family, and that threat must cause “that person,” the victim, to be in fear for her own safety or her immediate family's safety. We do not read “another person” so narrowly.

Based on a plain reading of the statute, we conclude “another person” means the victim or the victim's immediate family. If a defendant threatens the victim, “the person threatened,” with the death of her daughter, “another person,” the threat could cause “that person,” the victim, “reasonably to be in sustained fear for . . . her own safety or . . . her immediate family's safety.”

Our conclusion is supported by *People v. Maciel* (2003) 113 Cal.App.4th 679 (*Maciel*). In that case, citing to *Toledo*, the court held, “A criminal threat is the communication of an intent to inflict death or great bodily injury on another with the intent to cause the listener to believe death or great bodily injury will be inflicted on the person or a member of the person's immediate family. [Citation.]” (*Maciel, supra*,

113 Cal.App.4th at p. 683.) Thus, a jury could convict Young with threatening Dady with the death of her daughter Jasmine.

B. Unanimity

Young contends that if we conclude the jury could convict him on count 1, making a criminal threat to Dady based on a threat to kill Jasmine, the court erred in failing to instruct the jury with CALCRIM No. 3500, “Unanimity,” because the jury could have convicted him based on either threatening to kill Jasmine or threatening to blow up the motel. We conclude the trial court did not have a sua sponte duty to instruct the jury on unanimity.

In a criminal case, the constitutional right to jury unanimity requires that when a defendant is charged with a single criminal act and the evidence shows more than one such act, either the prosecution must select the specific act relied upon to prove the charge, or the jury must be instructed that it must agree unanimously that defendant committed the same act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

“The unanimity instruction is not required when the acts alleged are so closely connected as to form part of one transaction. [Citations.] Th[is] ‘continuous conduct’ rule [also] applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.” (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) Thus, the question becomes whether the evidence suggested two discrete crimes, i.e., two discrete criminal threats concerning Dady, or merely possible uncertainty on how Young is guilty of count 1. We conclude it is the latter.

Here, the prosecutor argued that with respect to count 1 either Young’s threat to Jasmine or blowing up the motel were sufficient to establish the first element. The evidence merely presented the possibility the jury may divide, or be uncertain, as to the exact way Young was guilty of a single discrete crime, making a criminal threat

against Dady. The jury could convict Young of making a criminal threat based on one of two threats. During her direct testimony, Dady testified Young was within five feet of her when he angrily threatened to kill Jasmine. The prosecutor asked Dady what Young did next. She replied, “He got really upset and he said that he was going to -- that he was going to kill all of us in the complex.” That Young continued to threaten to kill Jasmine and blow up the complex merely demonstrated a continuous course of conduct.

Additionally, Young offered the same defense to the offenses. Defense counsel argued Young was a “blow hard” who was just “mouthing off.” There was no risk the jury would not agree on any particular crime based on the evidence that there were two threats. Thus, the trial court did not have a sua sponte duty to instruct the jury with CALCRIM No. 3500.

II. Section 3000, subdivision (b)(1)

Young asserts the trial court erred in imposing a \$1,000 fine pursuant to section 3000, subdivision (b)(1), because that section governs periods of parole, which has no bearing on this case. In its respondent’s brief, the Attorney General did not respond. At oral argument, the Attorney General conceded the issue. Nonetheless, we conclude the parole revocation fine was proper.

The trial court sentenced Young to double the middle term of two years on count 3. This is a determinate prison term under section 1170; all determinate terms “shall include a period of parole” under section 3000. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075 (*Brasure*)). The *Brasure* court held section 1202.45 parole revocation fines should be included in a sentence whenever the sentence includes a determinate prison term, despite the simultaneous imposition of a life sentence without the possibility of parole. (*Brasure, supra*, 42 Cal.4th at p. 1075.) Under *Brasure*’s interpretation of the relevant Penal Code provisions, Young’s sentence in this case should include a parole revocation fine. (*Ibid.*)

DISPOSITION

We affirm the judgment.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J., Concurring.

I concur in the result, but analyze defendant David Lavar Young's instructional claim differently. Unlike the majority, I see no need to discuss whether *People v. Jackson* (2009) 178 Cal.App.4th 590 (*Jackson*), was correctly decided because any potential instructional error was harmless.

Here, based on the evidence and the arguments of counsel, the jury most likely determined the victim, Sue Dady, was not in sustained fear when Young uttered his threats. Young argues that if the jury concluded Dady was not actually afraid, under CALCRIM No. 1300 as phrased, there would be no need to determine whether the victim's nonexistent fear was reasonable. According to Young, the jury therefore would find him guilty of an attempted criminal threat without ever determining whether a reasonable person could have been in sustained fear from Young's threats. Alternatively, Young argues the same risk applies if the jury determined Dady was actually afraid, but her fear was unreasonable. These scenarios illustrate Young's argument: the trial court should have instructed the jury it was necessary for the prosecution to prove under an objective standard Young's intended threat reasonably could have caused sustained fear. Assuming *Jackson* was correctly decided, any potential instructional error based on *Jackson* was harmless because a reasonable person in Dady's position would have been afraid.

In *Jackson*, "[the victims] were safely inside the house with a telephone to call the police while defendant sat out front." (*Jackson, supra*, 178 Cal.App.4th at p. 600.) In contrast, Dady was sitting outside her motel room when Young approached within five feet and threatened to kill her daughter and everyone in the motel. Dady knew Young had assaulted her daughter's companion, Xavier, and Young continued to scream at Dady during the ordeal. Moreover, the arguments of counsel focused on whether Dady was actually afraid, and not whether a reasonable person would have been

in sustained fear. Indeed, the prosecutor informed the jury they could consider “an attempted criminal threat when you have all of the elements satisfied except the person’s not afraid.” Defense counsel emphasized Dady’s failure to call the police and that she remained seated as Young uttered his threats, which demonstrated her lack of concern. My review of the evidence convinces me that Young’s violent antics and belligerence would instill fear in a reasonable person in Dady’s position.

I therefore conclude the omission of a jury instruction on whether a reasonable person could have been placed in sustained fear cannot be attributed to Young’s conviction. Accordingly, I join in the majority’s decision to affirm.

ARONSON, J.