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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ROBERTO MENDOZA,

Defendant and Appellant.

B235680

(Los Angeles County
Super. Ct. No. KA092539)

APPEAL from a judgment of the Superior Court of Los Angeles County. Douglas W. Sortino, Judge. Modified and affirmed with directions.

Renee Rich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stacy S. Schwartz and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jose Roberto Mendoza appeals from the judgment entered following a jury trial in which he was convicted of kidnapping, making criminal threats, and inflicting corporal injury on a spouse. Defendant contends the trial court erred by failing to instruct sua sponte with a unanimity instruction and by imposing a domestic violence fine. We agree with respect to the fine, but otherwise affirm.

BACKGROUND

On September 7, 2010, defendant married the victim in this case, who was called Jane Doe in the information and throughout the proceedings. (All undesignated date references pertain to 2010.) They had been dating since sometime in 2008, and during that time defendant had been physically and verbally abusive to Doe. He had also told Doe that he had previously threatened a former girlfriend with a gun.

On November 1, defendant was angry with Doe and punched her in the arm, pulled her hair, and repeatedly struck her back and buttocks with her own belt. Doe suffered bruising, and photographs of her bruises were introduced at trial. Doe complied with defendant's demand and moved out of the house in Covina in which they had been living with defendant's nephew.

On the evening of November 10, defendant phoned the bakery in La Puente where Doe worked, but Doe told him she was busy and could not talk to him. At the end of their workday, Doe and her coworker Carmen Razo were walking through the parking lot to Razo's car when Doe saw defendant in his SUV. Doe informed Razo that defendant was present and said they should run to get inside Razo's car. They got inside Razo's car, but before Razo could start it, defendant drove alongside, pulled Doe out of Razo's car, and put Doe in his own car. As defendant got into the driver's seat of his car, Doe jumped out, ran to a security guard, and asked for help. The guard said he could not help her and told her to seek help inside the nearby market. Doe ran toward the market, but defendant caught up to her and grabbed her by her hair before she got inside. Defendant pulled and dragged Doe back toward his car. Doe called out to the security guard to call the police, then grabbed hold of Razo. Defendant pushed Razo away, threw and pushed Doe into his

car, and drove away. The security guard, Razo, and Kristal Torres, who was shopping at the market, all testified consistently with Doe regarding the events in the parking lot. Torres's husband called the police, and both Torres and the security guard provided responding officers with the license plate for defendant's SUV.

Defendant drove Doe through Covina to a park. As he drove, he struck her face with the back of his hand, causing her lip to split. At the park, he parked his SUV and talked to Doe for 20 or 30 minutes. Then he drove her back to his nephew's house where they had lived. Defendant took Doe into the room they had shared and told her that he loved her and could not stop thinking about her. Doe told defendant that she feared him and did not want to be with him. She also said the police would be looking for her. Defendant became angry and punched his own fist. He then said that he was "in the mood to give [her] a beating, and he wanted to knock out [her] teeth." Doe believed defendant was going to beat her or try to knock out her teeth. Defendant said he was going to take her somewhere else, and she believed that he was going to do so to beat her and knock out her teeth. Defendant then escorted Doe back outside, toward his truck. Doe saw the lights of an approaching police car and urged defendant to let her go because the police were coming. Defendant said that if he ended up in jail, he would kill her and her children, who lived in Mexico. The police arrived and arrested defendant.

On cross-examination, defense counsel read into the record a portion of Doe's preliminary hearing testimony about what happened when they got back inside defendant's nephew's house on the night of November 10, in which Doe did not mention a threat to beat her and knock out her teeth. Counsel then asked, "And so you said nothing happened at that house as far as threats or any statements made or anything happening until you guys had walked out of the front door, out the front door, correct?" Doe replied, "Yes." On redirect examination, the prosecutor also questioned Doe about her preliminary hearing testimony and read portions of it into the record: "You were being asked about threats that were made to you and you said at that time in an answer—well, the question was 'Tell us about that.' And you responded, 'He said that he was

going to break all my teeth and that he wanted to beat me up.’ ‘When did he say that?’ Your answer was ‘He said that to me when we were in the room.’ ‘Oh, that’s your old apartment?’ You answered ‘Yes.’ [¶] ‘The Court: Did he say, “I want to beat you up” or did he say “I’m going to break all your teeth?”’ ‘The witness: Both things.’” The prosecutor asked Doe if that was her prior testimony, and Doe agreed it was.

During an interview at the police station, defendant told detectives that Doe had left him for another man. He had gone to her workplace to talk to her, but she did not want to talk to him. Defendant admitted that he grabbed Doe and pushed her into his car and took her to where they had lived. He further admitted that he hit her face, but said his head hit her when they were getting out of his car. Defendant denied threatening Doe.

The jury convicted defendant of kidnapping, making criminal threats, and two counts of inflicting corporal injury on a spouse, one pertaining to November 1 and the other pertaining to November 10. The court sentenced defendant to 10 years in prison, consisting of 8 years for kidnapping plus 1 year for each of the corporal injury to a spouse counts, with a concurrent 2-year-term for making criminal threats.

DISCUSSION

1. Unanimity instruction

Because Doe testified that defendant made two threatening statements to her on the night of November 10—one inside the house threatening to beat her and knock out her teeth, and one outside the house threatening to kill her and her children if he went to jail—defendant contends that the trial court erred by failing to instruct sua sponte with a unanimity instruction.

A trial court must instruct jurors that they must unanimously agree that the defendant committed the same specific criminal act “‘when conviction on a single count could be based on two or more discrete criminal events,’ but not ‘where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.’ [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or

(2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.” (*People v. Russo* (2001) 25 Cal.4th 1124, 1135.) No instruction is necessary if the prosecution selects the particular act upon which it relies to prove a charge. (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) “There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime.” (*Ibid.*) Where a unanimity instruction is required it must be given sua sponte. (*People v. Curry* (2007) 158 Cal.App.4th 766, 783.)

In her opening statement on May 26, 2011, the prosecutor told the jury, “Count 3 is criminal threats. Penal Code section 422, and again, that’s on November 10. He at some point up in the apartment [*sic*] made a threat he would knock out her teeth and heat [*sic*] her up. They were inside the house where they used to live” The prosecutor then informed the jury of the statutory elements of the charge. She did not mention the threat made outside the house as the police were arriving.

In her opening argument on May 31, 2011, the prosecutor told the jury the following regarding the criminal threats charge: “Count 3 is criminal threats, that is when he threatened to knock her [*sic*] out her teeth and hit her. At the park, he already hit her, as [*sic*] least they were driving to the park as she explained. . . . They drove to the Benbow address and went inside. He led her inside by the arm and he said he loved her and then she responded ‘I’m afraid of you’ and he said ‘Look at me.’ . . . Then he got mad again and punched his hand and insulted her and he said to her ‘I’m in the mood to give you a beating. I want to knock out your teeth. I’m going to take you from here.’ [¶] The elements of criminal threats are No. 1, that he willfully threatened to unlawfully kill or unlawfully cause great bodily injury to the victim. The threat was to knock out her teeth. That would be great bodily injury of, or threat of great bodily injury. [¶] Element 2, that he intended his statement to be understood as a threat. I think it’s clear that would have been his intent. She said ‘I’m scared of you.’ He’s angry and he wanted her to fear

him. . . . [¶] . . . The threat was so clear and immediate, unconditional and specific that it communicated to the victim a serious intention, and the immediate prospect that the threat would be carried out. . . . Well, he threatened to beat her and knock out her teeth. Then he said he would take her somewhere else. She took it to mean he would take her to another location to beat her. Then he starts to leave the location. She took that to mean we're now on our way for him to go take me some place else so he can do these things, to knock out my teeth or whatever else he has in mind, and keep in mind that he already kidnaped her. He was still in the process of kidnaping her, which both of them were very well aware of. He already hit her in the lips. . . . [¶] The next element is that the threat actually caused the victim to be in sustained fear for her safety and that it was immediate. As they left the house, she feared she was to be taken to be beaten or have her teeth knocked out. She believed that was going to happen.” The prosecutor then discussed the final element, the reasonableness of Doe’s fear.

The prosecutor then stated, “When the police arrived, both of them apparently saw the rotating lights and realized that the police were coming up the street and the defendant said to her ‘I’m going to kill you and your kids if I go to jail.’ [¶] Now, that threat indicated his consciousness of guilt. When we were talking about before how there may be places in the world where it’s okay to beat your wife, . . . it’s not [a] defense. It’s not a defense that if you don’t know that something is against the law in this country, but it’s clear that he did know it was against the law because that’s when he threatened her when the police drove up. He knew that the police were after him. He knew that he committed all kinds of crimes against his wife. He knew they were coming to get him and that’s why he made that threat. That’s consciousness of guilt. So you can even use that in your determination of whether he is guilty of these various crimes.”

In defendant’s argument, he argued that Doe “said that as far as threats were concerned, she testified at the preliminary hearing and at the trial that the only threat she got on November 10 at all was that she was not threatened at the parking structure or the parking lot. She was not threatened on the way to the park or at the park. She was not

threatened coming home or inside the house. She said the first time she was threatened was after they left the front door and gone [*sic*] outside, and that's the point in time when the police officers were pulling up and she said [defendant] threatened her that he would kill her and that 'If I step in [*sic*] inside jail, then I will kill you.' In his statement he denies that. He said he didn't threaten her. . . . That's a question of credibility. . . . No other witness to say he threatened her. The threat was between the two of them. He says I 'didn't make that threat. I didn't threaten to kill her.' She said he did threaten to kill her. You have to make that decision, but the threat was outside at the very end of the testimony and she said something like 'threatening to punch me or beat me up and knock my teeth out,' and that kind of surprised me because it hadn't even been mentioned. The district attorney said, 'When did this take place?' She said 'in the room.' I don't know. It wasn't clear. I'm not sure if she's referring to that night. If she's saying now there was a threat inside that night or about a threat some time in that room on some different date. I don't really remember, but the threat, the allegation here about a threat is an allegation of saying 'I will kill you if I go to jail.'" Defendant later returned to the criminal threats charge, saying, "Count 4, criminal threats. Whether he made it; it's very simple. It will be the determination if you could determine who was telling the truth, the credibility between what Jane Doe said happened that night and what the defendant denied saying happened that night."

In her closing argument, the prosecutor did not directly address defense counsel's assertion that the criminal threats charge was based upon the threat made as the police arrived. She instead argued that Doe was credible, noted that with respect to some of the charges other witnesses corroborated her testimony, and that it made sense that "all of what she told us is true. She never exaggerated anything. She does mention two threats, one that happened inside the house and one that happened on the porch. She didn't make it out that he was—he was threat [*sic*] threatening her in the car. She didn't add to the things that he had done to her. She doesn't embellish or exaggerate. She told you what she can remember that he did to her."

Defendant argues that although the prosecutor “attempted to make an election,” it was ineffective because “she confused the court, counsel, and jurors by immediately thereafter referring to the threat outside the house.” We disagree. From the very outset in her opening statement, the prosecutor informed the jury that the criminal threats charge was based upon the threat to beat Doe and knock out her teeth. At the conclusion of the case, the prosecutor again argued at length and in great detail how the threat to beat Doe and knock out her teeth satisfied the elements required for a criminal threats conviction. The prosecutor referred to the second threat, but not as an alternative basis for the criminal threats conviction. She instead explained that the second threat demonstrated defendant’s consciousness of guilt, that is, “He knew that he committed all kinds of crimes against his wife.” Defendant attempts to minimize this limited purpose expressly given to the second threat by the prosecutor by arguing that no consciousness of guilt instruction was given. But the pattern consciousness of guilt instructions do not explain the concept of consciousness of guilt, but simply tell the jury that certain types of conduct may be considered as evidence of consciousness of guilt but that such evidence is not sufficient by itself to prove guilt. (CALJIC Nos. 2.03, 2.04, 2.05, 2.06; CALCRIM Nos. 362, 371.) The prosecutor explained the consciousness of guilt inference she was asking the jurors to draw, and no additional instruction was necessary for the jury to grasp the concept. “[A]n instruction that tells the jury what kinds of rational inferences may be drawn from the evidence does not provide any insight jurors are not already expected to possess.” [Citation.] Such instructions, while helpful in various circumstances, are not vital to the jury’s ability to analyze the evidence and therefore are not instructions that must be given to the jury even in the absence of a request.” (*People v. Najera* (2008) 43 Cal.4th 1132, 1139, fn. omitted.)

The clarity and sufficiency of the prosecutor’s election were not undermined by defense counsel’s arguments regarding the second threat. These arguments were principally directed to casting doubt upon Doe’s credibility. Given the prosecutor’s clear and extensive discussion of the first threat as the basis for the criminal threats charge, it is

highly implausible that defense counsel was confused, as defendant argues. To the extent defense counsel chose to attempt to confuse the jury about the basis for the criminal threats charge, his efforts cannot be deemed to have rendered the prosecutor's otherwise sufficient election ineffective or unclear. No authority supports such a result or requires a prosecutor to reiterate her election in her closing argument. Any confusion or potential for error created by the defense argument following the prosecutor's clear and sufficient election was invited error, which defendant is estopped from asserting. (*People v. Lang* (1989) 49 Cal.3d 991, 1031–1032.)

Nor was the prosecutor's clear election undermined by the trial court's apparent belief at sentencing—approximately seven weeks after the verdict—that the criminal threats conviction was based upon the second threat. We note that this erroneous belief worked to defendant's benefit, as the court stated that it chose to impose a concurrent term for that count because it found the seriousness of the threat “was mitigated by the fact the threat was made essentially as the police arrived at the scene.”

Defendant further argues that the prosecutor's election was undermined by her statement, regarding the consciousness of guilt shown by the second threat, that the jury could “use that in [its] determination of whether he is guilty of these various crimes.” Read fairly and in context, reasonable jurors would have understood the statement to refer to considering defendant's consciousness of guilt with respect to all of the charges, not considering the second threat as the basis for the criminal threats charge. Before her brief reference to the second threat, the prosecutor spent a great deal of time arguing in detail how the elements required for a criminal threats conviction were established by the evidence regarding the threat to beat Doe and knock out her teeth. She did not make a comparable argument regarding the second threat or even say, “and the same goes for the second threat.” Her argument clearly distinguished the limited purpose for which she urged the jury to consider the second threat: consciousness of guilt. “The record does not support the conclusion that the prosecutor conveyed the impression to the jury that one of

two threats could serve as the basis for a conviction.” (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292.)

Even if we were to conclude that the trial court erred by failing to give a unanimity instruction, we would find the error harmless beyond a reasonable doubt. Where the record indicates the jury resolved the basic credibility dispute against the defendant and thus would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless. (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853.) The jury’s verdicts demonstrate that it clearly believed Doe’s testimony, and defendant’s defense with respect to each threat was essentially that Doe was not credible and defendant had denied to the police that he threatened her. Although defendant attempted to show on cross-examination that the threat to beat Doe and knock out her teeth was newly fabricated and contrary to Doe’s testimony at the preliminary hearing, the prosecutor on redirect introduced her preliminary hearing testimony regarding the threat to beat her and knock out her teeth. Accordingly, given the jury’s resolution of the credibility dispute against defendant and in favor of Doe, the jury would have convicted defendant of the criminal threat charge whether it was premised on the threat upon which the prosecutor expressly based her case or upon the second threat.

2. Penal Code section 1203.097 domestic violence assessment

Defendant contends, and the Attorney General aptly concedes, that the trial court erred by imposing a \$400 domestic violence assessment under Penal Code section 1203.097, which applies only when a defendant is granted probation. We agree, and strike the assessment.

DISPOSITION

The \$400 domestic violence assessment imposed under Penal Code section 1203.097 is stricken. The judgment is otherwise affirmed. Upon remand, the trial court is directed to issue an amended abstract of judgment omitting the domestic violence assessment.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.