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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LAVETTE BATSON, Defendant and Appellant.	B263345 (Los Angeles County Super. Ct. No. KA104693)

APPEAL from an order of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed.

Susan L. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Ilana Herscovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Lavette Batson was convicted by a jury of criminal threats (Pen. Code, § 422, subd. (a); count 1),[1] assault with a deadly weapon (§ 245, subd. (a)(1); count 2), and first degree burglary (§ 459; count 3). In this appeal from the judgment, he seeks a reversal of his conviction on count 1 based on the omission of a unanimity instruction, or, alternatively, a modification staying the sentence on count 1 under section 654. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In a previous case, appellant was convicted of domestic violence against Ashlee Woodard, the mother of his children, for which he was imprisoned until October 2013.[2] After his release, Ashlee became pregnant with their third child. She was living with her mother, Donna Woodard, and her children in an apartment in Pomona, where the present domestic violence incident occurred on February 13, 2014.[3]

The present incident involved a dispute between appellant and Ashlee over the proceeds of their fraudulent tax scheme. Even though she was not employed, Ashlee had applied for a tax refund and was expecting $3,000. Appellant thought they had an agreement to split the refund and accused Ashlee of withholding it from him.

At about 11:30 p.m., appellant kicked open the front door of Ashlee's apartment and went inside her bedroom, yelling that he needed the money. He struck Ashlee in the head three times, knocking her to the floor. Donna called 911 and went to Sylvia Warren's apartment for help. Ashlee and Donna lived at one end of the second floor, Sylvia resided at the other end. Roy Ruiz and William Dye lived elsewhere on that floor.

Appellant left Ashlee's apartment and went downstairs. Ashlee went outside and vomited over the balcony. Appellant circled around and came back upstairs. While

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[1] All further undesignated statutory references are to the Penal Code.

[2] He also served a prison term for a 2008 domestic violence crime against another individual.

[3] For convenience, we refer to all individuals by their first names.

coming upstairs, he said "he was either going to go to jail or he was going to die tonight," which Ashlee understood to mean there would be a physical altercation. Ashlee ran inside to grab some knives to defend herself, and went back outside with a knife in each hand.

Donna met appellant at the top of the stairs and held him against the railing. Sylvia, who was between Ashlee and Donna, pushed Ashlee away from appellant and toward Sylvia's apartment. Appellant shoved Donna aside to get at Ashlee. Ashlee was swinging both knives at appellant, but Sylvia grabbed her wrists to prevent her from stabbing him. Appellant grabbed the blades of both knives and told Sylvia to get out of the way. Sylvia moved away, and appellant hit Ashlee in the head. The force of the blow caused her to drop the knives and fall down. While Ashlee was on the ground, appellant kicked her in the head, stomped on her stomach, and straddled her with one knee on her torso as he held a knife over her. As appellant swung the knife down at Ashlee, Roy slapped it away. William placed appellant in a headlock but let go when appellant bit him on the arm. Four or five men helped restrain appellant.

Police arrived in response to several 911 calls and arrested appellant. Ashlee was upset, crying, and vomiting. In addition to a cut on her side, she had bruises and swelling on her head and face.

Officer Blair Hornby of the Pomona Police Department advised appellant of his rights and interviewed him. Appellant made the following statements, which were introduced at trial: Appellant admitted snorting crystal methamphetamine before going to Ashlee's apartment that night. He went there in order to get his share of a fraudulent tax refund that she was withholding from him. He kicked in the front door and went inside. He was not expecting that Ashlee would turn over the money; he went there expecting a physical confrontation resulting in his death or imprisonment. He should have killed Ashlee, but hesitated to stab her. He had nothing to live for and "didn't give a fuck what happened."

As to Ashlee, appellant was charged with criminal threats (count 1),[4] assault with a deadly weapon (count 2), and burglary (count 3). He also was charged with assault against William (count 4) and battery against Donna (count 5). Several prior prison term enhancements also were alleged. (§ 667.5, subd. (b).)

At trial, the prosecution presented the percipient testimony of Ashlee, Donna, Sylvia, and Roy, and recordings and transcripts of 911 calls. Roy's testimony and 911 call showed that appellant was the initial aggressor. After he broke into the apartment, there was loud banging, yelling, screaming, and a male voice saying, "Give me the money. I'm going to kill you, [b]itch. I want the money now." Donna's testimony and 911 call showed that appellant remained the aggressor following his absence of about a minute and a half.[5] During that interlude, appellant went downstairs, "threw his stuff down," and came back upstairs, saying, "Fuck it. I'm either going to jail tonight or you're going to have to kill me, [b]itch."[6] Ashlee testified that she understood this to

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[4] "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison." (§ 422, subd. (a).)

[5] In closing argument, defense counsel narrated Donna's 911 call: Donna says "'He just took off.' Then 50 seconds later—now you have an idea how big this complex is so you know it doesn't take 50 seconds to get down there and turn around and be right there. So 50 seconds in this incident is a fairly long time. . . . You heard her say, 'He just took off running.' That's 50 seconds later. Then at the three minute and twenty-five second mark, fully a minute and 25 seconds later, she tells the 9-1-1 operator—. . . 'He's still there. He's still there.'"

[6] According to the transcript of the 911 tape, appellant said: "Your momma's out here playing you bitch! I need my mother fucking money!"; "I'll fuck you up"; and "Where's my money? My money? Tell me where's my money?"

mean there was going to be a fight, and got some knives to defend herself. By the time appellant knocked her to the ground, she was no longer armed; Ashlee testified that appellant was trying to stab her when Roy intervened.

Appellant testified at trial that when he kicked in the door, he "wasn't thinking at all" because he was under the influence of methamphetamine and tequila, which exacerbated his anger and impulse control issues.[7] Once inside the apartment, he realized Ashlee did not care about him and made a "brief and rational decision" to leave. When he came back upstairs, he was simply looking for his cell phone; he had disengaged from the earlier conflict.

Appellant denied threatening Ashlee while going upstairs: "Q As you were coming back up the stairs, did you yell out, 'Fuck it, I'm either going to go to prison or I'm going to die'? [¶] A No. [¶] Q You never said that? [¶] A No." However, he admitted using that phrase every day, including that day: "It's every day that I say I'm going to be dead or in jail. [¶] Q Including that day, correct? [¶] A Yeah."

He also conceded he did not communicate that he had stopped fighting: "Q . . . You did not communicate that you were not there to cause any trouble, correct? [¶] A Correct." To the contrary, while Sylvia was holding Ashlee's wrists, he taunted her: "I'm forcing my way back. I was telling her, I don't care about dying, kill me. You know what I'm saying. Go ahead and kill me. So I'm forcing this way, she's forcing this way and Sylvia . . . trying to hold her from stabbing me." He admitted that when he came back, he was angry and they had "a heated argument." "We are yelling. She's yelling at me. I'm yelling back." He conceded that he could have withdrawn from the confrontation but did not. He claimed he "wasn't thinking right" because he was under the influence. "She['s] charging at me with knives. I'm calling her bitches. She's telling

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[7] Appellant also testified that he had been diagnosed as bipolar and treated with psychotropic medication. He admitted prior felony convictions for assault by means likely to cause great bodily injury against Ashlee in 2012, receiving stolen property in 2011, and possession of cocaine for sale in 2008.

me this. She's telling her neighbors to move[,] so the incident re-escalated. And now there's knives involved. She's coming at me with knives, swinging knives."

He testified the combat was "mutual. I'm coming to her. She's coming towards [me], and we crashed in the middle." He explained that when Ashlee came at him with both knives, he grabbed one by the blade, which broke off (he sustained a cut on his hand that required five or six stitches), and forced the other knife from her hand. Although he intentionally kicked Ashlee's legs out from under her, he denied kicking her after she was down on the floor. He denied straddling her or trying to stab her. He stated that she "cut herself when she was trying to stab" him.

Appellant testified that he was standing up when William placed him in a chokehold. After biting William, he was released. He did not intend to hurt Donna, and told her: "[P]lease, excuse me. I don't have no beef with you. Leave me alone."[8] He evaded Donna with a football "swing move," and although she might have fallen down, he did not push or hit her.

As to count 1, the jury was instructed on criminal threats (CALCRIM No. 1300), a specific intent crime. It also received instructions on intoxication and specific intent (CALCRIM No. 3426), and mental impairment and specific intent (CALCRIM No. 3428).

For count 2, the court gave a modified version of CALCRIM No. 875, assault with a deadly weapon, which required the prosecution to prove that appellant was not acting in self-defense. Instructions were given on self-defense (CALCRIM No. 3470), the right to self-defense in cases of mutual combat (CALCRIM No. 3471), the right to self defense may not be contrived (CALCRIM No. 3472), and the right to self-defense continues only as long as the danger exists (CALCRIM No. 3474).

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[8] In closing argument defense counsel played the recording of Donna's 911 call in which appellant could be heard saying: "I don't want to have nothing to do with you. I have no beef with you. I don't care about anything you got going on. Excuse me I'm sorry."

In closing argument, the prosecution argued that appellant was the aggressor throughout the conflict, as indicated by the threats made at two different points in time: "There is more than one threat honestly. There is the threat that he initially makes inside the house. There is also the threat that he makes when he comes back up those stairs, and he says, 'I'm going to end up in jail or dead.'" The prosecution disputed appellant's self-defense theory, arguing that he was the aggressor throughout the incident; that he never communicated that he had stopped fighting and was only looking for his cell phone; to the contrary, as he came upstairs he renewed his threat to kill Ashlee, saying that he would be dead or in jail; and, in any event, by the time he had Ashlee on the ground, appellant was in no danger and thus had no right to self-defense.

Defense counsel conceded in closing argument that appellant was the initial aggressor, but argued he had stopped fighting by the time he left the apartment. According to defense counsel, when appellant returned, his only objective was to find his phone; he was put on the defensive by Ashlee, who came at him with knives; and, contrary to the prosecution's theory that appellant went downstairs and came right back, the 911 recordings confirmed that "he went down the stairs and he turned right and went back behind the apartment buildings."

As to the three counts involving Ashlee, the jury found appellant guilty of criminal threats, assault with a deadly weapon, and burglary.[9] It acquitted appellant on count 4 as to Donna and count 5 as to William. The trial court found that appellant had served three prior prison terms, and imposed a sentence of 10 years and 8 months.[10] Appellant filed a timely appeal from the judgment.

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[9] During the reading of the verdicts, appellant banged his head on the table and overturned the table. He tried to escape from bailiffs and struck his head on filing cabinets. He yelled and screamed for bailiffs to shoot him. He finally was restrained by 10 bailiffs.

[10] The court imposed the high term of six years on count 3; a consecutive one-year term on count 2 (one third the midterm of three years); and a consecutive term of eight months on count 1 (one third the midterm of two years). In addition, the court imposed three consecutive one-year enhancements under section 667.5.

DISCUSSION

I

Appellant contends that because count 1 was based on two different threats, either of which could have served as the basis for the crime charged, the trial court had a sua sponte duty to provide a unanimity instruction. He relies on the rule that if a defendant commits several acts, any one of which could constitute the crime charged, the prosecution must select the particular act which is the basis for that charge, or the jury must be given a unanimity instruction. (*People v. Jennings* (2010) 50 Cal.4th 616, 679.)

The record indicates there was a separate motive for each threat. The first threat, made inside the apartment, was intended to cause Ashlee to turn over the money. Appellant's contention that Ashlee provided no testimony regarding the first threat is not persuasive. Her testimony was not necessary to prove that she heard it and feared for her safety. The jury was entitled to draw those inferences from the recording of Roy's 911 call and his trial testimony. The evidence supports a finding that the threat was made in such a loud voice that it was heard in neighboring apartments.

The second threat, made on the staircase or the balcony, was intended to goad Ashlee to fight with appellant. He testified that he taunted her, "Go ahead and kill me," thus contradicting his testimony that he had "disengaged."

The second threat was relevant to prove that appellant was not acting in self-defense, and thus was guilty of assault with a deadly weapon. As our Supreme Court has explained, "the self-defense doctrine 'may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical attack or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified.'" (*People v. Eulian* (2016) 247 Cal.App.4th 1324, 1333, quoting *People v. Enraca* (2012) 53 Cal.4th 735, 761; see CALCRIM No. 3472.)

By convicting defendant of assault with a deadly weapon, the jury necessarily rejected the self-defense theory. There is ample evidence to support its implied finding that he was not acting in self-defense, a conclusion appellant does not challenge on appeal. (See *People v. Quach* (2004) 116 Cal.App.4th 294, 300–301 [in cases of mutual

combat, the right to self-defense does not arise unless the person communicated that he or she has stopped fighting and given the other person an opportunity to stop].)

Appellant provides no argument or analysis concerning the relationship between the conviction on count 2 and his contention that a unanimity instruction was required on count 1. He does not explain how the jury could find that he was not acting in self-defense without finding that he made the second threat—that he was going to be dead or in jail—in order to provoke a fight. His self-serving denial of making the second threat was at odds with his testimony that he says every day, including the day of the encounter, that he is "going to be dead or in jail."

Under the circumstances, even were we to assume that a unanimity instruction is necessary, we would conclude its omission was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Appellant's damaging admission coupled with the strong testimony by the prosecution witnesses demonstrate that the omission of the instruction did not improperly affect the verdict.

II

Appellant contends his sentence on count 1 must be stayed under section 654. Although this argument was not made in the trial court, we will consider it on the merits. (*People v. Brents* (2012) 53 Cal.4th 599, 618 [§ 654 error reviewable on appeal even if not argued below] (*Brents*).)

Section 654 provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." (§ 654, subd. (a).) "A trial court's express or implied determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence. [Citation.]" (*Brents, supra,* 53 Cal.4th at p. 618.)

In imposing consecutive sentences on counts 1 and 2, the trial court implicitly found that the purpose of the first threat was to force Ashlee to turn over the money, which formed the basis for count 1, and the purpose of the second threat was to incite a physical altercation. Because the threats involved separate objectives, we must uphold the trial court's determination if it is supported by substantial evidence. For the reasons discussed, we conclude it is.

DISPOSITION

The judgment is affirmed.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.