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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ARZURAY DIAMOND REED, Defendant and Appellant.	B283544 (Los Angeles County Super. Ct. No. MA069458)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Strassner, Commissioner. Affirmed.

Mary Jo Strnad, 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, Paul M. Roadarmel, Jr. and Charles J. Sarosy, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Arzuray Diamond Reed guilty of criminal threats and second degree robbery. On appeal, Reed argues that his convictions must be reversed because the trial court failed to properly instruct the jury on the lesser included offense of attempted criminal threats and Reed's theory that he was guilty of the uncharged offense of simple assault. Further, Reed contends that the trial court improperly relied on his admissions that his prior convictions were for residential burglary and thus prior strikes under the "Three Strikes" law. We reject those contentions and affirm the judgment.

BACKGROUND

Javier Alcantara, his son Juan Alcantara,[1] and Javier's wife were parked on a residential street where Javier had a construction job. According to Juan, he got out of his truck and saw Reed approaching. Reed asked Juan for directions. Juan initially tried to ignore Reed, but then replied that he was unfamiliar with the address Reed sought. Reed rummaged through his backpack and pulled out a piece of paper with directions. Javier then exited the truck and stood next to Reed. Reed again asked for directions, showing Javier the piece of paper.

When neither Juan nor Javier could help him, Reed became aggressive and began yelling at them. Javier asked Reed to leave. While standing less than 10 feet from Juan and Javier, Reed pulled out a 10-inch long metal knitting needle with a sharpened point, and pointed it at Juan while holding it about

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[1] We refer to the Alcantaras by their first names for the sake of clarity, intending no disrespect.

halfway up his body. Reed then demanded money and said, "I'll stab you. I'll stab someone." Juan felt scared and confused because of how quickly Reed's demeanor had changed from asking for directions to demanding money and threatening to stab him. Juan was scared for his life and did not want to be killed in front of his mother and his father.

Juan told Reed to leave and that he was going to call the police. Juan called the local sheriff's station on his cell phone. He did not dial 911 because he thought calling the station directly would get a faster response. Juan told the dispatcher that Reed was "yelling and trying to pick a fight with us." Juan added that Reed had "something sharp and [was] trying to attack" him with it.

While Juan was still on the phone, Reed took off his shoes, laid down on the grass, and removed other items from his backpack. Reed then stood and threw the knitting needle in the grass, before walking to the end of the street. Sheriff's deputies arrived approximately eight to 10 minutes after Juan called. Juan identified Reed to the deputies as Reed returned to the scene. Juan told the deputies that Reed had demanded money and had a sharp needle.

Javier testified somewhat differently, that he was the one who got out of the truck and attempted to help Reed. When Reed began yelling at him, he told Reed to leave and threatened to call the police. Reed removed the knitting needle from his backpack and demanded money. Reed held the knitting needle in his right hand like a knife at approximately the height of Javier's chin, but did not extend his arm. When Reed demanded money, he was looking at both Javier and Juan, but the knitting needle remained pointed towards Javier. Javier told Juan to call the

police. Reed then walked away and threw the knitting needle into a yard, eventually returning when the police arrived.

Reed testified at trial in his defense. Reed said that the day before the incident, he was in Lancaster at his cousin's girlfriend's house. Before leaving, Reed gave away all of his money except for $0.85. Reed walked around Lancaster and ended up spending the night at the sheriff's station to get out of the cold. He called his aunt to see if she could pick him up in Lancaster. She told him to go back to his cousin's girlfriend's house to get his money back so he could take the train to Los Angeles. A deputy sheriff wrote directions for Reed on a piece of paper.

Reed tried following the directions, but he got lost in a residential area. That is when he saw Juan and Javier and asked them for directions. Javier was a couple feet from Reed, and Juan was about 23 feet away. As Reed asked Javier for directions, Javier cut him off and walked away while Juan ignored Reed. Reed became upset because someone had given him erroneous directions to the hospital the night before. Reed then dumped the contents of his backpack, including the knitting needle, onto the sidewalk. Reed yelled to the surrounding houses, asking for directions. Javier told Reed to be quiet and that he was going to call the police. Reed was initially relieved, thinking that the police would be able to help him. After about five minutes, Reed realized that Javier and Juan were not calling the police for his benefit. Juan, Javier, and Javier's wife went inside the house where Javier had a job and stood behind a metal security door. Reed said he did not want to cause trouble before walking to the end of the street, where he sat and waited for the police to arrive.

Reed was charged with making a criminal threat (Pen. Code,[2] § 422, subd. (a); count 1) and attempted second degree robbery (§§ 211, 664; count 2). As to both counts, it was alleged Reed personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)). It was further alleged Reed had two prior convictions for burglary in December 1996 and December 2001, that each qualified as a prior serious felony (§ 667, subd. (a)(1)) which subjected Reed to sentencing under the Three Strikes law (§§ 667, subds. (b)-(j), 1170.12).

A jury found Reed guilty of both counts and found true the weapon allegation. In a bifurcated proceeding, Reed waived his right to a jury trial on his prior convictions. He admitted his 1996 and 2001 burglary convictions as prior strikes.

As to count 2, the trial court sentenced Reed to life in prison with a minimum parole eligibility date of 25 years under the Three Strikes law (§ 667, subd. (e)(2)(A)(ii)), plus a consecutive term of one year for the weapon enhancement, plus two consecutive terms of five years for the two priors. The trial court imposed the same sentence as to count 1, but stayed it pursuant to section 654.

DISCUSSION

Reed raises six claims on appeal. First, the trial court erred by failing to give a unanimity instruction on the criminal threat charge because the evidence showed Reed made two different threats and that he threatened both Juan and Javier. Second, the trial court erred in not instructing the jury on the lesser included offense of attempted criminal threats because the

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

jury could have found that neither Juan nor Javier were in sustained fear. Third, the trial court impermissibly failed to instruct the jury on the uncharged offense of simple assault when that was the overarching theory of Reed's defense. Fourth, and related to his third claim, defense counsel provided ineffective assistance by failing to request an assault instruction. Fifth, the trial court violated his Sixth Amendment right to a jury trial by accepting Reed's admissions that his prior convictions were for residential burglaries and prior strikes. Sixth, there was insufficient evidence that Reed's two residential burglary convictions qualified as prior serious felonies and strikes. We address each issue in turn.

I. Unanimity instruction

Reed's first contention is that his conviction of count 1 must be reversed because the trial court failed to give a unanimity instruction sua sponte after the People presented more than one statement and more than one victim that could have supported the jury's guilty verdict for making criminal threats. We disagree.

A jury verdict in a criminal case must be unanimous (*People v. Collins* (1976) 17 Cal.3d 687, 693) and each individual juror must find, beyond a reasonable doubt, that the defendant committed the specific offense he is charged with (*People v. Russo* (2001) 25 Cal.4th 1124, 1132). To ensure a criminal conviction is based on a unanimous jury verdict, if the evidence suggests more than one discrete crime, the prosecution must elect among the crimes or the trial court must instruct the jury that it must unanimously agree that the defendant committed the same criminal act. (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1499–

1500.) We review instructional errors de novo. (*People v. Shaw* (2002) 97 Cal.App.4th 833, 838.)

Reed contends that per Javier's testimony, there was evidence of a separate criminal threat directed towards Javier only. Reed's claim is not supported by the record. There was only one verbal threat that could serve as the basis for count 1—Reed's threat to stab someone while pointing the needle at Juan. Moreover, there was no evidence that Javier even heard the threat or that he was in sustained fear at any point during the encounter with Reed. Javier only heard Reed's demand for money and told him to leave. That Reed may have been pointing the needle in Javier's direction when he demanded money is not substantial evidence of a criminal threat because nonverbal conduct does not qualify as a criminal threat. (*People v. Gonzalez* (2017) 2 Cal.5th 1138, 1147.) Further, the People, consistent with the charges as alleged in the information, were clear in their opening statement and closing argument that the criminal threats charge was based on Reed's threat to stab someone, which was directed towards a single victim, Juan. No unanimity instruction was required.

II. Attempted criminal threats

Reed contends that the trial court prejudicially erred in failing to instruct the jury on the lesser-included offense of attempted criminal threats. Reed asserts that there was substantial evidence to support this instruction because the jury could have believed Juan's testimony that Reed communicated a threat while also believing Reed's contention that neither Juan nor Javier were actually in sustained fear. Again, we disagree.

Even absent a request, a trial court must instruct on the general principles of law, including lesser included offenses,

relevant to the issues raised by the evidence. (*People v. Smith* (2013) 57 Cal.4th 232, 239.) Instruction on a lesser included offense is required when there is evidence the defendant is guilty of the lesser offense, but not the greater. (*People v. Whalen* (2013) 56 Cal.4th 1, 68.) Substantial evidence is evidence a reasonable jury could find persuasive. (*People v. Williams* (2015) 61 Cal.4th 1244, 1263.) The testimony of a single witness, including defendant, may suffice. (*People v. Wyatt* (2012) 55 Cal.4th 694, 698.) In determining whether substantial evidence existed, we do not evaluate the credibility of the witnesses, a task for the jury. (*Ibid.*) Substantial evidence does not mean, however, the existence of any evidence, no matter how weak. (*Whalen*, at p. 68.)

We independently review whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Nelson* (2016) 1 Cal.5th 513, 538.) Reversal is not warranted unless it appears " 'reasonably probable' the defendant would have achieved a more favorable result had the error not occurred." (*People v. Breverman* (1998) 19 Cal.4th 142, 149.)

Reed challenges one element of the crime of criminal threats; specifically, that Juan was in sustained fear for his or his immediate family's safety. (See *People v. Toledo* (2001) 26 Cal.4th 221, 227–228 [describing the five elements of criminal threats]; § 422, subd. (a).) To show that Juan did not experience sustained fear, Reed relies on: (1) Juan's initial report to the police that Reed was yelling and trying to pick a fight; (2) Juan's voice on the recorded call sounded calm and the dispatcher understood him to be reporting a disturbance, not a life-ending threat; (3) Juan waited for at least 10 minutes for police to arrive

and made no attempt to leave despite having a vehicle; and (4) Juan dialed the local sheriff's station and not 911.

However, Reed takes this evidence out of context. Juan's calm demeanor notwithstanding, he reported to the dispatcher that Reed said he was going to stab someone. Juan also testified that he dialed the local sheriff's station because he thought the authorities would respond more quickly than if he dialed 911. That Juan waited 10 minutes before the police arrived also does not support Reed's contention that Juan was not in sustained fear. Sustained fear means " 'a period of time that extends beyond what is momentary, fleeting, or transitory.' " (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349.) Even a minute during which a victim hears a threat and sees someone brandishing a weapon can qualify as sustained fear. (*Ibid.*) "When one believes he is about to die, a minute is longer than 'momentary, fleeting, or transitory.' " (*Ibid.*) On this record, there was not substantial evidence to support instructing the jury sua sponte on the lesser included offense of attempted criminal threats.

III. Assault

Reed asserts on appeal that his overarching defense was that his conduct amounted to, at most, a simple assault, and the trial court should have instructed the jury on that offense.

As we have said, the trial court has a duty to instruct sua sponte on the general principles of law in the case. That duty extends to instructions on the defendant's theory of the case, including instructions as to defenses that the defendant is relying on, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824.) In the absence of these factors, defense counsel must request

instructions on the theory of defense. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1178–1181.) That being said, a defendant has the right to instructions on inconsistent defenses. (*People v. Atchison* (1978) 22 Cal.3d 181, 183.) And, when the trial court believes " 'there is substantial evidence that would support a defense inconsistent with that advanced by a defendant, the [trial] court should ascertain from the defendant whether he wishes instructions on the alternative theory.' " (*People v. Breverman*, *supra*, 19 Cal.4th at p. 157, italics omitted.)

Reed's characterization of his defense as an assault rather than a robbery is belied by the record. An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. (§ 240.) Reed's testimony was not that he assaulted Juan or Javier or became so upset that he threatened them with injury. His testimony was that he asked for directions and became frustrated when Javier would not help him. He did not point the knitting needle at Juan or Javier but merely emptied the contents of his backpack onto the ground, which included the knitting needle. Reed denied threatening Javier and Juan and demanding money. Thus, Reed's testimony does not support the defense theory on appeal that Reed committed an assault.

Moreover, assault is not a defense to robbery. Generally, defenses fall into two categories: (1) the theory that the evidence is insufficient to establish one of the elements of the offense; or (2) asserting a state of facts that defeats the prosecution allegations. A defense of the first category, insufficient evidence, does not impose a sua sponte duty on the trial court to instruct on that defense if the court has given complete and accurate instructions on the disputed element. (*People v. Lawson* (2013)

215 Cal.App.4th 108, 117.) Reed conflates the trial court's duty to instruct the jury on Reed's defenses with the trial court's sua sponte duty to instruct the jury on a lesser included offense. But, as Reed concedes, assault is not a lesser included offense of robbery. (See *People v. Parson* (2008) 44 Cal.4th 332, 349.) The trial court did not have a duty to instruct the jury on assault.

Because we conclude that no error occurred, we reject Reed's alternative argument that his counsel's failure to request an instruction deprived Reed his right to the effective assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687–688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216–217.)

IV. Sixth Amendment

Reed contends the trial court violated his Sixth Amendment rights by deciding the factual elements that would qualify his prior convictions as serious or violent felonies.

The Sixth Amendment contemplates that a jury—not a sentencing court—will find the facts giving rise to a conviction, when those facts lead to the imposition of additional punishment under a recidivist sentencing scheme. (*People v. Gallardo* (2017) 4 Cal.5th 120, 136.) *Gallardo* held, "a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the 'nature or basis' of the prior conviction based on its independent conclusions about what facts or conduct 'realistically' supported the conviction. [Citation.] That inquiry invades the jury's province by permitting the court to make disputed findings about 'what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct.' [Citation.] The court's role is, rather, limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a

guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (*Id.* at p. 136.)

People v. Gallardo is inapplicable here. The defendant in *People v. Gallardo*, *supra*, 4 Cal.5th 120 did not admit that the prior conviction was a strike. Instead, the trial court relied on a preliminary hearing transcript to determine that a prior assault conviction was a felony. (*Id.* at pp. 123, 125–126.) Unlike *Gallardo*, Reed admitted multiple times that his prior convictions were for residential burglaries. Reed admitted during direct examination that his 1996 and 2001 burglary convictions were for residential burglary. Reed demonstrated that he understood the difference between residential and commercial burglary when he testified that his convictions were for residential burglary, noting that he shifted from committing residential burglaries to commercial burglaries because the latter "takes the risk out of hurting someone." Reed also admitted that the prior convictions were for residential burglary and prior strikes in a bifurcated proceeding. The trial court thus did not engage in any judicial factfinding.

V. Reed's admissions

Reed contends that insufficient evidence supported the strike and serious felony findings under section 667. But Reed's claim fails for the same reason his Sixth Amendment claim fails—Reed is bound by his admissions that the prior burglary convictions were for burglarizing residences.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

LAVIN, J.