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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.

ROBERT NICO RAMIREZ,

Defendant and Appellant.

B270965

(Los Angeles County  
Super. Ct. No. BA434582)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dennis J. Landin, Judge. Affirmed with directions.

Stephen M. Vasil, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Steven D. Matthews,  
Supervising Deputy Attorney General, and Ryan M. Smith,  
Deputy Attorney General, for Plaintiff and Respondent.

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A jury found Robert Nico Ramirez (Ramirez) guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)<sup>1</sup>). In a separate and subsequent proceeding, Ramirez admitted to three prior convictions for serious and violent felonies. As a result, the trial court sentenced Ramirez to 40 years to life in state prison.

On appeal, Ramirez makes two central arguments. First, he contends that his counsel provided ineffective assistance that prejudiced his case; specifically, Ramirez maintains his counsel improperly told the jury that the abiding conviction necessary for a guilty verdict was akin to the certainty that jurors find in making everyday decisions. Second, Ramirez argues that the trial court erred by not giving the jury a unanimity instruction. We are not persuaded by either of these arguments.

Ramirez also raised a third argument, one regarding his custody credits. Specifically, Ramirez argued that the trial court erred in calculating those credits by erroneously applying section 2933.1, instead of section 4019. The People agree that the trial court erred. As a result, we hereby instruct the trial court to recalculate Ramirez's custody

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

credits, modify the abstract of judgment accordingly, and forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

## **BACKGROUND**

### **I. The assault**

On March 14, 2015, at approximately 1:20 a.m., Teresa Alfaro (Alfaro), who had just gotten off work, was sitting on a bench waiting for a bus when Ramirez approached her. Ramirez, uttering profanities in English, had a beer in one hand and a knife in the other; Ramirez waved the knife in front of Alfaro's face. At the time, no one else was around—just Alfaro and Ramirez.

Alfaro was scared but tried not to act scared. She grabbed her backpack and stood up; her intent was to walk to the crosswalk and, when the light changed, run away. However, when Alfaro stood up, Ramirez placed the knife against her side. Although Alfaro was wearing two shirts, a sweater, and a back brace, she could feel the knife against her. As they walked toward the lamp post, Alfaro took out her cell phone and dialed 911; however, she was unable to complete the call.

As Ramirez and Alfaro stood by the lamp post waiting for the light to change, a police car approached the intersection. Alfaro raised her hand and flagged the police car down. When the police car's lights came on, Ramirez told Alfaro to "be quiet" in Spanish.

As the police car approached, the officer noticed that Alfaro had “a scared look on her face, like she wasn’t comfortable”; as a result, the officer “decided to make contact with them.” When the officer approached on foot, he asked Alfaro if “she was okay, to which she told [him] she wasn’t.” To the officer, Alfaro appeared “very, very frightened.” When the officer separated Ramirez and Alfaro, he noticed an open folding knife with a three-inch blade laying on the ground next to Ramirez’s feet; the officer promptly called for backup. When the back-up officer arrived, he recovered the knife from the sidewalk and then interviewed Alfaro. Although Alfaro was “upset,” “crying,” and “nervous,” she identified the knife as the one used by Ramirez. Based on his interview with Alfaro, the back-up officer decided to arrest Ramirez. The back-up officer also recovered an empty leather knife sheaf from Ramirez’s belt. At the time of his arrest, Ramirez smelled of alcohol, had bloodshot, watery eyes, slurred speech, and was unsteady on his feet.

## **II. The trial**

On May 22, 2015, the People filed a one-count information charging Ramirez with assault with a deadly weapon.

In mid-November 2015, the trial court presided over a jury trial. Ramirez did not testify or present any affirmative evidence in his defense.

Ramirez did not request and the trial court did not give a unanimity instruction—that is, where, as here, an accusatory pleading charges a single criminal act, and the

evidence shows more than one unlawful act, the so-called either/or rule is generally applied, i.e., “*either* the prosecution must select the specific act relied on to prove the charge or the jury must be instructed . . . that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act.” (*People v. Gordon* (1985) 165 Cal.App.3d 839, 853, disapproved on another point by *People v. Lopez* (1998) 19 Cal.4th 282, 292; see CALCRIM, No. 3500.)

In its closing argument, the People, consistent with its one-count information, argued that there was just one act, one seamless transaction: “He did an act. We know what the act was. I have described the act. You heard the act. We all know the act. There’s several acts actually, the waving of the knife, following, knife at the hip. All that is an act.” During its rebuttal, the People once again described a single transaction: “Someone came up to her with a knife, followed her with it and assaulted her with it. . . . [¶] [I]t happened within the course of a few minutes.”

In its closing argument, the defense argued principally that Alfaro’s credibility was suspect, pointing to purported inconsistencies between the testimony she gave at the preliminary hearing and the testimony she gave at trial, and suggesting that, while Alfaro was not lying, her memory of the incident was flawed because she was “scared,” “alone” and in a “very unpredictable situation.” In addition, the defense argued that Ramirez’s conduct that evening was not willful.

In addressing the burden of proof in a criminal case, Ramirez's counsel made the following statement: "We hear the term reasonable doubt. It's all legal[ese] and doesn't make much sense, and for a long time it didn't make much sense to me. But over the years, I've learned that reasonable doubt requires you to have a certain degree of certainty when you return your verdict. That certainty is an abiding conviction. You need to have an abiding conviction because this is a criminal case. It's serious. It's a felony charge. It is the highest burden in the land that we have. It's higher than family court. It's higher than civil court where you have a preponderance of the evidence and clear and convincing. This is proof beyond a reasonable doubt. [¶] So what does abiding conviction, the certainty you have when you return this verdict? It means you want to have the decision when you purchase a home or get married, that kind of level of certainty that we, as individuals, have. I'd point to you the key difference in those situations and this is that you can always sell your home, rent your home, you can foreclose, can become widowed, divorced, separated. You can undo all of those situations, but for this, members of the jury, you can't undo it."

On November 18, 2015, after less than two hours of deliberation, the jury returned a guilty verdict. Later that same day, in a separate proceeding, Ramirez admitted to three prior convictions for serious and violent felonies.

On March 1, 2016, the trial court sentenced Ramirez to 40 years to life in state prison. Ramirez timely appealed.

## DISCUSSION

### I. Ineffective assistance of counsel?

Ramirez contends that his trial counsel provided ineffective assistance by lowering the prosecution's burden of proof during closing argument. More specifically, Ramirez contends that his counsel compromised his defense by "analogizing an 'abiding conviction' to the kind of certainty jurors had in making everyday decisions." (Boldface omitted.) We are not convinced by Ramirez's argument.

#### A. GUIDING LEGAL PRINCIPLES

##### 1. *Ineffective counsel claims*

" "A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. [Citations.] 'Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance.'" [Citation.] It is defendant's burden to demonstrate the inadequacy of trial counsel. [Citation.] [Our Supreme Court has] summarized defendant's burden as follows: " 'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome.” ’ ’ ’ ’ ( *People v. Vines* (2011) 51 Cal.4th 830, 875–876.) “If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails. Moreover, ‘ “a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” ’ ’ ( *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

## 2. *Instructions regarding reasonable doubt*

California has long recognized that in trying to explain the concept of reasonable doubt to a jury neither the bench nor the bar should analogize that concept with jurors’ everyday decisions. In *People v. Brannon* (1873) 47 Cal. 96, the trial court instructed the jury that a guilty verdict was authorized if the evidence satisfied the jury of the accused’s guilt to a “ ‘certainty as would influence the minds of the jury in the important affairs of life.’ ” (*Id.* at p. 97.) *Brannon* held that equating proof beyond a reasonable doubt to everyday decision-making in a juror’s life impermissibly lowered the burden of proof to that of a preponderance of the evidence, and reversed the judgment because the jury did not receive a proper description of the prosecution’s burden of proof beyond a reasonable doubt. (*Ibid.*) Since *Brannon*, California courts have repeatedly upheld this guiding principle. (See, e.g., *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35 [rejecting prosecutor’s analogies to “get[ting] married” & “chang[ing] lanes”]; *People v. Johnson* (2004) 115



Cal.App.4th 1169, 1171–1172 [rejecting court’s analogies to taking “vacations” & getting on “airplanes”]; *People v. Johnson* (2004) 119 Cal.App.4th 976, 980–983 [rejecting court’s repeated analogies to “everyday decision making in a juror’s life”].)

B. NO REASONABLE PROBABILITY OF A DIFFERENT RESULT

Here, Ramirez has failed to meet his burden with respect to prejudice. First, Ramirez’s counsel did not repeatedly return to the idea that reasonable doubt should be analogized to everyday decisions. She mentioned it only once. Moreover, she stressed that while life decisions such as buying or sell a house can be undone, “you can’t undo” a felony conviction—that is, at the same time she equated proof beyond a reasonable doubt with everyday decisions, she correctly elevated the criminal conviction standard above everyday decisions. The demanding nature of proof beyond a reasonable doubt was something that Ramirez’s counsel returned to repeatedly. Ramirez’s trial counsel correctly stressed that proof beyond a reasonable doubt was “the highest burden in the land,” higher than other standards of proof, such as “preponderance of the evidence and clear and convincing [evidence].” In addition, Ramirez’s counsel correctly linked proof beyond a reasonable doubt with an “abiding conviction,” the exact language found in CALCRIM 220, which the trial court used to instruct the jury.

Second, the trial court not only correctly instructed the jury on proof beyond a reasonable doubt, it also instructed the jurors that “[n]othing that the attorneys say is evidence.” Even more critically, the trial court instructed the jurors that they “must follow the law” as the court instructs and that if they “believe that the attorneys’ comments on the law conflict with my instructions, [they] must follow [the court’s] instructions.” “We of course presume ‘that jurors understand and follow the court’s instructions.’ [Citation.] This presumption includes the written instructions.” (*People v. Wilson* (2008) 44 Cal.4th 758, 803.)

Finally, there was compelling evidence that Ramirez was guilty. It was undisputed that Ramirez approached Alfaro at the bus stop, waived a knife in front of her face, and then placed it against her side when she tried to move away from him. It was undisputed that Alfaro waved down a passing patrol car. It was not disputed that the police found a noticeably distraught Alfaro and a knife on the ground next to Ramirez’s feet. Given these undisputed facts, it is not surprising that the jury reached its verdict in such a speedy manner

In short, even assuming *arguendo* that Ramirez’s counsel’s fleeting reference to everyday decisions constituted deficient performance below an objective standard of reasonableness, Ramirez has failed to show that but for his counsel’s purportedly unprofessional error, the jury’s verdict would have been different. (*People v. Vines, supra*, 51

Cal.4th at pp. 875–876.) Accordingly we hold that Ramirez’s counsel did not provide ineffective assistance.

## **II. Duty to give a unanimity instruction?**

Ramirez contends that the trial court should have given a unanimity instruction based on the People’s argument that the charge could have been based on either Ramirez’s act of waving the knife in front of Alfaro’s face or his holding the knife against Alfaro’s body.<sup>2</sup> We are unconvinced.

### **A. STANDARD OF REVIEW AND GUIDING LEGAL PRINCIPLES**

We review de novo the question of whether a court commits error in instructing or failing to instruct the jury. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Hernandez* (2013) 217 Cal.App.4th 559, 568.)

In a criminal case, the jury verdict must be unanimous. (Cal. Const., art. 1, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*)). “As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon

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<sup>2</sup> Although Ramirez failed to ask for a unanimity instruction, that failure is not fatal to his appeal. “The duty to instruct on unanimity when no election has been made rests upon the court sua sponte.’ [Citation.] Because this is a sua sponte duty, the presence or absence of a request is irrelevant.” (*People v. Datt* (2010) 185 Cal.App.4th 942, 951.)

which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty.” (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) The court has a sua sponte duty to give the unanimity instruction. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199; *People v. Hernandez, supra*, 217 Cal.App.4th at p. 569.)

As our Supreme Court held in *Russo, supra*, 25 Cal.4th 1124, “ ‘The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.’ ” (*Id.* at p. 1132.) The court in *Russo* specified two factors for a court to consider in deciding whether to give a unanimity 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.” (*Id.* at p. 1135, italics added.)

In other words, there is an exception to the unanimity instruction requirement when there is a continuous course of conduct. The continuous-course-of-conduct exception applies “when (1) ‘the acts are so closely connected in time as to form part of one transaction,’ (2) ‘the defendant tenders the same

defense or defenses to each act,’ and (3) ‘there is no reasonable basis for the jury to distinguish between them. [Citations.]’ [Citation.].) ‘This exception “ ‘is meant to apply not to all crimes occurring during a single transaction but only to those “where the acts testified to are so closely related in time and place that the jurors reasonably must either accept or reject the victim’s testimony in toto.” ’ ’ ’ ’ ” ( *People v. Lueth* (2012) 206 Cal.App.4th 189, 196.)<sup>3</sup>

On both temporal and spatial dimensions, California courts have an elastic understanding of what constitutes a continuing course-of-conduct. *People v. Harris* (1994) 9 Cal.4th, 407, is illustrative. In that case, the robbery victim, Atherton, was held captive for days while the defendant and cohorts used his credit cards to make purchases, and drove him to his home and office for more takings. The Court of Appeal reversed the defendant’s conviction due to a perceived error by the trial court in instructing the jury. In reversing and remanding the case, our Supreme Court counseled the trial court as follows: “[W]e observe that ‘[t]he unanimity instruction is not required when the acts alleged are so closely connected as to form part of one transaction.’ [Citation.] Even assuming a defendant, by and through the argument of counsel to the jury, suggests differing defenses to each of the alleged acts, still it must be determined

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<sup>3</sup> The court in *People v. Lueth*, *supra*, 206 Cal.App.4th at page 196, suggests that, given the very nature of the unanimity requirement, the continuing course of conduct exception is not strictly an exception.

whether there is any ‘reasonable basis’ for the jury to distinguish between them in determining whether the ‘continuous conduct’ rule applies. [Citation.] [¶] Here there was an ongoing forcible restraint of the victim throughout his two-day ordeal up until his murder. In particular, he was being held captive along with his stolen car throughout the period during which the office and home takings were accomplished. [Citation.] The takings were successive and compounding in nature; none of the items of personal property taken from Atherton’s home and office were ‘carried away to a place of temporary safety’ until well after completion of the looting of those premises. [Citation.] We may therefore question whether *any* ‘reasonable basis’ was available to *legally* distinguish between the four ‘taking theories’ for purposes of establishing the single count of robbery charged. The successive takings arguably reflected a ‘continuing course of conduct,’ the central objective of which was to rob Atherton of all of his property wherever it might be located, while forcibly restraining him in his own vehicle and transporting him to the various locations for the purpose of assisting the group in that objective.” (*Id.* at pp. 431–432, fn. 14.) In providing this guidance, our highest court also noted that “only one count of robbery had been charged.” (*Ibid.*)

B. RAMIREZ’S CONTINUING COURSE OF CONDUCT MADE A UNANIMITY INSTRUCTION UNNECESSARY

Here, the continuing course-of-conduct exception applies because there was no reasonable basis for the jury to

distinguish between Ramirez waving the knife in front of Alfaro and pressing the knife up against her side. The information alleged only one assault. Consistent with its charging document, the People effectively argued to the jury that there was only a single continuous assault. And the evidence showed that the waving of the knife and the pressing of it against Alfaro were so closely connected in time and space as to form part of just one transaction—the assault, from start to finish lasted only a few minutes and it took place in one locale. Consistent with the teaching of *People v. Harris, supra*, 9 Cal.4th 407, we hold that the trial court was under no duty to give a unanimity instruction to the jury.

C. EVEN IF A UNANIMITY INSTRUCTION WAS REQUIRED, THE ERROR WAS HARMLESS

Ramirez argues that the trial court’s failure to give a unanimity instruction was reversible error under *Chapman v. California* (1967) 386 U.S. 18.

“Under *Chapman* ‘[w]here the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that [the] defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless.’ [Citation.] For example, where the defendant offered the same defense to all criminal acts, and ‘the jury’s verdict implies that it did not believe the only defense offered,’ failure to give a unanimity instruction is harmless error. [Citation.] But if the

defendant offered separate defenses to each criminal act, reversal is required. [Citations.] The error is also harmless ‘[w]here the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence.’ ” (*People v. Hernandez, supra*, 217 Cal.App.4th at p. 577.)

Here, assuming *arguendo* that the trial court erred by failing to give a unanimity instruction, it was a harmless error. Ramirez did not offer one defense to the knife waving and a wholly separate defense to the pressing of the knife against Alfaro. Instead Ramirez offered two defenses—suspect testimony by Alfaro and lack of willful conduct by Ramirez—that were used to explain all of Ramirez’s conduct on the night in question. Moreover, given the speed with which the jury returned its verdict, it is clear that the jurors resolved the dispute over Alfaro’s credibility overwhelmingly in her favor.

### **III. Cumulative effect of error denial of due process?**

Ramirez contends that his alleged errors, even if deemed harmless singly, amount to prejudicial error when considered jointly. However, our rejection of each of Ramirez’s specific claims “necessarily forecloses his claim of cumulative error.” (See, e.g., *People v. Avila* (2006) 38 Cal.4th 491, 608.)



### **DISPOSITION**

The trial court is directed to recalculate Robert Nico Ramirez's custody credits, modify the abstract of judgment accordingly, and forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.