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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.

ALFRED GARCIA, JR.,

Defendant and Appellant.

B270883

(Los Angeles County  
Super. Ct. No. GA090078)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dorothy L. Shubin, Judge. Affirmed.

Heather J. Manolakas, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

\* \* \* \* \*

Defendant Alfred Garcia, Jr., was charged by information with one count of making a criminal threat (Pen. Code, § 422, subd. (a)). It was also alleged that he personally used a deadly and dangerous weapon, and that he suffered a prior conviction for which he served a prison term (§§ 12022, subd. (b)(1), 667, subd. (a)(1), 667.5, subd. (b), 1170, subd. (h), 1170.12).

Proceedings were suspended after defense counsel declared a doubt as to defendant's mental competence. Defendant was transferred Patton State Hospital. Patton opined that defendant was competent to stand trial, and after the court conducted a hearing at which the parties submitted on the letters from Patton, proceedings were resumed.

The jury found defendant guilty of making a criminal threat, and found the deadly and dangerous weapon allegation to be true. Defendant admitted his prior conviction.

The trial court denied defendant's motion to strike his 2009 burglary conviction. He was sentenced to an aggregate term of seven years eight months in prison, consisting of the low term for the criminal threat count, doubled because of the strike prior, plus five years for his serious felony conviction. The court struck the additional term for the weapon enhancement.

The following facts were adduced at trial. On June 15, 2013, defendant lived with his mother, Maria Garcia, at an apartment in Monrovia. Defendant, Ms. Garcia, and defendant's girlfriend, Myra Cordova, were present in the apartment when defendant and Ms. Garcia got into an argument after Ms. Garcia refused to give defendant money, and defendant threatened her with a knife. Ms. Garcia fled the apartment and called 911.

At trial, Ms. Garcia denied that she had argued with her son, or that he threatened her with a knife, claiming she called

police and lied because she was desperate to get help for her son who had previously attempted to take his own life. Ms. Garcia testified with the help of a Spanish language interpreter, and claimed that when she was interviewed by police, she did not understand the questions posed to her.

The day after the incident, Ms. Garcia went to the police station to tell the truth about what happened, and told police defendant never threatened her.

Detective Robert Van testified that he responded to a family disturbance call and interviewed Ms. Garcia. He does not speak Spanish and conducted the interview in English. Ms. Garcia was able to communicate with him and never told him she did not understand him. Ms. Garcia told Detective Van that defendant pointed a knife at her and threatened to kill her, after Ms. Garcia refused to give him money, fearing he would use it to buy drugs. Ms. Garcia seemed afraid. When shown a knife recovered from her apartment, Ms. Garcia identified it as the knife defendant used to threaten her. The knife was booked into evidence and displayed at trial.

Ms. Garcia's call to 911 was played for the jury, as was her recorded interview with Detective Van.

Defendant filed a notice of appeal. We appointed appellate counsel to represent him. On December 13, 2016, appointed counsel filed a brief in which no issues were raised. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).) In January 2017, defendant filed a supplemental brief with this court. In February 2017, we ordered counsel's *Wende* brief to be stricken, based on a defect in counsel's declaration and verification, and her failure to summarize some of the relevant procedural aspects of the case. On February 16, 2017, counsel filed a new *Wende* brief remedying

the deficiencies. We denied defendant's request for appointment of new appellate counsel.

Defendant asked for, and was granted, a number of extensions to file an additional supplemental brief with this court. On July 21, 2017, we denied defendant's fourth request for an extension. However, on August 2, 2017, we accepted defendant's supplemental brief for filing.

Defendant's briefs raised a number of issues, such as: the trial court's failure to properly answer the jury's question regarding the prosecution's burden of proof concerning the knife; the court's failure to sua sponte instruct the jury on the lesser included offense of attempted criminal threats, and trial counsel's failure to request such an instruction; prosecutorial misconduct for failing to provide the police report to the defense; ineffective assistance of appellate counsel and ineffective assistance of trial counsel; the improper admission of hearsay evidence; that an alternate juror saw defendant in handcuffs; and cumulative error.

Defendant has not raised any arguable appellate issues. Contrary to defendant's claim on appeal, the People were not required to prove that the knife in evidence at trial was the same knife that defendant used to threaten his mother. Therefore, when the jury asked about the prosecution's burden of proof regarding the knife, the trial court properly referred the jury to the instructions for the enhancement. (See Pen. Code, § 12022, subd. (b)(1).)

As to his claim of instructional error, there was no obligation to instruct the jury on attempted criminal threats where the evidence only supported the charged offense. (*People v.*

*Huggins* (2006) 38 Cal.4th 175, 215; *People v. Breverman* (1998) 19 Cal.4th 142, 154-155.)

We also can discern no ineffective assistance of counsel on the record before us. (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 467; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Defendant claims trial counsel did not call Ms. Cordova or other responding officers as witnesses, and did not request an instruction on the lesser offense of attempted criminal threats. However, as discussed *ante*, no such instruction was warranted, and counsel likely had strategic reasons for not calling these witnesses. (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) Also, based on our examination of the entire record before us, we can discern no failure of appellate counsel to effectively represent defendant, as no arguable issues exist.<sup>1</sup> (*People v. Kelly* (2006) 40 Cal.4th 106; *Wende, supra*, 25 Cal.3d 436.)

We also find no error in the admission of the 911 call and recordings of Ms. Garcia's statements to police. Contrary to defendant's claim on appeal, this evidence does not constitute inadmissible hearsay. (Evid. Code, §§ 1235, 1236.)

Also, we can discern no prosecutorial misconduct based on the prosecutor's supposed failure to disclose the police report in discovery. The record makes clear that defense counsel was in possession of the report, as he made use of the report when he cross-examined Detective Van.

As to defendant's claim that an alternate juror saw him in handcuffs during recess, this claim is outside of the appellate record, and is therefore more appropriately addressed by habeas

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<sup>1</sup> We therefore deny defendant's second request to be appointed new appellate counsel.

petition. (*People v. Mendoza Tello, supra*, 15 Cal.4th at pp. 266-267.) Moreover, we can discern no prejudice because none of the alternate jurors deliberated or rendered a verdict, and because simply viewing a defendant in restraints, outside of court, is rarely prejudicial. (*People v. Jacobs* (1989) 210 Cal.App.3d 1135, 1141.)

As we have said, we have examined the entire record, and are satisfied that no arguable issues exist. (*People v. Kelly, supra*, 40 Cal.4th 106; *Wende, supra*, 25 Cal.3d 436.)

We therefore affirm the judgment below.

**DISPOSITION**

The judgment is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.