Filed 6/4/18 P. v. King CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. THOMAS KING, JR., Defendant and Appellant.	B276024 (Los Angeles County Super. Ct. No. MA049522)

APPEAL from a judgment of the Superior Court of Los Angeles County, Shannon Knight, Judge. Affirmed in part, modified in part, reversed in part, and remanded.

Joseph S. Klapach, 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, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

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This is defendant Thomas King, Jr.'s, third appeal from a judgment of conviction. We reversed the prior two judgments because defendant was precluded from cross-examining the victim and only percipient witness. (*People v. King* (June 5, 2012, B229834) [nonpub. opn.] (*King I*); *People v. King* (Dec. 5, 2014, B246794) [nonpub. opn.] (*King II*).) Both times, we concluded defendant's right under the confrontation clause had been violated.

Following his third jury trial, defendant was convicted of felony dissuading a witness from reporting a crime by use of a deadly weapon (Pen. Code, § 136.1, subd. (b)(1)), misdemeanor battery (Pen. Code, § 242), misdemeanor false imprisonment (Pen. Code, § 236), and misdemeanor recklessly causing fire to the property of another (Pen. Code, § 452, subd. (d)). On appeal, defendant raises numerous challenges, most of which lack merit. The following two claims of error are undisputed and are persuasive: (1) defendant's conviction for battery violates double jeopardy principles, and (2) errors in the abstract of judgment should be corrected. Except for the battery conviction and a minor sentence modification, we affirm the judgment. We remand the case to the trial court to calculate defendant's custody credits.

BACKGROUND

1. D.N.'s Testimony from the First Trial[1]

D.N. and defendant were friends, and D.N.'s daughter was defendant's ex-girlfriend. Defendant was not D.N.'s boyfriend.

At the time of the incident underlying defendant's conviction, D.N. was taking Xanax, Lotrimin, and Risperdal. The

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[1] Parts 1, 2, and 5 of the Background are heavily based on *King II*.

medication helped her sleep because it prevented her from hearing voices. It did not affect her memory.

On June 23, 2010, defendant knocked on D.N.'s bedroom window because he wanted to watch a movie of a funeral. She let him inside. D.N. pretended to call her insurance agent to inquire how much money she would receive if she cashed in the life insurance policies on her daughter and other family members in order to recover her jewelry from a pawn shop. D.N. did not actually speak to her insurance agent.

When defendant heard D.N. suggest she would cash in her daughter's life insurance policy, defendant repeatedly called D.N. a "mean old bitch." D.N. asked defendant to leave, and he took her cell phone and keys against her will. Defendant then retrieved a butcher knife from D.N.'s kitchen and cut the cord to two of her televisions, telling her she did not deserve them. Defendant threatened to take D.N.'s car to a place "where nobody can find it."

D.N. snuck in the bedroom and called 911. D.N. asked for help and then put the phone down and walked away. The 911 operator disconnected the call.

When D.N. told defendant she would call the police, defendant put hedge clippers around D.N.'s neck and threatened to chop off her head. Defendant dragged D.N. through the house with the hedge clippers for about four minutes. Defendant cut the cord to D.N.'s telephone and threatened to kill her.

That same evening, defendant lit a broom on fire and told D.N. he would burn her face to make her ugly. When D.N. tried to leave the house defendant slammed the door shut, preventing her from exiting. Defendant moved the broom in circles, and D.N. fell to the floor to avoid the flames. Defendant's waiving the

broom over D.N. resulted in several injuries including scars on her face, a singed eyebrow, burnt hair, and a burnt shoulder.

Under a ruse to get to a phone, D.N. requested defendant and she go to a store and purchase beer. D.N. drove defendant to the store, where D.N. called 911 and stated that defendant took her keys, phone, and burnt her with a broom. D.N. told the operator that defendant ran when he saw her on the phone. D.N. retrieved her cell phone and keys from defendant's home the next day.

2. D.N.'s Testimony from the Second Trial

Defendant was D.N.'s boyfriend (this differed from her testimony during the first trial). William Brown was D.N.'s ex-boyfriend. Brown came to her house on June 23, 2010. D.N. had been hiding from Detective Berry for a week. Defendant knocked on her window and asked D.N. to let him inside.

Defendant was angry with D.N. because D.N. would not allow her daughter to live in her house, and because he thought D.N. was cheating on him with Brown. Defendant took D.N.'s cell phone and keys.

Defendant retrieved a knife from the kitchen and started cutting various cords. Defendant threatened to move D.N.'s car so that she could not locate it and said that God should have burnt down her house. Defendant put hedge clippers around D.N.'s neck.

In the middle of her testimony, D.N. stated, "[y]ou know, what? I'm sorry, ma'am, I can't take this. [¶] . . . [¶] . . . William did this. Now she's bringing up all this ugly stuff. He [defendant] didn't do that. I'm sorry. [¶] . . . [¶] . . . All I remember is Thomas, he never do this. He never hurt me." According to D.N., defendant never touched her and never

touched the hedge clippers. Although D.N. previously testified that defendant was responsible, when she thought about it more she realized it was Brown. Brown lit the broom on fire, not defendant. D.N. testified her prior testimony was not true. She testified that Brown was upset because D.N. did not want a relationship with him.

D.N. testified that she suffered from posttraumatic stress disorder and was diagnosed as having schizophrenia, and bipolar disorder with psychotic features. She testified she did not remember anything from the prior proceeding due to stress. D.N. did not complete her testimony because, after allegedly threatening to kill the prosecutor, she invoked her Fifth Amendment right to remain silent.

3. D.N.'s Testimony from the Third Trial

During the third trial, D.N. testified that on June 23, 2010, she was intimately involved with defendant. She and defendant had a disagreement and defendant "picked up" hedge clippers and "put them around [her] neck and was carrying [her] through the house by [her] neck with these hedge clippers." Defendant warned D.N. that he would "make [her] ugly." D.N.'s thumb started to bleed as a result of being carried with hedge clippers.

Using the hedge clippers, defendant cut the cord to two televisions and a DVD player. Defendant took D.N.'s cell phone. He also took her car keys and house keys.

Using the house phone, D.N. called 911. She begged for help, but the 911 operator disconnected the phone. Defendant heard D.N. speaking.

D.N. tried unsuccessfully to leave her house. Defendant lit a broom on fire. D.N. assumed a fetal position, lying on the floor to try to stop defendant from burning her face. Using the broom,

defendant burnt D.N.'s left shoulder, arm, and hair. Defendant also burnt D.N.'s face, causing it to blister and causing her to lose her eyebrows. Defendant told D.N. "you're pretty dumb but I'm going to make your ass ugly. . . . I'm going to make sure that you're not going to be pretty anymore when I finish with you."

D.N. and defendant went to a liquor store where D.N. again called 911. Defendant fled. An officer came to the liquor store to assist D.N.

D.N.'s second 911 call was played for jurors. In it she stated that "a guy that I deal with took my keys, my phone. He burned me with a broom in the house and he begged me to forgive him and he's got the keys to . . . my house and my car." D.N. identified defendant as the person who burned her with the broom. D.N. also said that defendant ran when he saw her on the phone.

D.N. acknowledged that she had been convicted of criminal threats, stemming from threatening the former prosecutor in this case (which occurred during the second trial). She testified that she did not remember threatening the prosecutor but had been told that she did.

D.N. admitted that she suffered from bipolar disorder, schizophrenia, and posttraumatic stress disorder. To treat these illnesses, D.N. took Zyprexa, Xanax, Ativan, and Temazepam (different medications than those identified in her first trial). D.N. testified that at the time of the incident with defendant, D.N. had a caretaker who would ensure D.N. took her medication. D.N. testified that she needed a caretaker "[b]ecause I took too much one time and so they asked the person to control my medicine because they thought I tried to kill myself and that's mostly what I tried to do." D.N. testified that when she

threatened the former prosecutor in 2013 she had a different provider, and she did not "think I had my medication that day. . . . It was a day off." D.N. testified that she could not determine whether her behavior was different when she failed to take medication "because they change it so much."

D.N. acknowledged that she sometimes heard voices. She testified that she did not experience hallucinations.

During cross-examination, D.N. testified that sometimes her schizophrenia "flares up" and she feels out of control. She acknowledged that she had been admitted to the hospital. She testified that she was admitted because someone believed that she had been suicidal, but according to her she was not suicidal. She had had too much alcohol. D.N. denied that she tried to hurt herself (possibly in conflict with her above quoted testimony that she tried to kill herself). Defense counsel did not ask whether she suffered from delusions or hallucinations.

4. Deputy Sheriff Jason Goedecke

Deputy Goedecke testified that on June 23, 2010, he responded to a call, went to a liquor store, and saw D.N. crying. He observed that D.N. had been burned and her index finger was cut. Later he observed an injury to her thumb. When Deputy Goedecke drove D.N. home, he observed ash on the ground in her house and cut wires to both the telephone and television.

Deputy Goedecke went to defendant's home, where he heard a male voice say " 'tell the cops I'm not here.' " He found defendant crouched inside a cabinet.

5. Dr. Jack Rothberg

Dr. Jack Rothberg, a psychiatrist, testified for the defense in the second trial. His testimony was read to jurors in the current case.

Dr. Rothberg had never met or evaluated D.N. He reviewed a hospital record identifying her diagnosis. According to him, schizophrenia is a major mental disorder characterized by problems in perception. Persons suffering from schizophrenia may have delusions, or may hear voices. Sometimes a person suffering from schizophrenia may remember his or her actions during an episode, and sometimes the person will not. A schizophrenic may hear voices. Some patients respond well to medication and others do not.

On cross-examination, Dr. Rothberg admitted he did not interview D.N. or anyone else who testified in this case. Dr. Rothberg did not listen to D.N.'s 911 call. But he opined D.N. may have been delusional even if she appeared to give specific details of an incident to a 911 operator. According to Dr. Rothberg, a schizophrenic's consistency in reporting an event was not indicative that the event actually occurred. A person may be coherent and still be delusional. Dr. Rothberg acknowledged, "I'm not really commenting specifically about Miss [D.N.]. I said nothing specifically about [D.N.]." Dr. Rothberg acknowledged he did not know if D.N. was delusional on June 23, 2010, or on any date she was interviewed or testified. Dr. Rothberg did not speak to D.N.'s treating psychiatrist and was not aware of any medication that she took.

PROCEDURE

1. Defendant's Pretrial *Faretta* (*Faretta v. California* (1975) 422 U.S. 806) Motions Were Withdrawn

On August 5, 2015, prior to the third trial, defendant indicated that he wanted to represent himself. On September 30, 2015, defendant again requested to represent himself. When the court asked: "[d]o you want to represent yourself or not?", defendant responded: "As of right now, no."

On December 8, 2015, defendant renewed his previously abandoned request to represent himself. Defendant, however, did not complete the form provided by the court to waive his right to counsel. Defendant explained: "I would like a state-appointed attorney or I just need time to get my own lawyer. I don't trust anyone in this building. Period." Defendant continued: "I am not going pro per so you could sweep this under. I had enough time and you guys violated my rights. No, I don't want to go pro per now." When asked if he was "certain" and whether it was "a voluntary decision not to represent" himself, defendant responded "[y]es, your honor."

2. Defense Counsel Was Permitted to Cross-examine D.N. Regarding Her Mental Illness

Before trial, in a motion in limine, the prosecutor argued that a majority of D.N.'s medical records were irrelevant. Defense counsel responded that he believed D.N. would admit to suffering from schizophrenia and that he would question her about her symptoms. He agreed not to introduce her medical records.

As expected, D.N. testified during direct examination that she suffered from schizophrenia. Defense counsel was permitted to cross-examine D.N. During his cross-examination, only one

objection was sustained as described in the below colloquy between defense counsel and D.N.:

"Q. You had to go to Antelope Valley Hospital and be admitted there a number of times, somebody thought that you were suicidal. Am I stating that correctly?

"A. The only time that I went to the hospital because I – it's a long story, sir. It's just like this.

"Q. I'm not trying to put you on the spot.

"A. You're not putting me on the spot. I don't want to take all this time to explain all these situations. Years ago my job was working with kids.

"[Prosecutor]: I'm going to object.

"The Court: Sustained.

"The Witness: I had friend Tookie kill someone and they killed him.

"The Court: Ma'am, let me interrupt you for a second. There's been an objection and I've sustained it."

The court then instructed defense counsel to ask more specific questions. Defense counsel continued cross-examining D.N.

3. Defendant's Midtrial *Marsden* (*People v. Marsden* (1970) 2 Cal.3d 118) Motion Was Withdrawn

On June 10, 2016, the court held a *Marsden* hearing. Defense counsel indicated that he refused to ask all of the questions defendant had requested. The court asked defendant if he wanted a different lawyer. Defendant responded: "Not yet, your honor. I'm just waiting to see is he going to continue to let [*sic*] me to the best ability or keep on sandbag [*sic*]. If he continues to do a great job, then he's fine. I like him. But if he leaves doorways open for the District Attorney, I have no choice

but to fire him." Eventually, defendant stated that he was "going to stick with" his counsel.

4. The Court Denies Defendant's *Faretta* Motion Made at the Conclusion of Trial

Dr. Rothburg was the last witness to testify (through readback of his second trial testimony). During his testimony, defendant said in front of jurors "[e]xcuse me, your honor. This is illegal." Defendant continued: "He can't pick and choose what to say."

After the court excused the jurors, defendant informed the court that he did not want his counsel to represent him anymore. Defendant expressed frustration that a transcript from a prior trial was read. Defendant believed that it suggested that he had suffered a prior conviction. The court asked if defendant was prepared to represent himself that day. Defendant responded: "I have no choice . . . ." He continued: "I just want a fair trial. And if he's going to drop the ball to let her win, then I have no choice. I have to do what I have to do just to have a basic trial again; so I'm ready to go pro per as of right now, co-counsel, however. I just want a fair trial." Defendant was concerned that his counsel was "not putting in the evidence."

Defendant told his counsel: "I don't have a choice. I tried to tell you when we were in there. Okay? You keep – keep dropping the ball. . . . Not this shit. I didn't do it. If you cared about it, I mean you should say, 'hey, look. I'm cut this fuckin' case.' They set you up . . . ."

After a recess, the court denied defendant's request to represent himself.

5. Conviction and Sentence

Jurors convicted defendant of felony dissuading a witness from reporting a crime by the use of a broom, misdemeanor battery, misdemeanor false imprisonment, and misdemeanor causing fire to the property of another. The court sentenced defendant to consecutive sentences of four years for dissuading a witness using a weapon (i.e. a broom), six months for battery, one year for false imprisonment, and six months for causing fire to the property of another. The court noted that defendant had already served this sentence and ordered him to report to parole. The abstract of judgment does not reflect defendant's time in custody or his custody credits.[2]

DISCUSSION

For reasons we shall explain, we reject defendant's argument that (1) the trial court violated his right to confront D.N.; (2) the prosecutor engaged in misconduct; and (3) the trial court violated defendant's right to self-representation. With one exception, we also reject the argument that defense counsel rendered ineffective assistance of counsel. However, we conclude that counsel was deficient in failing to enter a plea of double jeopardy to the battery charge. Further, we find that the sentence for false imprisonment should have been stayed, and that the trial court should calculate defendant's time in custody and his custody credits.

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[2] We grant defendant's motion for judicial notice of the record in the prior appeals. We also grant defendant's request to file third party medical records under seal.

1. The Trial Court Permitted Defendant to Cross-examine D.N.

As noted, we reversed two prior judgments of conviction because defendant was denied the opportunity to fully cross-examine D.N. We explained that her medical history indicating that she suffered from delusions was probative of her ability to perceive the events involving defendant. In this appeal, defendant again argues that he was denied the opportunity to fully cross-examine D.N.

This time his argument lacks merit. The court sustained only one objection to D.N.'s testimony and that occurred when D.N. volunteered nonresponsive testimony regarding her work years earlier, which was also irrelevant to her ability to perceive the incident with defendant. Defendant demonstrates no error in the trial court sustaining this sole objection. The fact that the court sustained one objection does not show the court precluded defense counsel from cross-examining D.N. Defendant's factual premise therefore lacks merit, and his legal argument based solely on that premise must fail.

2. With One Exception, Defendant's Claims of Ineffective Assistance of Counsel Lack Merit

" ' "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. Lucas* (1995) 12 Cal.4th 415, 436-437.)

"In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926.) " 'Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission. In all other cases the conviction will be affirmed and the defendant relegated to habeas corpus proceedings at which evidence dehors the record may be taken to determine the basis, if any, for counsel's conduct or omission. [Citation.]' " (*People v. Orloff* (2016) 2 Cal.App.5th 947, 955.)

In this case the appellate record does not reveal whether counsel had a legitimate reason for his litigation choice. Accordingly, defendant's ineffective assistance claims are better considered in a possible petition for writ of habeas corpus. (*People v. Snow* (2003) 30 Cal.4th 43, 95.) For example, defendant argues that his counsel's failure to present expert psychiatric testimony regarding D.N.'s medical condition and failure to impeach D.N. with statements from her medical records constituted deficient conduct. On appeal we cannot evaluate whether any expert would have opined D.N.'s mental condition affected her perception at the relevant time. Without the proffered expert testimony, it is impossible to determine whether defendant's counsel was deficient for failing to present the evidence, or whether defendant suffered prejudice from its absence. Defendant's argument that "[h]ad a psychiatric expert

been provided with these medical records, he could have testified that D.N. was suffering from a severe form of paranoid schizophrenia characterized by paranoia, delusions, obsessive ideations, and hallucinations at the time of the June 23, 2010 incident" is not persuasive because there is no evidence any witness would have so testified.

Based on the record on appeal, defendant has additional unpersuasive claims of ineffective assistance of counsel. For example, he argues that his counsel should have cross-examined D.N. and Deputy Sheriff Goedecke with their second trial testimony and especially D.N.'s identification of Brown as the assailant. Defendant also argues that D.N. should have been impeached with prior inconsistent statements related to whether she took medication on the night of the incident. We need not speculate as to counsel's rationale, if any, for each of these decisions. Defense counsel was not asked for an explanation, and defendant has not shown that " ' "there simply could be no satisfactory explanation," . . .' " for deciding not to present this evidence. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Further defendant's reliance on so-called exculpatory evidence from his second trial may be overstated because jurors in the second trial convicted him. In short, on appeal, defendant fails to establish either deficient conduct or prejudice necessary for his ineffective assistance of counsel claim.

3. Defendant Demonstrates His Counsel Was Ineffective for Failing to File a Plea of Double Jeopardy to Battery

In the first trial, jurors acquitted defendant of assault with a deadly weapon (to wit, hedge clippers). Jurors also acquitted him of the lesser offenses of battery and simple assault.[3]

Defendant argues that his conviction for battery must be reversed because it was entered in violation of principles of double jeopardy. Respondent admits that "[r]etrial of the battery charge based on the use of hedge clippers was barred under principles of double jeopardy" but argues that the issue was forfeited. As respondent acknowledges, the prosecutor urged jurors to convict defendant of battery for attacking D.N. with hedge clippers. Specifically, the prosecutor argued: "Now, there's many instances in which the defendant touched Ms. N[.] in a harmful or offensive way: several times with the hedge clippers."

We agree with respondent that the issue is forfeited. (*People v. Memro* (1995) 11 Cal.4th 786, 821.) However, the failure to raise a plea of double jeopardy was deficient conduct and prejudiced defendant by resulting in a conviction for battery. From this record we cannot divine any tactical reason for failing to plead double jeopardy and avoid the conviction.[4] (*People v.*

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[3] Jurors were instructed that "Simple assault and simple battery is [*sic*] a lesser crime of Assault with a Deadly Weapon . . . ."

[4] Assuming arguendo that defense counsel failed to initially plead double jeopardy under the theory that defendant used a burning broom to inflict a battery on D.N., once the prosecutor argued that the use of the hedge clippers supported a battery conviction, defense counsel had a duty to object and seek a judicial remedy for this improper argument. Defense counsel's

Morales (2003) 112 Cal.App.4th 1176, 1185 ["we can conceive of no legitimate tactical reason for failing to raise" double jeopardy].) It is undisputed and the record shows that jurors were asked to relitigate an issue necessarily decided in defendant's favor in his first trial. (See *People v. Catlin* (2001) 26 Cal.4th 81, 123.)

4. Defendant Demonstrates No Prosecutorial Misconduct

"Under the federal Constitution, a prosecutor commits misconduct when his or her conduct 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citation.] Under California law, a prosecutor commits reversible misconduct when 'he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted.' [Citation.] To preserve a claim of prosecutorial misconduct on appeal, 'the defense must make a

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failure to object resulted in defendant's conviction for a crime for which he had already been acquitted.

Although we do not minimize the stigma of defendant incurring a misdemeanor criminal conviction that should have been precluded under double jeopardy principles, we note that defendant, at the time of sentencing, suffered no additional incarceration period as a result of the error. Notwithstanding the trial court's imposition of a six-month consecutive sentence for the offending battery count, at the time of sentencing the defendant had already accrued sufficient presentence custody credits to satisfy the entirety of the incarnation portion of the judgment. As discussed *post*, following imposition of sentence the trial court ordered defendant to report to parole; the defendant was not remanded for any additional custody period.

timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.' " (*People v. Clark* (2016) 63 Cal.4th 522, 576-577.)

Defendant's claim of prosecutorial misconduct is forfeited because he did not object or request an admonition in the trial court. (*People v. Clark, supra*, 63 Cal.4th at p. 577.) In any event, defendant's claim is based solely on the prosecutor's failure to consider evidence outside the record, evidence defendant believes that his counsel should have presented at trial.[5] Defendant cites no support for his claim that the prosecutor is bound by evidence *outside* the trial. Defendant's premise violates the well-established rule that the prosecution is required to limit its argument to evidence admitted *in* trial. "It is well settled that it is 'clearly misconduct' for a prosecutor to make arguments based on facts not in evidence that are not matters of common knowledge." (*People v. Zurinaga* (2007) 148 Cal.App.4th 1248,

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[5] For example, although defendant argues that his counsel should have impeached D.N. with her second-trial testimony identifying Brown as her assailant, the prosecutor correctly argued that D.N. was "never confronted with a statement that she made in the past that is inconsistent with her statement here in court . . . ." Similarly, defendant argues that the prosecutor misrepresented D.N.'s medical records when she argued that D.N. was "closer to the fully functional end of the schizophrenia because she takes medication." According to defendant this "was an outright lie designed to make D.N. appear more credible and less delusional than the prosecution knew she was." But as explained, defendant presented no expert testimony supporting his version of D.N.'s medical records, and the prosecutor's argument did not misrepresent the evidence at trial.

1259.) In short, defendant demonstrates no prosecutorial misconduct.

5. Defendant Shows No Error in the Court's Denial of His Request to Represent Himself Made at the Conclusion of Trial

Almost at the end of the evidentiary portion of trial, defendant requested to represent himself. Defendant indicated that he was prepared to make closing argument without counsel's assistance.

The court denied defendant's request, reasoning as follows: "The court has considered your request to go pro per. The court is considering the fact that this request is made . . . beyond the 11th hour. . . . [T]he defense case is nearly over. The trial is expected to conclude today. This request came after you had an outburst here in open court in front of the jury where you apparently have disagreed with the tactical decision made by your attorney. [¶] Your statements that you made during the course of your outbursts were somewhat nonsensical, but it seems to me that this request is not coming really out of a true desire to represent yourself." "[Y]ou have demonstrated to the court today as well as on previous occasions that you are unable or unwilling to conform your behavior to what would be required of you."

The trial court did not abuse its discretion in denying defendant's belated request to represent himself. (*People v. Lawrence* (2009) 46 Cal.4th 186, 192 [trial court has discretion in considering midtrial request for self-representation and must consider totality of the circumstances]; see *People v. Bradford* (2010) 187 Cal.App.4th 1345, 1354 [defendant's outburst during trial suggested "he might not comply with procedural rules during self-representation" and supported trial court's exercise of

discretion to deny motion for self-representation made before closing argument].) There is no merit to defendant's argument that the trial court should have allowed him to represent himself to afford him the chance to present exculpatory evidence. At the time defendant requested to represent himself, no additional witnesses were scheduled to testify and he did not argue that anyone else should be permitted to testify. Defendant could not present the exculpatory testimony during his closing argument.

People v. Windham (1977) 19 Cal.3d 121, relied on heavily by defendant, supports the conclusion that the trial court acted well within its discretion. In *Windham*, our high court concluded that when a defendant seeks to proceed pro se after trial has commenced, it is "within the sound discretion of the trial court to determine whether such a defendant may dismiss counsel and proceed *pro se*." (*Id*. at p. 124.) In *Windham*, the defendant was concerned that his attorney did not elicit evidence that he had been acting in self-defense, and on the final day of testimony, sought to represent himself. (*Id*. at p. 125.) The court concluded that: "Assessment of the record in the present case reveals no pretrial request by defendant that he be permitted to represent himself. The absence of such a request amounts to a waiver of the unconditional right to proceed by way of self-representation. Consequently the midtrial motion for self-representation was addressed to the sound discretion of the trial court." (*Id*. at p. 129.) The high court found "no abuse of discretion in the trial court's denial of the motion. The sole reason put forth by defendant to support his request was the claim that his admittedly competent counsel had been unable to present a stronger case on the theory of self-defense." (*Ibid*.) As relevant here, the court further noted that "defendant's request came at

an exceedingly late stage of the trial. Denial of the motion for self-representation resulted in nothing more than preventing defendant from addressing the jury during closing argument." (*Id.* at p. 130.)[6]

This case is like *Windham*. Defendant was concerned that his attorney did not present certain evidence. His request was made just before closing argument. At most, it prevented him from delivering the closing argument. Additionally, it was made after he started speaking in front of jurors. As in *Windham*, defendant demonstrates no abuse of discretion in denying his motion to represent himself.

6. Minor Sentencing Modifications Are Required

Defendant argues that his misdemeanor convictions should have been stayed pursuant to Penal Code section 654. Penal Code section 654, subdivision (a) provides: "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

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[6] *Windham* emphasized the following factors in reviewing a midtrial *Faretta* motion: "the defendant's reasons for the motion, the quality of defense counsel's representation, the defendant's proclivity to substitute counsel, the length and stage of the proceedings, and the disruption or delay that might reasonably be expected to follow if the motion were granted." (*People v. Bradford, supra*, 187 Cal.App.4th at p. 1353.) Contrary to defendant's argument *Windham* did not set forth specific, exclusive factors for evaluating a belated request to proceed in pro per. (*Bradford*, at pp. 1354-1355.) *Windham* required the trial court to "inquire into the reasons behind a defendant's untimely" request to proceed in pro per, but did not require the trial court to expressly state each factor in denying a motion. (*Bradford,* at p. 1354.)

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."

"Section 654 provides that even though an act violates more than one statute and thus constitutes more than one crime, a defendant may not be punished multiple times for that single act. [Citations.] The 'act' which invokes section 654 may be a continuous ' "course of conduct" . . . comprising an indivisible transaction . . . .' [Citation.] 'The divisibility of a course of conduct depends upon the intent and objective of the defendant. . . . [I]f the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' " (*People v. Akins* (1997) 56 Cal.App.4th 331, 338-339.)

According to defendant, all of the crimes were based on a continuous course of conduct to prevent D.N. from contacting the police. Respondent argues that only the sentence for battery should have been stayed.

Putting aside the conviction for battery (count 1), which as previously explained violated principles of double jeopardy, defendant could have harbored different intents and objectives with respect to the crimes of recklessly setting a fire (count 5) and dissuading a witness from testifying (count 4). There was evidence that defendant lit the broom on fire to deface D.N. and "make" her "ugly." This is a criminal objective separate from dissuading her not to testify and supported the consecutive sentence for recklessly causing a fire by lighting the broom.

However, defendant's intent in falsely imprisoning D.N. (count 3) in her house with the lit broom cannot be distinguished from the other crimes. The prosecutor argued "we know that defendant prevented her from reporting the crime when he grabbed a broom and prevented her from escaping . . . ." "[S]he was unable to actually escape or actually leave from her home because of what the defendant was doing to her, attacking her with this flaming broom." The sentence for false imprisonment should have been stayed. (See e.g. *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1263 [Pen. Code, § 654 precluded punishment for both robbery and dissuading a witness because the objective of the robbery was to take the victim's cell phone so the victim could not contact the police]; see also *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1346 [terrorist threat incidental to objective of dissuading witness from testifying and should have been stayed under Pen. Code, § 654].) Accordingly, defendant's sentence must be modified to stay the term for false imprisonment.

7. Errors in the Abstract of Judgment Should Be Corrected.

The parties agree and persuasively show that the abstract of judgment should be corrected to reflect defendant's pretrial custody credits. They also agree that the record contains conflicting information regarding the number of credits and that the trial court should make a definite calculation.[7]

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[7] Because we find only one error, we need not consider defendant's argument that cumulative error requires the reversal of his convictions.

DISPOSITION

The judgment is affirmed in part, modified in part, and reversed in part. The conviction for battery is reversed. The sentence on misdemeanor false imprisonment is stayed. The case is remanded for the trial court to calculate defendant's custody credits. In all other respects, the judgment is affirmed. The clerk of the superior court is directed to amend the abstract of judgment to reflect defendant's time spent in custody and conduct credits. Upon issuance of remittitur, the clerk of this court is directed to forward a copy of the opinion to the State Bar of California.

ROGAN, J.*

We Concur:

BIGELOW, P. J.

GRIMES, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.