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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. OGANES METSOYAN, Defendant and Appellant.	B283562 (Los Angeles County Super. Ct. No. BA452671)

APPEAL from a judgment of the Superior Court of Los Angeles County, Drew E. Edwards, Judge. Affirmed.

Law Offices of Taylor Clark and Taylor L. Clark 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 and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant Oganes Metsoyan of having made a criminal threat. (Pen. Code, § 422, subd. (a).)[1] Defendant admitted a prior strike conviction (§§ 667, subd. (d), 1170.12, subd. (b)) and a prior serious felony conviction (§ 667, subd. (a)(1)). He was sentenced to nine years in state prison.

On appeal, defendant argues: the trial court erred when it admitted evidence of a prior incident between defendant and the victim, Luis Gomez, under Evidence Code sections 1101, subdivision (b) and 352; there was insufficient evidence defendant's threat caused Gomez to be in sustained fear; the trial court erred when it discharged a juror; cumulative error was prejudicial; and the trial court abused its discretion when it denied defendant's *Romero*[2] motion. We reject defendant's contentions and affirm the judgment.

II. THE EVIDENCE

Gomez testified about a prior altercation with defendant. Gomez owned a restaurant. In 2009, Gomez threw defendant out of the restaurant for harassing two female customers. Defendant, who appeared to be intoxicated, told Gomez he would "pay for that." Defendant returned about 30 minutes later and struck Gomez, injuring Gomez's hand. Gomez called the police.

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1 Further statutory references are to the Penal Code except where otherwise noted.

2 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

Defendant was prosecuted and a restraining order was imposed. Gomez had seen defendant in the neighborhood since that time, but they had not interacted.

On November 17, 2016, however, defendant entered Gomez's restaurant, walked immediately to Gomez, and stared at him. Defendant appeared to be intoxicated. Gomez testified defendant "was almost always drunk." When Gomez asked defendant to leave, defendant held up his middle finger and said, "Fuck you." Defendant asked Gomez, "Do you see I am free[?]" Gomez yelled for someone to call the police. Defendant left the restaurant but immediately returned. While looking at Gomez, defendant said he was coming back with a gun and he was going to kill Gomez. He mimicked firing a gun with his hand. Gomez testified: "[H]e told me he was going to come back again with a gun, and that he was going to kill me because he had a friend in the . . . Armenian Power gang." Gomez knew the gang operated in the area. Gomez denied hating defendant but stated, "The problem is that one day he could again attack me."

III. DISCUSSION

A. *Prior Bad Act: the 2009 Encounter*

Defendant argues the trial court erred when it admitted evidence of the 2009 incident under Evidence Code sections 1101, subdivision (b) and 352. "'Subdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101

clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition [such as motive, opportunity, intent, identity].' [Citation.] . . . 'The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citation.]'" (*People v. Fuiava* (2012) 53 Cal.4th 622, 667.)

Pursuant to Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." However: """"[T]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues."""" [Citation.]" (*People v. Fruits* (2016) 247 Cal.App.4th 188, 205.)

We review for an abuse of discretion the trial court's rulings on relevance and admission or exclusion under Evidence Code sections 1101, subdivision (b) and 352. (*People v. Fuiava, supra*, 53 Cal.4th at pp. 667-668.) "[A] trial court's [evidentiary] ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in

a manifest miscarriage of justice. [Citation]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.[3]) We find no abuse of discretion.

Testimony about the 2009 incident was admissible under Evidence Code section 1101, subdivision (b) to show motive.[4] (*People v. Fruits, supra*, 247 Cal.App.4th at pp. 204-205; see *People v. McCray* (1997) 58 Cal.App.4th 159, 171-173 [intent to place stalking victim in fear for her safety]; *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1610 [intent and motive to commit murder].) "A defendant is not entitled to have the jury determine his guilt or innocence on a false presentation that his and the victim's relationship was peaceful and friendly. [Citations.]" (*People v. Fruits, supra*, 247 Cal.App.4th at p. 204.) Defendant entered Gomez's restaurant and asked, "Do you see I am free[?]" The jury could reasonably infer that defendant's comment was a reference to Gomez having called the police in 2009; and that Gomez had a retaliatory motive for his conduct. Evidence of events in 2009 placed the current altercation in context by demonstrating the acrimonious relationship between defendant and Gomez.

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[3] *Rundle* was in turn disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, footnote 22.

[4] As the jury was instructed, the People were not required to prove motive, but the jury could consider whether defendant had a motive to commit the crime charged. "Having a motive may be a factor tending to show the defendant is guilty. Not having a motive may be a factor tending to show that the defendant is not guilty."

Further, the trial court could reasonably conclude the probative value of the evidence outweighed any prejudicial effect. (Evid. Code, § 352.) The 2009 altercation shared several similar circumstances with the present incident. In both cases, defendant was intoxicated and, while in Gomez's restaurant, threatened Gomez. One difference between the 2009 incident and the charged case was that in 2009, defendant struck Gomez, injuring Gomez's hand. No such battery or injury was present in the charged case. Even so, defendant was charged with threatening to return with a gun and kill Gomez, a threat that was far more violent than the nature of the battery in 2009. In context, the 2009 incident would not uniquely evoke in the jurors an emotional bias against defendant.[5] There was no abuse of discretion.

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[5] Defendant argues that the jury may have improperly considered evidence of the 2009 incident as proof that Gomez actually and reasonably was in sustained fear for his safety. First, we conclude any potential prejudicial effect was reduced by the limiting instruction given to the jury. (*People v. Fruits, supra*, 247 Cal.App.4th at p. 207.) The jury was instructed it could consider the 2009 battery "for the limited purpose of deciding whether the defendant had a motive to commit the offense alleged in this case." The jury was further instructed, "Do not consider this evidence for any other purpose." Moreover, even if the court had instructed the jury it could consider this evidence for proof of Gomez's sustained fear, there would have been no error. Evidence Code section 1101, subdivision (b) permits evidence of uncharged misconduct to establish "some fact other than [defendant's] character or disposition." As defendant correctly notes, in order to prove a violation of section 422, the People were required to prove, beyond a reasonable doubt, that the threat caused Gomez to actually and reasonably be in

Defendant also argues the error violated his Fifth, Sixth, and Fourteenth Amendment rights. Absent state law error, we reject defendant's constitutional claims. (*People v. Abilez* (2007) 41 Cal.4th 472, 503.) "[T]he application of the ordinary rules of evidence under state law do not violate a criminal defendant's federal constitutional right to present a defense, because trial courts retain the intrinsic power under state law to exercise discretion to control the admission of evidence at trial. [Citation.]" (*Ibid.*)

Defendant objects to Gomez's testimony that in 2009, defendant broke Gomez's hand. Whether Gomez's hand was in fact broken was immaterial. What mattered for purposes of showing defendant's motive was that defendant battered Gomez and Gomez was injured. Gomez believed defendant broke his hand. An eyewitness, Gregorio Pablo, corroborated Gomez's injury claim. Pablo testified that around the time of the 2009 altercation, he had seen Gomez with a cast or an injury to his arm. Whether the jurors believed defendant broke Gomez's hand or merely injured it would not have affected their verdict.

B. *Substantial Evidence of Sustained Fear*

Defendant challenges the sufficiency of the evidence his threat caused Gomez to be in sustained fear that was reasonable under the circumstances. The crime of making a criminal threat has five elements. Elements 4 and 5 address the victim's sustained fear. "In order to prove a violation of section 422, the

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sustained fear for his safety. (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) Thus, the jury could have properly considered the 2009 incident as proof of Gomez's actual and sustained fear.

prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . 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,' (4) *that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and* (5) *that the threatened person's fear was 'reasonabl[e]' under the circumstances*. [Citation.]" (*People v. Toledo*, *supra*, 26 Cal.4th at pp. 227-228, italics added; accord, *In re George T.* (2004) 33 Cal.4th 620, 630.) Defendant argues he was "obviously stone-cold drunk and engaging in emotional outbursts, angry utterances, and ranting soliloquies . . . ." Defendant further argues there was no evidence he was armed or ever returned to the restaurant.

"'On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.]" (*People v. Abilez, supra*, 41 Cal.4th at p. 504.)

There was substantial evidence Gomez experienced sustained fear that was reasonable under the circumstances. Sustained means "a period of time that extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156; accord, *People v. Wilson* (2010) 186 Cal.App.4th 789, 808.) Defendant entered the restaurant, walked immediately to Gomez, and stared at him. After leaving the restaurant, defendant returned to tell Gomez that he was going to "come back again with a gun," and kill him. Defendant stated that he had a friend in the Armenian Power gang. Gomez testified he was afraid. The jury could reasonably conclude that in light of defendant's promise to return, and the nature of his threats, Gomez was actually and reasonably in sustained fear for a period of time that was more than momentary, fleeting, or transitory.

C. *The Discharged Juror*

Defendant claims it was error to discharge a sitting juror. Defendant argues "the record does not show by a 'demonstrable reality' that Juror No. 11 could not perform his duties." We find no error.

Section 1089 governs discharging a juror for cause. It states in part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate . . . ." "'[A] trial court has broad discretion to remove a juror for cause, [but] it

should exercise that discretion with great care.'" (*People v. Fuiava, supra*, 53 Cal.4th at p. 710.)

On review, we apply not the typical abuse of discretion standard but the "demonstrable reality" test. (*People v. Fuiava, supra*, 53 Cal.4th at p. 711.) As compared to abuse of discretion, "'[t]he demonstrable reality test entails a more comprehensive and less deferential review. It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. It is important to make clear that a reviewing court does not *reweigh* the evidence . . . . Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied. [¶] In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides.' [Citation.]" (*Id.* at p. 712.)

During the first day of trial, after the parties had delivered opening statement, Juror No. 11 approached court staff and expressed concern about his ability to be impartial. At a subsequent hearing, Juror No. 11 stated that both of his parents were mental health professionals who advocated for the mentally ill, and considered the government ill-equipped to deal with the mentally ill including alcoholics. Both parents had lost a parent to alcoholism. Juror No. 11 was uncertain about his ability to follow the court's instructions and separate his own bias from the facts presented at trial. If in his mind there was some sort of mental health issue, he would be partial toward the person with the illness. He had a stepbrother who was a psychopath, but he thought he could "separate" that. When asked whether he could

refrain from speculating about "what someone might be suffering from," Juror No. 11 stated: "So the evidence being actions that were taken. It is not a total vacuum. [¶] For instance, we hear he has acted in a certain way, and nobody said that is evidence of mental illness. Are you saying I not speculate about whether that is why? [¶] [Prosecutor] Yes. That is exactly my question. [¶] Juror No. 11: I don't think I—well, I don't think I wouldn't speculate. I think I could at least be aware that I am speculating. If that is not what I am supposed to do, I think I can probably separate that." At the end of the conversation, the court asked whether Juror No. 11 thought he could decide the case based solely on the instructions. The juror answered, "It is hard to bring into play what that actually means [but] I think I can."

The trial court summarized: "Juror [No.] 11 indicated he has family members involved in the mental health field. He has some concerns there might be a mental health issue in this case, that might—I'll stress the word 'might'—affect his ability to follow this court's instructions and decide the case solely on the law." The prosecutor asked that the juror be excused based on his serious hesitation over his ability to set aside his personal experience when it comes to mental illness including alcoholism. The prosecutor stated, "It is very unlikely that he's going to be able to set [his experiences] aside." Defense counsel opined Juror No. 11 had clearly expressed his willingness to set his bias aside and follow the law.

The trial court observed that Juror No. 11 had asked how long the case would last, which raised some doubt in the court's mind about the juror's motivation. Having factored that in, the court nevertheless concluded: "[O]ut of abundance of caution, the juror did indicate at least, once again, in his mind, the possibility

that his experience with these mental health issues with his family and his parent might affect his ability to be a fair juror. It is a close case, quite frankly. [¶] Over the motion of the People and over the objection of the defense, I am going to excuse [J]uror [No.] 11 and seat our last alternate."

We find no error. The trial court relied on evidence Juror No. 11's background and life experiences made him sympathetic and sensitive to the plight of the mentally ill, including alcoholics. Juror No. 11 was not certain he could refrain from exercising that bias in defendant's favor notwithstanding the trial court's instructions. Defendant's mental health was not the subject of any evidence or jury instruction. The jury was, however, instructed on involuntary intoxication. The evidence on which the trial court relied, and its reasons given, considered in light of the entire record, support the conclusion there was good cause to remove Juror No. 11.

D. *Cumulative Error*

Defendant argues he is entitled to reversal because of cumulative error. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844.) We find no series of errors. Therefore, we reject defendant's argument the cumulative effect of the trial court's errors requires reversal. (*People v. Melendez* (2016) 2 Cal.5th 1, 33.)

E. *Defendant's Romero Motion*

Defendant argues the trial court's denial of his *Romero* motion was an abuse of discretion because: he committed the prior strike offense—attempted carjacking—on June 16, 2010, more than six years prior to the present crime; his criminal record otherwise consisted of five misdemeanors spaced over 16 years; the evidence showed he had an alcohol problem; the current crime was "purely verbal"; and he never carried out the threat.

A trial court has discretion to strike or vacate a prior strike conviction allegation or finding under section 1385, subdivision (a) in furtherance of justice. (*People v. Carmony* (2004) 33 Cal.4th 367, 373.) The question before the court on a *Romero* motion is whether the defendant falls outside the "spirit" of the Three Strikes sentencing scheme "in whole or in part." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) A court considers the nature and circumstances of the present offense and the prior strike offense as well as the defendant's background, character and prospects for the future. (*Ibid.*)

Our review is for an abuse of discretion. (*People v. Carmony, supra*, 33 Cal.4th at p. 374.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) The burden is on the defendant to "clearly show" the trial court's ruling was "irrational or arbitrary." (*Id.* at p. 376.) Moreover, "[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first

instance. (*People v. Wade* (1959) 53 Cal.2d 322, 338.)" (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

The trial court acted within its discretion in denying defendant's motion. Defendant had a history of violent or potentially violent criminal acts: fighting in public (2002); vandalism (2003); battery on a peace officer/fireman (2009); attempted carjacking (2010); battery (2016); and making a criminal threat (2017). In the present case, he threatened to shoot and kill Gomez. He had been repeatedly placed on probation, which was revoked and reinstated at least twice. Upon conviction for his strike prior, attempted carjacking, defendant was placed on formal probation for three years on the condition that he serve 364 days in the county jail. More than two years later, his probation was revoked and reinstated on the condition that he serve an additional 365 days in the county jail. His struggles with alcohol dated back to at least 1999, when he was arrested for driving while intoxicated. He was arrested on December 18, 2016, a month after threatening Gomez, after law enforcement officers saw him drinking in a parking lot. There was no indication defendant had or intended to address his drinking problem. As a result, his prospects for the future were poor.

IV. DISPOSITON

The judgment is affirmed.

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KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.