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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BEN CHANDLER, JR., Defendant and Appellant.	E054154 (Super.Ct.No. SWF027980) **OPINION**

APPEAL from the Superior Court of Riverside County. Mark E. Johnson, Judge. Affirmed as modified.

Stephen M. Hinkle, 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, Senior Assistant Attorney General, and William M. Wood, Bradley A. Weinreb, and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

For no apparent reason, defendant Ben Chandler, Jr., walked up to a female neighbor while swinging a golf club from side to side and yelled, "Fuck you, bitch. I'm

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts III, IV, and V.

going to kill you." The next day, likewise for no apparent reason, he walked up to another female neighbor and yelled, "I'm going to kill you[,] bitch."

A jury found defendant not guilty on one count of stalking. (Pen. Code, § 646.9, subd. (a).) It also found him not guilty on two counts of making a criminal threat (Pen. Code, § 422); however, it found him guilty, on both counts, of the lesser included offense of attempting to make a criminal threat (Pen. Code, §§ 422, 664).

In a bifurcated proceeding, the jury also found true two "strike" priors (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and two prior serious felony convictions enhancements (Pen. Code, § 667, subd. (a)). The trial court later struck one of the two prior serious felony convictions enhancements, because they had not been separately brought and tried.

Defendant was sentenced to a total of 33 years to life in prison, plus the usual fines and fees.

Defendant now contends that:

1. The trial court erroneously failed to instruct the jury that the crime of attempting to make a criminal threat — like the completed crime of a making a criminal threat — requires that it would be reasonable under the circumstances for the victim to be in sustained fear.

2. There was insufficient evidence that defendant attempted to make criminal threats, because he made completed threats and the jury found that these were not criminal.

3. The trial court erred by granting defendant's *Romero* motion[1] only in part, rather than in toto.

In the published portion of our opinion, we will hold 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; we will further hold that this is consistent with the First Amendment. In the unpublished portion of our opinion, we will reject defendant's other claims; however, we will correct one sentencing error that we have discovered. We will affirm the judgment as modified.

I

STATEMENT OF FACTS

A. *Background*.

Defendant lived on Pottery Street in Lake Elsinore. Victim Jamie Lopez lived around the corner, on Scrivener Street.

Four or five years before the charged events, Lopez had had "problems" with defendant, which led her to get a restraining order against him. By 2009, however, she barely recognized him and did not think he would recognize her.

Sometime in January 2009, defendant drove up to Lopez's house just as she was going inside. He called her a bitch and said he knew when she was alone.

The next day, defendant drove by again and said, "Fuck you, bitch."

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[1] A "*Romero* motion" is a motion to dismiss a strike prior in the interest of justice. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.)

After that, defendant "would walk up and down the street constantly and use profanity."

Once, in the middle of the night, Lopez heard a noise like a tennis ball being bounced off her bedroom window. Another time, there was loud pounding on her rear windows. Yet another time, someone threw a pipe at her front door, leaving a dent.

On January 29, 2009, hundreds of nails were left all over Scrivener, and the word "fuck" was spray-painted in the street.

B. *Count 3: Criminal Threat Against Alva*.

Victim Deborah Alva also lived on Scrivener. Alva and Lopez were friends. At one time, Alva and defendant had also been friends. However, after a business dispute, their relationship had soured.

On January 29, 2009, the same day as the nail incident, around 7:20 p.m., Alva was out on her porch; Lopez was outside her house, talking to a neighbor. Defendant came walking up the middle of the street. He was swinging a golf club back and forth and yelling, "Fuck you, bitch. I'm going to kill you."

Lopez was terrified; she ran to the house of a male neighbor. She was so frightened that she and her children stayed at Alva's house for the next few nights.

Alva believed that defendant was talking to her, because he was looking right at her. She "wasn't going to show him fear," so she responded by yelling, "Bring it on." Defendant continued to yell, but he backed up and went back to his own property.

Alva's testimony about whether she was afraid was somewhat equivocal. When first asked if she was afraid, she answered, "No." When asked again, she said, "I was

afraid that he would do something to my car." When asked a third time, she said, "Yes." She added that she was afraid for her own safety "if he had gone up [on her porch]." "I was upset that he was gonna come in and do something to me, to my grandkids . . . ." She believed defendant was capable of carrying out the threat "[b]ecause of the drugs."

Later that night, when Alva and Lopez were both out on Alva's porch, they heard defendant, at his home, yelling at them; they also heard him "taunting" them by singing a song that Alva had heard before on the radio; the lyrics included, "I always feel like somebody's watching me."

C. *Count 2: Criminal Threat Against Lopez.*

The next day, January 30, 2009, as Lopez was stopping her car at the stop sign at Pottery and Scrivener, defendant came out of his house, got within 10 feet of her car, and yelled, "I'm going to kill you[,] bitch." Lopez "panicked," stepped on the gas, and sped away. She used her cell phone to call 911.

D. *Aftermath.*

As a result of defendant's threats, Alva "[l]ocked [her]self in the house, . . . put the lights on outside more, [and] slept in the living room."

Lopez started checking her house before letting her children go inside. She and her children slept in one locked bedroom. She kept an axe and a bat at the ready. She got a second, larger dog for protection. She set up a video surveillance camera. Two or three months later, as a result of these incidents, she moved away.

E. *Defense*.

Defendant denied even knowing Lopez — "I've never seen her in my life, never." He testified that he knew the people who lived at Lopez's claimed address, and Lopez did not live there. He denied threatening Alva. He denied placing nails or writing graffiti in the street.

Defendant testified that on January 29, 2009, around 8:00 p.m., he was out on his lawn, chipping golf balls, when he noticed a laser light on his chest. He was upset because a week or two earlier, someone had shot at him.

When he walked out of his yard to look for the source of the light, he saw a group of people on Scrivener. He yelled, "Stop pointing that f[uck]ing thing at me." He heard Alva laugh. He swung the golf club once, at a tree. Then he turned around and went into his house.

Defendant felt that his neighbors were "ganging up" to "railroad" him. He believed that Alva had some connection to the incident in which someone had shot at him. He also believed that Alva and her husband were following him when he took his daily walks.

II

INSTRUCTIONS ON THE REASONABLENESS OF THE VICTIM'S FEAR

Defendant contends that — as *People v. Jackson* (2009) 178 Cal.App.4th 590 in fact held — the standard criminal threat instruction and the standard attempt instruction erroneously fail to convey the requirement that, under the circumstances, the victim would *reasonably* be in sustained fear.

A. *Additional Factual and Procedural Background.*

The trial court gave the standard instruction on making a criminal threat, CALCRIM No. 1300. This instruction stated that the elements of this crime included that:

"The threat actually caused [the victim] to be in sustained fear . . . ;

"And [the victim's] fear was reasonable under the circumstances."

The trial court also gave the standard attempt instruction, CALCRIM No. 460. This instruction stated, in part:

"To prove that the defendant is guilty of . . . an attempt to commit . . . a criminal threat, the People must prove that[:]

"(1) The defendant took a direct but ineffective step towards committing . . . criminal threats . . . ;

"And (2) the defendant intended to commit . . . criminal threats . . . ."

The instruction further stated:

"To decide whether the defendant intended to commit . . . criminal threats, please refer to the separate instructions I have given you on th[at] crime[]."

B. *Analysis.*

1. *The crime of making a criminal threat.*

The elements of the crime of making a criminal threat 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 . . . 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.]" (*In re George T.* (2004) 33 Cal.4th 620, 630, fn. omitted.)

Penal Code section 422 is not unconstitutionally overbroad because it is narrowly tailored to true threats, which are not protected by the First Amendment. (*People v. Toledo* (2001) 26 Cal.4th 221, 233; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 861-862; *People v. Fisher* (1993) 12 Cal.App.4th 1556, 1558-1560.) "[T]he type of threat satisfying the criminal threat provisions of section 422 — that is, a threat 'to commit a crime which will result in death or great bodily injury to another person . . . 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' — constitutes speech that falls outside the protection of the First Amendment. [Citations.]" (*Toledo*, at p. 233.)

2. *The crime of attempting to make a criminal threat.*

a. *The Toledo case.*

In *Toledo*, the California Supreme Court held that the general criminal attempt statutes (Pen. Code, §§ 21a, 664) apply to the crime of making a criminal threat, and hence "there is a crime of attempted criminal threat . . . ." (*People v. Toledo, supra*, 26

Cal.4th at p. 230.) "[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." (*Id*. at pp. 230-231, italics added.)

The defendant argued, however, that such a crime would be unconstitutionally overbroad. (*People v. Toledo, supra*, 26 Cal.4th at p. 233.) The Supreme Court disagreed, in part because "defendant's claim misconceives the general circumstances to which the crime of attempted criminal threat ordinarily will apply." (*Ibid*.)

The court gave three examples of "some of the most common situations that would support a conviction of attempted criminal threat" (*People v. Toledo, supra*, 26 Cal.4th at p. 234):

1. "[I]f 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 . . . ." (*People v. Toledo, supra*, 26 Cal.4th at p. 231.)

2. "[I]f 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 . . . ." (*People v. Toledo, supra*, 26 Cal.4th at p. 231.)

3. "[I]f 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* . . . ." (*People v. Toledo, supra*, 26 Cal.4th at p. 231, second italics added.)

The court noted that "[i]n 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." (*People v. Toledo, supra*, 26 Cal.4th at p. 231; see also *id*. at p. 234.)

It concluded that "[i]n each of these situations, a defendant who is convicted of attempted criminal threat will be held criminally responsible only for speech that clearly is not constitutionally protected, and thus it is evident that in these instances a conviction of attempted criminal threat will pose no constitutional problems." (*People v. Toledo, supra*, 26 Cal.4th at p. 234.) "[E]ven if we . . . assume that there may be some unusual circumstances in which the crime of attempted criminal threat theoretically might reach speech that is constitutionally protected, it nonetheless would not be appropriate . . . to refuse to recognize the crime of attempted criminal threat on the ground of constitutional overbreadth." (*Ibid*.)

Finally, the court held that the "offense is not unconstitutional as applied to the facts of the present case. . . . [T]he jury in this case properly could have found that defendant's threat . . . was made with the requisite intent and was the type of threat that satisfied the provisions of section 422 *and reasonably could have caused* [*the victim*] *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 [the victim] 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 [the victim] 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." (*People v. Toledo, supra*, 26 Cal.4th at p. 235, first italics added, fn. omitted.)

b. The *Jackson* case.

Based on *Toledo*, *Jackson* held that a defendant cannot be guilty of attempting to make a criminal threat unless, under the circumstances, a reasonable person could have been in sustained fear. (*People v. Jackson, supra*, 178 Cal.App.4th at pp. 595-598.)

The court relied on the three references in *Toledo* — which we have italicized above — to the reasonableness of sustained fear on the part of the victim. (*People v. Jackson, supra*, 178 Cal.App.4th at pp. 596-597.) It concluded, "It is important to remember that the crime of criminal threat, or attempted criminal threat, punishes speech

and, consequently, risks offending the First Amendment. . . . By insisting that the intended threat be evaluated from the point of view of a reasonable person under the circumstances of the case, we can insure that punishment will apply only to speech that clearly falls outside First Amendment protection." (*Id*. at p. 598.)

The court further held that the standard criminal threat instruction and the standard attempt instruction erroneously fail to convey this reasonableness element. (*People v. Jackson*, *supra*, 178 Cal.App.4th at pp. 598-599.) In the case before it, it held that the instructional error was prejudicial because the jury could have found "that [the victims] did not suffer sustained fear or that their fear was unreasonable under the circumstances. . . . The latter scenario is legally insufficient to support conviction of an attempted criminal threat and the former scenario is sufficient only upon finding that a reasonable person could have suffered fear in those circumstances, something the jury was not asked to decide." (*Id*. at p. 600.)

3. *Discussion.*

The People argue that *Jackson* was wrongly decided. As we will discuss, we are compelled to agree.

a. *Toledo does not support Jackson.*

As the Supreme Court held in *Toledo*, the general attempt principles of Penal Code sections 21a and 664 apply to the crime of making a criminal threat just as they do to any other crime. Under Penal Code section 422, the completed crime of making a criminal threat requires that the victim's fear must be reasonable under the circumstances. Statutorily, then, the crime of attempting to make a criminal threat does *not* require that it

would *actually* be reasonable under the circumstances for the victim to be in fear. All it requires is that (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. (See Pen. Code, § 21a.)

In *Toledo*, there was simply no issue as to whether an attempt to make a criminal threat requires that fear would be reasonable under the circumstances. "It is axiomatic that an opinion does not stand for a proposition the court did not consider. [Citation.]" (*People v. Taylor* (2010) 48 Cal.4th 574, 626.) While even a dictum of our Supreme Court is "'persuasive,'" we need not follow it unless it "'demonstrates a thorough analysis of the issue or reflects compelling logic.'" (*People v. Smith* (2002) 95 Cal.App.4th 283, 300.)

We do not read the three italicized passages from *Toledo* as supporting the holding in *Jackson*. First, the Supreme Court stated that an attempt to make a criminal threat requires the specific 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." (*People v. Toledo, supra*, 26 Cal.4th at pp. 230-231, italics added.) This is ambiguous. Must the circumstances *actually* be such that the threat would reasonably cause sustained fear? Or is it sufficient that the defendant *intends* the circumstances to be such that the threat would reasonably cause sustained fear?

Next, the Supreme Court gave three examples of the crime of an attempt to make a criminal threat. One was "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* . . . ." (*People v. Toledo, supra*, 26 Cal.4th at p. 231, second italics added.)

Another example, however, was "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 . . . ." (*People v. Toledo, supra*, 26 Cal.4th at p. 231.) In that case it would *not* be reasonable for the victim to feel sustained fear. For example, if the perpetrator threatens the victim orally, but the victim is totally deaf, it would seem that the circumstances are such that it would be unreasonable for the victim to feel any fear.

Yet another example was if "the crime is not completed only because the written threat is intercepted before delivery to the threatened person . . . ." (*People v. Toledo, supra,* 26 Cal.4th at p. 231.) Again, it seems tautological that if the victim never receives the threat, it would be unreasonable for the victim to feel any fear.

Third and finally, the Supreme Court held that, in the case before it, Penal Code section 422 was not unconstitutional as applied, noting that the jury could have found "that defendant's threat . . . was made with the requisite intent and was the type of threat that satisfied the provisions of section 422 *and reasonably could have caused* [*the victim*]

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 [the victim] to be in such fear." (*People v. Toledo, supra*, 26 Cal.4th at p. 235, first italics added.)

This statement must be viewed in light of the facts in *Toledo*, where it appeared that the reason *why* the jury found the defendant guilty of attempt, rather than guilty of the completed crime (see *People v. Toledo, supra*, 26 Cal.4th at p. 226), was that the victim denied at trial that she felt any fear. (*Id*. at p. 225.) It cannot be viewed as an indication that even if the defendant *did* cause the victim to feel fear, the prosecution *still* must prove that the victim's fear was reasonable under the circumstances. Rather, what was most significant, in the court's view, was that the completed crime had failed due to "a fortuity, not intended by the defendant . . . ." (*People v. Toledo, supra*, 26 Cal.4th at p. 231; see also *id*. at p. 234.)

In our view, the *Jackson* court went astray in part because it did not clearly distinguish the (counterfactual) intended crime from the (actual) attempt. Indeed, at times, it seems to say that the defendant need only *intend* the circumstances to be such that the victim's fear would be reasonable. (E.g., *People v. Jackson*, *supra*, 178 Cal.App.4th at pp. 593, 597, 599.) We agree with this proposition. It follows from the general principle, stated in Penal Code section 21a, that in order to be guilty of an attempt, the defendant must have the specific intent to commit the completed crime.

If that were the true holding of *Jackson*, however, the court would have affirmed, not reversed. The standard instruction on making a criminal threat and the standard

instruction on attempt, when combined, adequately inform a jury that the defendant must *intend* the victim reasonably to be in fear. *Jackson* held, however, that the attempt instruction "simply referred the jury back to the elements of the substantive crime. The problem with that was that the instruction on the substantive crime included the reasonableness element only as part of the result of the completed crime . . . . Thus, in deciding whether defendant had the intent necessary to support conviction for attempted criminal threat, the jury was not instructed to consider whether the intended threat reasonably could have caused sustained fear under the circumstances." (*People v. Jackson*, *supra*, 178 Cal.App.4th at p. 599.) "[T]here was nothing in the instructions . . . 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." (*Ibid.*) Thus, the court necessarily held that the *actual* circumstances must be such that the victim reasonably could have been in fear.

b. *The First Amendment does not support Jackson.*

Also in our view, besides relying too heavily on *Toledo*, *Jackson* relied too little on the First Amendment. We can depart from the statutory framework, if at all, only because the federal or state Constitution compels us to. Accordingly, as we see it, the key issue is whether the statutes making it a crime to attempt to make a criminal threat must be construed to require that the victim's fear would be reasonable because otherwise, they would be unconstitutional.

Any discussion of true threats must begin with *Watts v. United States* (1969) 394 U.S. 705 [89 S.Ct. 1399, 22 L.Ed.2d 664]. There, the defendant asserted that he was not

going to respond to his draft notice, adding, "'If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.'" (*Id*. at p. 706.) The Supreme Court held that this was constitutionally protected speech because it was "political hyperbole" rather than a "'true' threat." (*Id*. at p. 708.)

Watts did not define a "true threat." In *Virginia v. Black* (2003) 538 U.S. 343 [123 S.Ct. 1536, 155 L.Ed.2d 535], however, the Supreme Court stated: "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. [Citations.] The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protects individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.' [Citation.] Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." (*Id*. at pp. 359-360.)

In the case before it, the Supreme Court held that "[t]he First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate . . . ." (*Virginia v. Black*, *supra*, 538 U.S. at p. 363.) Significantly, the Virginia law at issue did not require that anybody actually be intimidated, much less that it be reasonable for someone to be intimidated under the circumstances. (See *id*. at p. 348.) It was closely analogous to the California crime of attempting to make a criminal threat, in that all it required was the specific intent to intimidate, along with the direct step of burning a cross — "a

particularly virulent form of intimidation" (*id.* at p. 363), to be sure, but still, an act made criminal by its intended effect, not its actual effect. We conclude that California can constitutionally declare it a crime to attempt to make a criminal threat even when, under the circumstances, it would not be actually reasonable for the victim to be in fear.

At first glance, this conclusion may appear to conflict with *People v. Lowery* (2011) 52 Cal.4th 419. There, the issue was the constitutionality of Penal Code section 140, subdivision (a), which makes it a crime to threaten to use force or violence on a victim of or a witness to a crime. (*Lowery*, at p. 421.) The defendant had not threatened the witness directly; rather, in phone calls to his own wife, the defendant had said that he was going to kill the witness. (*Id.* at pp. 422-423.) He admitted making the threats, but he claimed he did not mean them; he was "simply expressing his anger over [the witness's] false accusation . . . ." (*Id.* at p. 423.)

The defendant argued that the statute was unconstitutional because it did not require the intent to intimidate the victim or witness. (*People v. Lowery*, *supra*, 52 Cal.4th at p. 425.) His argument was supported by the Ninth Circuit's holding, in *U.S. v. Bagdasarian* (9th Cir. 2011) 652 F.3d 1113, that a true threat requires the subjective intent to intimidate. (See *Lowery*, at p. 427, fn. 1; see also *id.* at p. 432 [conc. opn. of Baxter, J.].)

Our Supreme Court, however, disagreed with *Bagdasarian*; it held that Penal Code section 140 was constitutional because it "appl[ied] only to those threatening statements that a reasonable listener would understand, in light of the context and surrounding circumstances, to constitute a true threat . . . ." (*People v. Lowery*, *supra*, 52 Cal.4th at

p. 427.) In Justice Baxter's concurring opinion, joined by a majority of the court, the majority stated that it was adopting the "objective standard" of a true threat and rejecting *Bagdasarian*'s "subjective standard." (*Lowery*, at pp. 432-433 [conc. opn. of Baxter, J.].)

Thus, *Lowery* held that a subjective intent to intimidate is not a *necessary* condition of a true threat; an objective or apparent intent to intimidate can also be *sufficient*. Even aside from the fact that *Lowery* is binding on us, we agree. We merely conclude that a subjective intent to intimidate can *also* be sufficient. While the *Lowery* majority, in dictum, expressed some doubt about this (*People v. Lowery*, *supra*, 52 Cal.4th at p. 432 [conc. opn. of Baxter, J.]), it follows from *Black*.

And it makes sense in light of the purpose of the true threat requirement. As *Watts* demonstrates, this requirement serves to distinguish protected speech, which uses a metaphorical threat of violence to make a point, from a literal threat of violence, which is unprotected. Speech that a reasonable person would expect to be taken as a threat fails to function as metaphor; it presents the same risk of disruption as a literal threat. At the same time, however, speech that the speaker intends to be taken as a threat is not metaphor at all. Outlawing speech that is subjectively intended as a threat cannot possibly have any chilling effect on protected speech. (See *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 203 [prosecution for attempt to seduce minor; "the only chilling effect of section 288.2 is on pedophiles who intend that their statements will be acted upon by children. Given the intention with which they are made, such statements are not entitled to the extraordinary protection of the First Amendment"].)

Separately and alternatively, we may assume that the objective standard is the exclusive test of a true threat and hence that a threat intended to intimidate, but made under circumstances such that no reasonable listener would be intimidated, is protected speech. Even if so, however, for the reasons we will discuss, such a threat can be criminally punished as an attempt to make a criminal threat.

Beyond the narrow issue of true threats lurks the broader question of how the First Amendment applies to attempt offenses in general. Would it be constitutional to convict a defendant of attempted criminal libel if the apparently libelous statement, unbeknownst to the defendant, was actually true? Or to convict a defendant of attempted possession of child pornography if the apparent child, unbeknownst to the defendant, was actually 18?

The United States Supreme Court shed some light on these questions in *U.S. v. Williams* (2008) 553 U.S. 285 [128 S.Ct. 1830, 170 L.Ed.2d 650]. Earlier, as *Williams* noted, *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234 had held that the government could not ban "virtual images of children generated by a computer . . . because the child-protection rationale for speech restriction does not apply to materials produced without children." (*Williams*, at p. 289.) Accordingly, in *Williams*, the Eleventh Circuit had reversed the defendant's conviction for offering or requesting child pornography, including material depicting "virtual" children (*id*. at pp. 292-293), in part because "it would be unconstitutional to punish someone for mistakenly distributing virtual child pornography as real child pornography." (*Id*. at p. 300.)

The Supreme Court stated, "We disagree. Offers to deal in illegal products or otherwise engage in illegal activity do not acquire First Amendment protection when the

offeror is mistaken about the factual predicate of his offer. The pandering and solicitation made unlawful by the Act are sorts of inchoate crimes — acts looking toward the commission of another crime, the delivery of child pornography. As with other inchoate crimes — attempt and conspiracy, for example — impossibility of completing the crime because the facts were not as the defendant believed is not a defense." (*U.S. v. Williams*, *supra*, 553 U.S. at p. 300.) Thus, the Supreme Court indicated that it can be constitutional to punish even protected speech as an attempt to engage in unprotected speech, provided the speaker intended the speech to be unprotected and it is protected only fortuitously.

In sum, then, in California, an attempt to make a criminal threat is a crime, regardless of whether it was objectively reasonable, under the circumstances, for the victim to be in fear; this does not violate the First Amendment. Accordingly, the trial court was not required to instruct the jury otherwise.

III

THE SUFFICIENCY OF THE EVIDENCE OF AN ATTEMPT

Defendant contends that there was insufficient evidence to support his convictions for attempting to make a criminal threat.

"In reviewing a criminal conviction challenged as lacking evidentiary support, '"the 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.]' [Citation.]" (*People v. Streeter* (2012) 54 Cal.4th 205, 241.)

Regarding the January 29 threat to Alva, there was evidence that defendant was walking up the street toward Alva, looking at her, and swinging a golf club when he yelled, "Fuck you, bitch. I'm going to kill you." Alva's testimony was equivocal, however, with respect to whether she was afraid. Thus, the jury could have found either that she felt fear or that she did not. Also, while the jury could have found that Alva's fear was reasonable, it also could have found that, because defendant never came up on her porch, any fear she felt was unreasonable.

Similarly, regarding the January 30 threat to Lopez, there was evidence that defendant walked up to her car while it was stopped at a stop sign and said, "I'm going to kill you[,] bitch." This occurred after a series of intimidating events, which, although charged as stalking, were also relevant to show that defendant intended to cause fear and that Lopez felt fear. Lopez, however, could and did drive away. Thus, the jury could have believed that she felt fear, or it could have rejected her testimony to that effect. Also, it could have found either that her fear was reasonable or that it was not.

In each instance, then, the jury could have found that defendant intended to threaten and did threaten to commit a crime resulting in death. It could also find that he had the specific intent that his words be taken as a threat. It could further find that defendant intended to make and did make a threat that was unequivocal and that conveyed an immediate prospect of execution.

The jury may have found that the crimes were only attempts because, even though defendant intended the victims to be in sustained fear, and even though it would have been reasonable for them to be in sustained fear, they were not. This is virtually identical to the third example given in *Toledo* — "[I]f a defendant, . . . 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 . . . ." (*People v. Toledo*, *supra*, 26 Cal.4th at p. 231.) Thus, there was sufficient evidence to support the attempt convictions.

Alternatively, the jury may have found that the crimes were only attempts because, even though the victims were in sustained fear, their fear was unreasonable. Defendant argues that this was not one of the three examples in *Toledo*. Those examples, however, were just that — examples. They were not an exhaustive list. What they had in common, according to the court, was that in each instance, "only a fortuity, not intended by the defendant, has prevented the defendant from perpetrating the completed offense of criminal threat itself." (*People v. Toledo*, *supra*, 26 Cal.4th at p. 231.) Here, there was substantial evidence that defendant intended the victims to be in sustained fear and intended their fear to be reasonable. If their fear was unreasonable, that was an unintended fortuity.[2]

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[2] Of course, the jury could have come to two different conclusions about the two different victims. That is, it could have concluded that Lopez was in fear, but her fear was not reasonable, whereas Alva was not in fear at all, or vice versa.

Defendant argues that we cannot be sure which particular element the jury found to be missing. We agree, but so what? The issue is whether there was *sufficient* evidence to support the conviction. We can never know how the jury *actually* arrived at its verdict. Indeed, absent jury misconduct, we are prohibited from even inquiring. (See Evid. Code, § 1150, subd. (a); *People v. Cleveland* (2001) 25 Cal.4th 466, 475-476.) Rather, under the applicable standard of review, "we *presume* in support of the judgment the existence of every fact the trier of fact *could reasonably have deduced* from the evidence. [Citation.]" (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1081, fn. 15, italics added.)

Separately and alternatively, even if the jury did not find that *any* element was missing — even if it concluded that defendant was guilty of the completed crime — it could still find him guilty of attempt. (Pen. Code, § 663.) "The system accepts the possibility that 'the jury arrived at an inconsistent conclusion through "mistake, compromise, or lenity." [Citation.]' [Citation.]" (*People v. Guerra* (2009) 176 Cal.App.4th 933, 943.) Hence, the fact that the jury acquitted defendant of the completed crime is irrelevant to our sufficiency of the evidence review. We ask only whether there is substantial evidence of each of the elements of an attempt; we simply do not care whether there is or is not substantial evidence of the completed crime. (See *People v. Lewis* (2001) 25 Cal.4th 610, 656 ["[s]ufficiency-of-the-evidence review . . . should be independent of the jury's determination that evidence on another count was insufficient"].)

Finally, defendant argues: "[A]ppellant did not make an attempt, but instead completed his actions. The jury . . . determined that those actions did not constitute

criminal threats. Therefore appellant was not guilty of the charges against him because he did not attempt a criminal act; instead he completed an act the jury determined was not criminal."

A "completed action," however, can still be a criminal "attempt." Suppose a person shoots his enemy in the head, with the intent to kill, but his enemy survives. The shooter has completed his intended action; however, he has not achieved his intended result. Hence, while the crime is not murder, it is attempted murder. Here, the jury could find that defendant completed his intended action. That action did not constitute the *completed* crime, because he did not achieve his intended result — either the victims were not afraid, or their fear was not reasonable. Nevertheless, his action was still criminal.

We therefore conclude that there was sufficient evidence to support defendant's convictions for attempting to make a criminal threat.

IV

ROMERO MOTION

Defendant contends that the trial court erred by granting his *Romero* motion in part, rather than in toto.

A. *Additional Factual and Procedural Background.*

Defendant's prior convictions included:

1995: Violating a harassment restraining order, a misdemeanor. (Pen. Code, § 273.6, subd. (a).)

2006: Being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)), a misdemeanor.

2006: Making a criminal threat (Pen. Code, § 422), brandishing a deadly weapon (Pen. Code, § 417, subd. (a)(1)), and battery (Pen. Code, § 242), all misdemeanors. These convictions arose out of an argument between defendant and a woman and her boyfriend over the purchase of a television. Defendant got into a "physical fight" with the boyfriend. At one point, he pulled out a knife and said to the woman, "I'm a crazy mother fucker. . . . I'll gut your fat ass and if that doesn't work I have a gun. Try to sleep tonight, bitch."

2007: Aggravated assault (Pen. Code, § 245, subd. (a)(1)) and intimidating a witness (Pen. Code, § 136.1, subd. (c)), both felonies, and battery, a misdemeanor. These two felony convictions were the strike priors. They both arose out of an incident that started when defendant threw a rock at a neighbor's fence, leaving a hole. When the neighbor confronted him, defendant punched the victim and headbutted him in the face. When the victim said he was calling the police, defendant said, "If you call the police, I'll fucking kill you." Defendant then threw two bricks and a cinder block at the victim, but they missed.

Defendant was still on parole for the strike priors when he committed the current crimes. However, he was in violation of his parole even before that, due to his failure to enroll in an anger management class.

According to the People, defendant had made threats similar to those in the present case in at least two previous uncharged incidents, as follows.

In 2003, in violation of a restraining order, defendant went to an ex-girlfriend's workplace and yelled, "You tell that thieving whore I'm gonna kill her!" When an

employee asked him to leave, defendant yelled, "I know where you live, I'm gonna kill you and your family!" Later, defendant brandished what appeared to be a pipe.

In 2007, at the end of the sentencing hearing on the strike priors, defendant told his then-prosecutor, "I'm gonna kill you, motherfucker."

Defendant filed a motion to strike one of the two strikes, arguing, among other things, that they both arose out of a single incident.

The trial court granted the motion in part and denied it in part. Solely with respect to count 2 (attempt to make a criminal threat against Lopez), it granted the motion and struck one of the strikes. However, with respect to count 3 (attempt to make a criminal threat against Alva), it denied the motion. Accordingly, on count 3, it sentenced defendant to 25 years to life, but on count 2, it sentenced him to just three years (half the upper term for attempt, doubled), to be served consecutively.

B. *Analysis.*

In *Romero*, the Supreme Court held that a trial court has discretion to dismiss a three-strikes prior felony conviction allegation under Penal Code section 1385. (*People v. Superior Court* (*Romero*), *supra*, 13 Cal.4th at pp. 529-530.) The focus of the analysis must be on "'whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

"Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 375.)

We find no extraordinary circumstances in this case. Defendant has a disturbing pattern of making violent threats. He has brandished an assortment of weapons, including a knife, a pipe, bricks, and a golf club. Moreover, he is clearly capable of following through on his threats, as shown by his 2006 battery conviction and his 2007 aggravated assault conviction. As further evidence of his lack of self-control, he violated restraining orders twice, he threatened a prosecutor in court, and he failed to enroll in an anger management class, even though this was a violation of his parole. Defendant's convictions in this case are not relatively minor felonies, such as petty theft; they are both serious felonies. (Pen. Code, § 667, subd. (d)(1), 1170.12, subd. (b)(1), 1192.7, subd. (c)(38), (39).) Thus, defendant has shown that he cannot be rehabilitated by an ordinary prison term; he must be not only incarcerated but also incapacitated. He falls squarely within both the letter and the spirit of the three strikes law.

If the trial court had totally denied defendant's *Romero* motion, it would not have abused its discretion. Remarkably, however, while defendant acknowledges, as a factual matter, that the trial court granted his motion in part, he treats this fact as legally irrelevant. He even states that "[b]y denying the invitation to exercise section 1385 discretion, the trial court abused its authority." However, it did exercise its discretion — indeed, it did so very thoughtfully and carefully. Defendant cannot cite a single case in which a trial court granted a *Romero* motion in part, yet was held to have abused its discretion by failing to grant the defendant even more relief. For this reason alone, we may reject his contention.

Defendant's main argument is that both of the strikes arose out of a single incident. He relies on cases in which both strikes arose out of a single act, so that Penal Code section 654 applied. In *People v. Benson* (1998) 18 Cal.4th 24, the Supreme Court indicated that "a trial court retains discretion in such cases to strike one or more prior felony convictions under section 1385 if the trial court properly concludes that the interests of justice support such action. [Citation.]" (*Id*. at p. 36, fn. omitted.) Later, in *People v. Burgos* (2004) 117 Cal.App.4th 1209, the appellate court held that, when (1) both of the strikes "arose from a single criminal act," (2) the defendant's other previous convictions are all misdemeanors, and (3) even a second-strike sentence would be as long as 20 years, the trial court abused its discretion by refusing to strike a strike. (*Id*. at pp. 1216-1217.)

In this case, however, defendant's strikes did not arise out of a single act. He assaulted the victim; separately, he also threatened to kill the victim if he called the

police. It appears that, in the prior case, the court did not stay any term under Penal Code section 654. This is sufficient to distinguish *Burgos*. If only out of an excess of caution, however, we note that here, unlike in *Burgos*, the longest possible second-strike sentence would be only eight years eight months.[3] The trial court could reasonably feel that this was not commensurate with defendant's recidivism. Defendant's poor performance on parole further distinguishes *Burgos*.

We therefore conclude that the trial court did not abuse its discretion by denying, in part, defendant's *Romero* motion.

V

SENTENCING ERROR

We have discovered one sentencing error, which we address on our own motion to prevent an unauthorized sentence.

As already discussed, on count 3, the trial court imposed a three-strikes sentence of 25 years to life. On count 2, however, it imposed a sentence of three years, representing the upper term of three years (Pen. Code, §§ 18, subd. (a), 422, subd. (a)), halved for

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[3] Calculated as follows:

1. On count 2, three years, representing the upper term of three years, halved for attempt, and then doubled. (Pen. Code, §§ 18, subd. (a), 422, subd. (a), 664, subd. (a), 667, subd. (e)(1), 1170.12, subd. (c)(1).)

2. On count 3, eight months, representing one-third the midterm of two years, halved for attempt, and then doubled. (See Pen. Code, § 1170.1, subd. (a).)

3. On the prior serious felony conviction enhancement, five years. (Pen. Code, § 667, subd. (a).)

attempt (Pen. Code, § 664, subd. (a)), and then doubled based on the second strike. (Pen. Code, §§ 667, subd. (e)(1), 1170.12, subd. (c)(1).)

The problem is that, because the trial court ran the sentence on count 2 consecutively, it could not start with the upper term; it had to start with one-third the midterm. (See Pen. Code, § 1170.1, subd. (a).) This is true even though it was sentencing on both counts pursuant to the three strikes law. (*People v. Nguyen* (1999) 21 Cal.4th 197, 207.) Accordingly, the only legally authorized sentence on count 2 was eight months, representing one-third the midterm of two years, halved and then doubled. We will modify the judgment accordingly.

VI

DISPOSITION

The sentence on count 2 is reduced from three years to eight months. Accordingly, the total sentence is reduced from 33 years to life to 30 years 8 months to life. As thus modified, the judgment is affirmed.

The superior court clerk is directed to prepare an amended sentencing minute order and an amended abstract of judgment, reflecting these modifications, and to forward a certified copy of the new abstract to the Department of Corrections and Rehabilitation.

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.