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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. JAMES WARE, Defendant and Appellant.	B271291 (Los Angeles County Super. Ct. No. PA083082)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lloyd M. Nash and David B. Gelfound, Judges. Reversed and remanded.

Joy A. Maulitz, 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, Senior Assistant Attorney General, Colleen M. Tiedemann and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant James Ware, Jr. (defendant) talked himself into a sentence of 35 years to life in prison. During phone calls with his brother Rick Ware (Rick), defendant repeatedly threatened to set fire to the house occupied by their mother, Rick, and Rick's daughter after Rick told defendant he was not welcome in the house. Rick recorded the calls without defendant's knowledge and played the recordings for the police, who arrested defendant and charged him with attempted arson and making criminal threats. Defendant initially secured a very favorable plea deal, but when he exhibited reticence about following through on his end of the bargain, the trial court withdrew its approval of the deal and set the case for trial. A jury found defendant guilty on the criminal threats charge, and we are asked to decide (1) whether the trial court abused its discretion when it set aside the plea deal, (2) whether the court correctly ruled the phone call recordings were admissible, (3) whether sufficient evidence supports defendant's conviction, and (4) whether reversal is required because the court did not instruct the jury on the lesser included offense of attempted criminal threats.

I. BACKGROUND

A. The Recorded Calls

Early in the morning on February 26, 2015, defendant's mother (also Rick's mother) called 911 to report defendant was causing a disturbance at her house and refusing to leave the property. Defendant left the scene before the responding police officers arrived.

Later that same morning, Rick spoke to defendant by phone and recorded the call without telling defendant he was

doing so. Rick placed the call on speakerphone so their mother, who was also in the house, could listen in. Defendant said he wanted to come over to the house so he could eat, take his diabetes medication, and shower before going to school.[1] Rick refused to give defendant permission to enter the house, explaining it was not his house (it was their mother's) and reminding defendant he would "assault everybody" whenever he came over. Defendant then began arguing with Rick, and Rick repeatedly told defendant he should get counseling or enter a treatment program to address his substance abuse and mental health issues.[2] Defendant eventually hung up on Rick.

When defendant called Rick back, Rick again surreptitiously recorded their conversation. Defendant told Rick he was "so mad" and "really want[ed] that house to burn down." Defendant elaborated, using even more vivid language: "I got a Molotov cocktail right here. I've got a lighter in my hand, Ricky. And—and I—I got a great big old 40-ounce bottle full of gas, and I'm going to burn your house down, man." Rick responded by telling defendant "we really care about you" and "[w]e want you to go to counseling."

Defendant, however, was far from done. Over the next ten-plus minutes, he repeatedly threatened Rick and the other occupants of the house, stating at one point: "I hate you so much

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[1] Defendant was homeless at the time.

[2] Defendant accused Rick of wearing all of defendant's underwear and socks. Rick responded by telling defendant to "[j]ust go to counseling," explaining "[i]t ain't going to kill you." Defendant continued to argue and Rick responded, "This is all noise."

that I could really trap with you [*sic*] motherfuckers in there right now and burn that house down. That's how I'm feeling right now. You know what I mean? But you want to talk to me about a fucking [counseling] program? [¶] . . . [¶] I'm tired of this motherfucking shit. I'm tired. You think I'm going to—the next time I go to jail, I just want you motherfuckers to know, yeah, I deserve that. So whatever life sentence I get or whoever die[s], whatever happen[s], man, you all—you all brought this shit on yourself, man, you know? [¶] . . . [¶] "I want you dead, man. I want your mama dead and your fucking daughter, man, and I'm going to kill you motherfuckers . . . . I'm going to show you motherfuckers what real hate is, you know. [¶] . . . [¶] I don't want to beg. I don't want to—you know what, fuck being, I don't even want to fucking be alive. You know what I mean?" Throughout this portion of defendant's tirade, Rick did not respond to defendant's threats other than to reiterate defendant should enroll in a counseling program and to extol the virtues of such a program, e.g., that a residential program would provide defendant with food and an opportunity for Bible study.[3]

The phone conversation continued. Defendant told Rick he was standing on the roof of the house and could "light all the exits on fire and you motherfuckers won't even be able to get out." Defendant asked Rick, "Do you hear me on the roof, Ricky?" Rick responded, "Nope," and followed up with, "Hey Jamie, the program is going to be great for you." Defendant's retort was to tell Rick his "car is on fire already"; in fact, it wasn't.

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[3] We have listened to the audio recording of the call and Rick's tone of voice and manner of speaking remains calm (or at most exasperated or dejected) throughout.

Defendant asked to speak to his mother, and she told defendant he should go to school and go to counseling. After defendant continued to protest being kept out of the house and told Rick he "lit your house on fire," Rick responded, "Jamie, this is terrorism." Defendant said he didn't care and told Rick maybe he (defendant) could eat in jail; Rick responded that he thought "it would be better in a program." The conversation ended when Rick indicated he was going to get off the phone and would see defendant after his "little program"; defendant replied, "you have a nice day."

Sometime after the call between defendant and Rick ended (the exact interval of time is not apparent from the record), Rick called 911. Rick told the 911 operator his mother asked him to call because defendant had come to the house and damaged a door while trying to break in. Rick's mother, who also spoke to the 911 operator during the call, explained defendant broke the door frame but couldn't get the door all the way open. In response to the operator's questions, Rick said defendant was still trying to get in the house and believed to be on drugs. At the end of the call, the operator told Rick and his mother to call back if anything else happened, and the recording ends with Rick's mother saying, "I smell um, I smell."

Rick called 911 again approximately ten minutes later. He told the operator he thought defendant "just poured gasoline all over, [and] he's trying to burn the house down." The operator asked, "And you said he put gas all over the house?" Rick responded, "Y[eah], we have a tape of the thing. And he did it. And he burst the door down trying to get in." Rick then said, "It really smells like gas, or something in here. But we can't go out because he's out there. Yea[h], he's coming back and forth across

the street from the neighbors house, they're also . . . felons." The 911 operator told Rick that the police were being sent to his location and the fire department was also being notified.

B. Police Response and Investigation

Police officers quickly arrived at the house occupied by Rick and his mother. The house had two entrances, a front door and a side door. Rick told the officers that defendant broke the side door and tried to get in the house. One of the officers examined the house's side door and found the jamb had been cracked in a way consistent with someone hitting or kicking the door. In addition, Rick told one of the officers he had a tape recording of the call with defendant and Rick played a portion of the recording for the officer. According to the officer, Rick appeared "animated" and "very distraught and concerned."

During their inspection of the property, the officers saw no gasoline or incendiary devices, but they could smell gasoline when standing in the area of the two doorways. A piece of carpet in front of one of the doorways was not wet or stained, but it later tested positive for the presence of gasoline.

Rick gave the responding officers a description of defendant, and they found defendant at the home of one of his friends located a few houses down the street. The officers took defendant into custody, and during a search of his person, found a Bic lighter in his front pocket. Defendant did not smell like gasoline, however, and none of his clothing later tested positive for any flammable liquid.

The day after the police arrested defendant, Detective Molly Beall interviewed Rick. Rick told Detective Beall he had been on the phone with defendant, defendant made threats to

burn down the house and tried to break down the door, Rick then smelled gasoline, and that's what prompted him to call the police. Rick played the recorded phone calls with defendant for Detective Beall, and when she asked him to email her a copy of the recording, he did so "right then and there." According to Detective Beall, Rick said he had been afraid of defendant during the prior days' events and it was that fear that prompted him to call the police.

C. Rick's Testimony at the Preliminary Hearing and at Trial

Defendant represented himself at the preliminary hearing held to determine whether he would be held to answer on charges of making criminal threats (Pen. Code, § 422, subd. (a)) and attempted arson (Pen. Code, § 455). The prosecution called Rick as a witness,[4] and he testified that defendant's threats caused him to feel fear for his own safety and the safety of his family. Rick acknowledged he had previously argued with defendant without feeling threatened, but Rick explained that "what made [the most recent] situation different [was] the part where [defendant] said, 'I'm going to get way more violent. I'm gonna.' And then it actually happened." The trial court found there was sufficient cause to believe defendant committed both offenses and ordered him held to answer.

Pre-trial court proceedings ensued, and the People offered defendant a plea deal at a hearing on April 17, 2015. Under the terms of the proposed deal, the prosecution would recommend a

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[4] Rick's mother (also defendant's mother) did not testify at the preliminary hearing or at trial.

six-year prison sentence if defendant pled guilty or no contest to the criminal threats charge. As we later explain in greater detail, defendant rejected that deal but thereafter agreed to an even more favorable agreement, which the trial court initially approved, that would result in a probationary sentence (by striking both of his prior convictions for serious or violent felonies under the Three Strikes law). However, after defendant began to express some reticence about fulfilling the expected terms and conditions of probation, the trial court withdrew its approval of the plea agreement and set the case for trial instead.

During the pre-trial period of the case, defendant placed several phone calls from jail to his mother and Rick. Defendant repeatedly asked Rick to refuse to show up as a witness at trial and to tell the district attorney to drop the case. In one of the calls, defendant asked Rick to "recant this statement" and "help me try to dismiss this case" because the prosecution was "trying to give me life!" Incredulous, Rick told defendant "they" (the prosecution) were just trying to get defendant to go to treatment. Defendant told Rick he was wrong and explained the prosecution was not offering treatment but was "trying to give me 25-life." Defendant urged Rick to come to an upcoming hearing in court so Rick could "hear it for yourself," and Rick agreed he would.

When trial later commenced, the prosecution called Rick as a witness and elements of his testimony varied in significant respects from what he testified to at the preliminary hearing. Rick explained he and his mother refused to let defendant in the house on the day he was arrested because they were practicing "tough love" and wanted him to "hit bottom" so he would get treatment for his psychological and drug issues. Rick also testified defendant's behavior on the day in question was not

unprecedented; defendant had acted the same way, and made threats similar to those he made on February 26, "countless" times, especially when he had not eaten or taken his medication. Rick said he "[did]n't pay attention" to the threats, which were a "normal occurrence" that defendant "constantly" made, "like a broken record." Rick testified defendant had never hurt him or followed through on any of his threats.

When asked directly whether defendant's threats during the recorded phone calls provoked any fear, Rick repeatedly testified he had never been afraid of defendant, not during the calls on February 26 nor at any other time. Rick acknowledged he testified to the contrary during the preliminary hearing, but he said his prior testimony was untruthful. Rick explained he falsely claimed to have been in fear because he believed that was what he needed to say to get the prosecution to compel defendant to participate in treatment for his drug and mental health problems.[5]

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[5] Rick also said he falsely claimed, during the preliminary hearing, to have been in fear as a result of defendant's threats because he wanted to "win" against defendant when they "got into it a little bit" during cross-examination (defendant represented himself at the hearing). Rick additionally asserted that any fear he did feel was not attributable to defendant's threats but to a man named Louie Jimenez. Jimenez was defendant's best friend and Rick testified he had a confrontation with Jimenez a couple days before the recorded phone calls and believed Jimenez was going to try to have him (Rick) killed.

D. Closing Arguments and the Jury's Verdicts

The defense argument to the jury was two-fold: (1) defendant's mental health issues and his low blood sugar left him in an impaired cognitive state and unable to form the specific intent required to find him guilty of the charged offenses, and (2) as to the criminal threats offense in particular, there was no evidence Rick was in "sustained fear" as a result of defendant's threats, which is an element the prosecution needed to prove to obtain a conviction. Naturally, the prosecution contested both points. As to the disputed element of sustained fear necessary for a criminal threats conviction, the prosecution argued Rick "took the stand and he lied. . . . He lied about everything." The prosecution further argued Rick's 911 calls and his refusal to go outside and talk to defendant when defendant tried to break in the house were circumstantial evidence Rick "was afraid of his brother" despite Rick's testimony to the contrary.

During deliberations, the jury asked to again hear the calls between Rick and defendant, as well as Rick's 911 calls. The jury also asked whether "the call between Rick[ ] and [defendant] occur[red] before or after the second 911 call." The court replayed the calls in open court and instructed the jury, with respect to its question about the timing of the calls, that it had "heard all the evidence in this case."

The jury thereafter returned verdicts of guilty on the criminal threat charge and not guilty on the attempted arson charge. The jurors were also asked to determine the truth of allegations that defendant suffered three prior serious or violent felony convictions in 1992, one for voluntary manslaughter and two for assault with a deadly weapon (both of which were

sustained in the same criminal proceeding). The jury found the allegations true.

The trial court sentenced defendant to a prison term of 35 years to life, composed as follows: 25 years to life for the criminal threats conviction, pursuant to the Three Strikes law (Penal Code sections 667, subdivisions (b)-(i) and 1170.12);[6] plus two consecutive five-year terms under section 667, subdivision (a)(1) for the qualifying prior serious felony convictions.

II. DISCUSSION

Defendant contends the trial judge's decision to set aside the plea agreement it initially accepted was an abuse of discretion. Defendant also argues the trial court erred in admitting into evidence Rick's recordings of the phone calls with defendant notwithstanding section 632, which renders inadmissible any evidence obtained as a result of recording a confidential communication without the consent of all parties to the communication. (§ 632, subds. (a), (d).) Defendant further contends there is no substantial evidence supporting his criminal threats conviction—specifically as to elements of that offense that require the threats convey a gravity of purpose and cause the listener to be in sustained fear. (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228 (*Toledo*); CALCRIM No. 1300.) For reasons we will explain, each of these arguments is unpersuasive.

We reach the opposite conclusion, however, with respect to defendant's final assignment of error, namely, that the trial court should have sua sponte instructed the jury on the lesser included

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[6] Undesignated statutory references that follow are to the Penal Code.

offense of attempted criminal threats. Unlike a challenge to the sufficiency of the evidence to support a jury's guilty verdict, a challenge to the absence of a lesser included offense instruction requires us to examine the evidence in the light most favorable to the defendant and decide whether it could persuade a reasonable jury that the defendant committed the lesser but not the greater offense. (*People v. Simon* (2016) 1 Cal.5th 98, 132 (*Simon*).) Applying that standard of review, we are persuaded that the trial court should have instructed the jury on the lesser offense of attempted criminal threats and that there is a reasonable possibility defendant would have been convicted of only that offense had the instruction been given. Under the circumstances, we give the People the option to retry the case or to accept a reduction of the conviction to attempted criminal threats.

A. The Court Did Not Abuse its Discretion in Setting Aside the Initial Plea Deal

1. Procedural history

On the day trial was originally set to begin in May 2015, the trial court asked defendant, who was still representing himself at that moment, whether he had any "second thoughts or considerations about taking a deal." The People had earlier offered defendant a plea deal requiring him to serve six years in prison. Defendant told the court he didn't "feel [he] should have to go to prison" and was "not taking any deal that has prison time." But defendant also told the court he did not "want to be pro per anymore" because "[t]his is above my head." The trial court ordered standby counsel to take over defendant's representation, and the court took a recess to allow defendant

and his appointed attorney to discuss whether he should accept the prosecution's plea offer.

When the court session resumed, counsel for defendant informed the court there had been "some discussion" between him and the prosecutor "about maybe trying to come up with some alternative" disposition of the case. At defense counsel's request, the trial court transferred the matter to Judge Lloyd Nash for settlement discussions before trial was to begin.

Those further discussions resulted in an "open" plea agreement—accepted by Judge Nash over the People's objection—to resolve the case. Pursuant to that agreement, defendant pled no contest to both of the charges against him and admitted he had previously sustained two serious or violent felony convictions. Judge Nash agreed he would strike both prior conviction allegations at the time of sentencing and sentence defendant to four years of formal felony probation, with execution of an 11-year and four-month sentence suspended. Judge Nash explained that a condition of defendant's probation would be his participation in a one-year, live-in "dual diagnosis" program.[7] Judge Nash informed defendant he would have "quite a bit of time hanging over [his] head," and it was therefore important that defendant not violate his probation.

Roughly one month after entering his no contest pleas, but before sentencing, defendant asked Judge Nash to modify the agreed upon deal in certain respects. Defendant's attorney told

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[7] Defendant asked the judge to allow him to use medical marijuana while participating in the program. The court responded: "I'm telling you that while—if you're taking bipolar medication, unless the program says that medical marijuana is part of your regimen, I can't allow it, just so you know."

the judge that defendant wanted (1) his four-year probation period to instead end after roughly one year (on April 21, 2016, the date his existing parole term on a previous case would end) and (2) to have the ability to cut short his agreed-upon participation in the live-in dual diagnosis program if he received a clean, drug-free report in three or four months. Defendant told Judge Nash he wanted these changes so he could register for classes at California State University Los Angeles and move into a dorm. The following exchange between Judge Nash and defendant immediately ensued: "[The Court:] First of all, I'm not negotiating anything. I gave you a deal that I was not totally comfortable with to begin with, and so you're just making it easy for me to set aside the plea and send you back across the hall and have a jury trial . . . . [¶] You have two choices: either do what we agreed upon or you take four years state prison, or I'll set aside your plea—that's three choices. [¶] But I'm not negotiating anything. It's a program, a year program that you agreed upon. When you were first here, you wanted a suspended sentence and probation. [¶] The Defendant: Actually, your honor, I asked you [for] something that would not send me to prison. [¶] The Court: And I went along with that, over the People's objection. And we—I was going to strike your strikes. I was making you a great deal. Obviously, for you, it's just not good enough, which is fine. [¶] The Defendant: No. Because the dude from the program [said I] can't go to school, that was my whole purpose was to go to school."

After this exchange, Judge Nash ultimately agreed to have another "recovery network" interview defendant for participation in a dual diagnosis program that might allow him to attend school while participating in the program. Judge Nash explained

he was "trying to do the best for the benefit of the community and you [defendant], and I have to walk a fine line . . . ."

Later during the same hearing, questions arose concerning defendant's drug use. The prosecutor remarked that defendant had "a history of drugs," and defendant protested he had "[n]o arrests for drugs, other than a 14-year-ago misdemeanor, possession of marijuana in a car." Judge Nash responded by reading aloud from defendant's probation report, which recounted statements by Rick that defendant needed drug treatment because he was using cocaine and methamphetamine. Defendant protested again, stating, "They are the one[s] in my mother's house manipulating that entire situation. I'm just trying to leave, which is why I was trying to get the probation to end with the parole so that I can get back and never be on the lam and never come back."

A month later, in July 2015, the parties returned to court for another hearing. Defendant still had yet to be sentenced, and he had obtained a letter showing he had been conditionally accepted into the Los Angeles Transition Center residential treatment program. After reading the letter, Judge Nash told defendant, "[the letter] mentioned your addiction severity, and you were telling me you weren't addicted to anything." Defendant replied, "I didn't say that. I had no clue about addiction severity or anything like that."

Judge Nash said he had "given this case a lot of thought since [the] last meeting and [defendant's] comments regarding that he does not have an addiction. [¶] I was under the impression—or had the impression that he did have an addiction, and he claimed that he didn't, and he still claims he doesn't know anything about that." Defendant responded by telling the court

he "wasn't under the influence of any drugs when this happened." Defense counsel then interjected to say the court's offer was "beyond fair" and he understood, after talking with defendant, that defendant "believe[d] that this [was] the best deal for him at this point." Defendant agreed.

Judge Nash decided, however, to set aside defendant's plea on his own motion and order defendant to stand trial. Judge Nash noted for the record that it could not "think of another time where [it had] been this uncomfortable about an open plea . . . and a disposition that [the court] agreed upon . . . ." The judge explained he was setting aside the plea deal "[b]ased on the conversations that I've had with [defendant], based on the information that I have that he doesn't have a drug addiction . . . ."

Defendant thereafter filed a motion for reconsideration of the decision to set aside his plea. He argued that in contrast to his prior "non-committal attitude" toward the need for drug treatment, he had since acknowledged his need to enter a program and that acknowledgement was a "new fact" meriting reconsideration.

Judge Nash denied the motion for reconsideration. He disagreed with defendant's characterization of his prior attitude as "noncommittal," finding instead that defendant had been "very adamant" he did not need treatment, which is "really what persuaded" the judge to set aside the plea. Judge Nash further observed that defendant "made it very clear he did not need drug treatment, and now, of course—do I believe him now or do I believe him at that time? And now I don't even know, and that is a problem for me."

2. Analysis

Section 1192.5 gives a trial judge discretion to withdraw its approval of a guilty or no contest plea that specifies the punishment to be imposed. The statute, in relevant part, provides that "[i]f the court approves of [a] plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so." (§ 1192.5.)

It has long been established that "'implicit in the language of section 1192.5 is the premise that the court, upon sentencing, has broad discretion to withdraw its prior approval of a negotiated plea.' (*People v. Johnson* (1974) 10 Cal.3d 868, 873 [ ].) Such withdrawal is permitted, for example, in those instances where the court becomes more fully informed about the case [citation], or where, after further consideration, the court concludes that the bargain is not in the best interests of society. [Citation.]" (*People v. Superior Court (Gifford)* (1997) 53 Cal.App.4th 1333, 1338; see also *People v. Stringham* (1988) 206 Cal.App.3d 184, 194 ["The potential for reflection and a change of the judicial position is obvious and statutorily sanctioned"].) With these legal standards in mind, Judge Nash did not abuse his discretion in setting aside defendant's plea.

The record discloses two related reasons for Judge Nash's decision, both of which serve as a proper basis for the discretionary determination he made. (Compare *People v. Loya* (2016) 1 Cal.App.5th 932, 936 [abuse of discretion for court to reject plea bargain "in the absence of any stated justification"].)

First, it is apparent Judge Nash, even at the time he approved defendant's plea, harbored reservations that the deal for a probationary sentence was extraordinarily lenient in light of the 25-years-to-life sentence the Three Strikes law would call for if defendant were convicted at trial. Judge Nash recognized he had to consider whether the open plea agreement with defendant would benefit the community, and upon further reflection, came to believe the deal was one of the "rare occasions" on which he was uncomfortable with the proposed disposition he had entered into. Second, and relatedly, Judge Nash was obviously concerned defendant had begun to exhibit reticence about living up to his end of the extraordinarily favorable bargain. If Judge Nash initially believed a non-custodial sentence coupled with intensive drug and mental health treatment would suffice to address the problems that might have been responsible for defendant's criminal behavior, the judge reasonably understood defendant's statements in court as exhibiting, at a minimum, a failure to acknowledge the full depth of those problems and a worrisome lack of commitment to work on overcoming them.[8] Under these

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[8] Defendant argues that the "record simply does not show that [he] denied that he had an addiction to drugs, that he was 'adamant' that he did not need a drug program, or even that he *suggested* that he did not need a drug program." That is not how we see the record. When the prosecutor said in open court that defendant had a "history of drugs," defendant responded he had only one prior arrest for a drug offense. When Judge Nash read Rick's statements about defendant's drug use from the probation report, defendant responded by accusing Rick of "manipulating that entire situation" and repeated his desire to cut short the probation term to which he previously agreed. Even if we accept the proposition that defendant made no false statements about

circumstances, Judge Nash could reasonably exercise the authority conferred by section 1192.5 in favor of setting aside his prior approval of defendant's plea. (See *People v. Simmons* (2015) 233 Cal.App.4th 1458, 1467-1468 [court did not abuse its "broad discretion" in withdrawing approval of a plea agreement when the defendants expressed doubts about their pleas after entering them and the court was "'uncomfortable'" that "'any of the defendants have accepted this in good faith'"].)

B. The Trial Court Did not Err in Admitting the Recorded Phone Calls

1. Legal background and procedural history

Section 632, subdivision (a) makes it unlawful to intentionally record a confidential communication without the consent of all participants. A "confidential communication" is "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication . . . in which the parties . . . may reasonably expect that the communication may be overheard or recorded." (§ 632, subd. (c).) Such recordings generally may not be used as evidence in a judicial proceeding. (§ 632, subd (d).)

Prior to trial, defendant moved to exclude the phone calls Rick recorded without defendant's knowledge. The prosecution opposed the motion, providing an offer of proof that the conversations were not confidential because defendant's mother

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his prior drug use, these statements and others by defendant were reasonably understood as minimizing the extent of his drug abuse.

participated in the phone calls and because defendant made the calls on a cell phone in a public area where anyone could hear his end of the conversation. The prosecutor further argued the calls were independently admissible under section 633.5, which states: "Nothing in Section [632 and other specified statues] prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of . . . any felony involving violence against the person . . . . Sections [632 and others] do not render any evidence so obtained inadmissible in a prosecution for . . . any felony involving violence against the person . . . ."[9]

The trial court denied the in limine motion to exclude the recorded phone calls between Rick and defendant. The court found the conversations were not confidential "based on the offer of proof the defendant was outside yelling on the phone to the alleged victims" and Rick was speaking to defendant "on speaker phone where [Rosa] was listening." The court further found that even if the calls were considered confidential communications, the section 633.5 exception to the rule on inadmissibility "falls square within the facts of this case."

Later at trial, during a sidebar conference right before Rick's testimony commenced, defense counsel renewed his motion to exclude presentation of the phone call recordings. The prosecutor again argued the recordings were admissible under section 633.5. The prosecutor explained that even if Rick wanted to "recant" when testifying, his conduct—mentioning the

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[9] Section 633.5 was recently amended, but the changes have no bearing on the result in this case.

recordings' existence during his 911 call and playing the recordings for the responding officers and Detective Beall—demonstrated Rick recorded the calls to turn over to the police for defendant's prosecution. The court ruled the recordings "would fall within the purview of 633.5" "whether this witness goes backwards or not" and allowed the recordings to be introduced in evidence.[10]

2. Standard of review and analysis

A trial court's evidentiary rulings in limine are generally reviewed under an abuse of discretion standard. (*People v. Williams* (2006) 40 Cal.4th 287, 317; *People v. Sarpas* (2014) 225 Cal.App.4th 1539, 1555; *People v. Nakai* (2010) 183 Cal.App.4th 499, 516 (*Nakai*).) Appellate courts reviewing evidentiary rulings made pursuant to section 632, however, have applied the standard of review applicable to motions to suppress where the trial court's analysis conformed to a motion to suppress procedure, as opposed to an exercise of discretion. (*Nakai, supra*, at pp. 516-517 [trial court did not exercise discretion but rather "applied section 632 to the facts of the case and concluded, as a

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[10] During his testimony, Rick did assert he recorded the phone calls for a purpose other than obtaining evidence for a prosecution. Rick testified he recorded defendant only so he could play the call back for him, "so he can see if he doesn't take his medication and go to treatment, he's going to—he could die." Rick said he had recorded a conversation with defendant a week earlier when defendant was saying "some crazy stuff," including threats to kill Rick and other family members. When Rick then played the earlier recording back for defendant, defendant started crying and "didn't believe he said that stuff to me."

matter of law, that defendant did not have a reasonable expectation of privacy" in the communication at issue]; see also *People v. Nazary* (2010) 191 Cal.App.4th 727, 746-747, disapproved on another ground by *People v. Vidana* (2016) 1 Cal.5th 632 (*Nazary*).) We follow the *Nazary* and *Nakai* approach here, which means we review the trial court's factual findings for substantial evidence and its application of the law to the facts so found de novo. (*Nakai*, *supra*, at p. 516.)

We agree with the trial court that the recorded phone calls were admissible under section 633.5.[11] There is substantial evidence supporting the court's factual finding that Rick mentioned the existence of the recordings (without prompting) when he spoke to the 911 operator. There is also substantial evidence that supports the court's finding that Rick immediately provided the recordings to the police who investigated in response to the 911 call (or played the recordings so the police could listen to them). In our independent judgment, these facts demonstrate Rick recorded the calls "for the purpose of obtaining evidence reasonably believed to relate to the commission by [defendant] of . . . any felony involving violence against the person . . . or a violation of Section 653m." (§ 633.5; see also § 653m, subd. (a) ["Every person who, with intent to annoy, telephones . . . another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his

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[11] Because we hold the trial court correctly admitted the recorded calls pursuant to section 633.5, we need not address whether the calls were also admissible because they were not "confidential communications."

or her family, is guilty of a misdemeanor"]; *People v. Suite* (1980) 101 Cal.App.3d 680, 688-689 [bomb threat would be admissible under section 633.5 as involving the potential for violence against the person].)

C. Sufficient Evidence Supports Defendant's Conviction

"In order to prove a violation of section 422, the 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. (See generally *People v. Bolin* (1998) 18 Cal.4th 297, 337-340 & fn. 13 [ ].)" (*Toledo*, *supra*, 26 Cal.4th at pp. 227-228.)

Defendant contends there was insufficient evidence for the jury to convict him of making criminal threats because the only alleged victim, Rick, was never in sustained fear and defendant's threats did not convey to Rick a gravity of purpose. Under the applicable standard of review—which is key for reasons we will

discuss in the next section of our opinion—the contention is meritless.

When assessing the sufficiency of the evidence to support a conviction, "'"we review the entire record in the light most favorable to the judgment to determine whether it contains 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." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.]'" (*People v. Williams* (2015) 61 Cal.4th 1244, 1281.) If the evidence reasonably justifies the jury's findings, reversal is not appropriate simply because the evidence might reasonably be found to support a contrary finding as well. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215; *People v. Riley* (2015) 240 Cal.App.4th 1152, 1165-1166 ["If our review of the record shows that there is substantial evidence to support the judgment, we must affirm, even if there is also substantial evidence to support a contrary conclusion and the jury might have reached a different result if it had believed other evidence"].)

The evidence at trial entitled the jury to find defendant's threats communicated to Rick a gravity of purpose and caused him to be in sustained fear notwithstanding Rick's testimony to the contrary during trial. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1140 [fear is "sustained" when it is "more than fleeting or transitory"]; *People v. Bolin*, *supra*, 18 Cal.4th at pp. 339-340 [threat must convey gravity of purpose and immediate prospect of execution to the victim].) As to the gravity of purpose element,

the recordings themselves demonstrated defendant's threats were clear and specific so as to convey an immediate prospect of their execution. The element that requires proof of sustained fear was more hotly disputed, but the jury was entitled to rely on Rick's preliminary hearing testimony, which was corroborated to some degree by the 911 calls and the testimony of one of the responding police officers.

When asked by the prosecutor at the preliminary hearing, Rick agreed defendant's threats made Rick fear for his and his family's safety. Rick acknowledged he had argued with defendant in the past without feeling threatened, but Rick testified that defendant's threats during the recorded calls on February 26 were different because defendant "actually took steps," meaning Rick saw the door broken and smelled gasoline. The jury could credit this prior testimony rather than Rick's testimony at trial. (*People v. Wilson* (2008) 43 Cal.4th 1, 20-21 [where there is evidence witness made prior inconsistent statement, jury may disbelieve witness's trial testimony and credit the prior statement]; Evid. Code, § 1235; CALCRIM No. 318.) In addition, Rick told the 911 operator that defendant was "trying to burn the house down" and Rick and his family "[could not] go out because [defendant was] out there . . . coming back and forth across the street" from a neighbor's house where other felons lived. This too was some evidence of sustained fear, as was the testimony of one of the officers who responded to the 911 call. He stated Rick appeared, in the officer's opinion, to be "very distraught and concerned." In light of this evidence and the governing standard of review, we reject defendant's contention the evidence was insufficient to prove defendant's threats

conveyed a gravity of purpose and caused Rick to experience more than fleeting fear.

D. The Absence of a Lesser Included Offense Instruction on Attempted Criminal Threats Requires Reversal

Defendant next argues that it was error for the trial court to fail to instruct the jury on the lesser included offense of *attempted* criminal threats. On this issue, the standard of review is effectively reversed—favoring the defense rather than the prosecution—and that makes all the difference.

"A trial court has a sua sponte duty to instruct the jury on a lesser included uncharged offense if there is substantial evidence that would absolve the defendant from guilt of the greater, but not the lesser, offense. [Citation.] Substantial evidence is evidence from which a jury could conclude beyond a reasonable doubt that the lesser offense was committed." (*Simon*, *supra*, 1 Cal.5th at p. 132; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [lesser included offense instruction must be given whenever evidence the defendant is guilty of only the lesser offense is "'substantial enough to merit consideration' by the jury," which means evidence from which a reasonable jury could conclude the lesser but not the greater offense was committed].) Our review is again de novo, and we view the evidence in the light most favorable to the *defendant*—precisely the opposite manner in which we consider the evidence when evaluating whether a conviction is supported by substantial evidence. (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30 ["We review the trial court's failure to instruct on a lesser included offense de novo . . . [,] considering the evidence in the light most favorable to the defendant"]; *People v. Millbrook* (2014) 222 Cal.App.4th 1122,

1137 [same]; *People v. Turk* (2008) 164 Cal.App.4th 1361, 1368, fn. 5 [evidence construed in light most favorable to the defendant]; see also *Simon*, *supra*, at p. 133 [de novo review].)

"[A] defendant properly may be found guilty of attempted criminal threat whenever, acting with the specific intent to commit the offense of criminal threat, the defendant performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action. . . . [A] defendant acts with the specific intent to commit the offense of criminal threat only if he or she specifically intends to threaten to commit a crime resulting in death or great bodily injury with the further intent that the threat be taken as a threat, under circumstances sufficient to convey to the person threatened a gravity of purpose and an immediate prospect of execution so as to reasonably cause the person to be in sustained fear for his or her own safety or for his or her family's safety." (*Toledo*, *supra*, 26 Cal.4th at pp. 230-231.) A defendant commits an attempted criminal threat, as opposed to a completed criminal threat, where he or she "acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear . . . ." (*Id.* at p. 231; accord, *People v. Chandler* (2014) 60 Cal.4th 508, 515-516 [quoting this passage from *Toledo*].)

Here, a reasonable jury could find defendant committed only the offense of attempted criminal threats. While there was substantial evidence Rick suffered sustained fear as a result of defendant's threats, there was also substantial evidence he did not—most prominently, Rick's own trial testimony. Rick

explained at trial that he was defendant's "big brother" and repeatedly emphasized in response to questions from both sides that he was "never, ever afraid of my brother," including on the day of the recorded calls. The prosecutor's position was that Rick "lied about everything," but Rick had an explanation for his changed testimony the jury could have found plausible. Rick explained he previously, and falsely, claimed to have been in fear as a result of defendant's statements partly because he wanted to force his brother to get help and believed he had to admit he was in fear to ensure the prosecution would be able to compel defendant to take a deal involving a treatment program. Rick testified that once he came to believe any such deal was not going to happen, he abandoned his prior testimony and admitted the sort of threats defendant made were common in their often "confrontational" relationship and did not cause him to be in any sustained fear.[12]

Considering, as we must, the evidence in the light most favorable to defendant, the evidence that Rick was not in sustained fear was sufficient to warrant jury consideration of the lesser included offense of attempted criminal threats. Indeed, the

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[12] Defendant's jail calls with Rick, recorded prior to the time of trial, provide some corroboration for Rick's testimony on this point. In one of the calls, defendant told Rick the prosecution was "trying to give [him] life." Rick disagreed, telling defendant the prosecution was trying to get defendant to "do a program" and get treatment. Defendant told Rick he was wrong, explaining the prosecution was not offering treatment but had filed papers to seek a 25 to life prison sentence, which Rick would understand if he came to court and heard it for himself. Rick agreed he would come to court, his testimony about whether he was in fear appears to have changed sometime after that.

evidence here is comparable with the facts at issue in *Toledo*, *supra*, 26 Cal.4th 221. In that case, our Supreme Court observed a jury could have found "that defendant's threat to [his wife]—'You know, death is going to become you tonight. I am going to kill you.' —was made with the requisite intent and was the type of threat that satisfied the provisions of section 422 and reasonably could have caused [the wife] to be in sustained fear for her own safety." (*Id*. at p. 235; see also *id.* at p. 225 [in addition to the verbal threats, the defendant threw a telephone into a closet door, punched a hole through a bedroom door, and plunged a pair of scissors toward his wife's neck, stopping just inches from her skin].) But the *Toledo* court also observed it was not improper for the jury to find the defendant guilty of only attempted criminal threats, not the completed offense, because "the jury might have entertained a reasonable doubt—in view of [the wife's] testimony at trial that she was not frightened by defendant's statements [and conduct consistent with that trial testimony]—as to whether the threat *actually* caused [the wife] to be in such fear." (*Ibid*.)

Although we have determined substantial evidence required an instruction on attempted criminal threats, that is not enough to warrant reversal. As our Supreme Court has explained, "an erroneous failure to instruct the jury on a lesser included offense is subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 837 [ ], and . . . evidence sufficient to warrant an instruction on a lesser included offense does not necessarily amount to evidence sufficient to create a reasonable probability of a different outcome had the instruction been given." (*People v. Banks* (2014) 59 Cal.4th 1113, 1161, disapproved on another point in *People v. Scott* (2015) 61 Cal.4th

363, 391, fn. 3.) When assessing prejudice under the *People v. Watson* standard, we "focus[ ] not on what a reasonable jury *could* do, but what such a jury is *likely* to have done" and we "consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Breverman*, *supra*, 19 Cal.4th at p. 177.) "A reasonable probability in this context does not mean more likely than not; it means a reasonable chance and not merely a theoretical or abstract possibility." (*People v. Woods* (2015) 241 Cal.App.4th 461, 474; see also, e.g., *People v. Sandoval* (2015) 62 Cal.4th 394, 426.)

For much the same reasons we have already discussed, defendant has established there is a reasonable chance the jury would have convicted him only of attempted criminal threats if instructed on that offense. The evidence that would support a finding that Rick was not in sustained fear is strong enough to bridge the incremental analytical gap between what a jury could do and what a jury is reasonably likely to have done if given an appropriate instruction. (See *People v. Ngo* (2014) 225 Cal.App.4th 126, 158-159 [finding prejudice in the failure to give lesser included attempt instruction where the victim's contradictory statements provided the only evidence regarding whether crime was completed or attempted].) In addition, the jury's not guilty verdict on the attempted arson charge is some indication it may have viewed the case as close. (See, e.g., *People v. Perry* (1985) 166 Cal.App.3d 924, 933 [relying on a jury's acquittal on some counts, in addition to lengthy deliberations and the prosecution's reliance on circumstantial evidence, to conclude

the case against the defendants was "reasonably close"].) And perhaps it goes without saying, but the fact that the jury found defendant guilty of the greater charge is of no moment. (*People v. Brown* (2016) 245 Cal.App.4th 140, 156 [in assessing prejudice for failure to instruct on a lesser included offense, "'it does not matter that the jury chose to convict the defendant of the greater offense over acquittal or that the defendant was convicted of the greater offense on sufficient evidence'" because "[t]o hold otherwise would undermine the very purpose of the sua sponte rule"]; see also *People v. Majors* (1998) 18 Cal.4th 385, 410 ["primary reason[ ] for requiring instructions on lesser included offenses is '"to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between [guilt] and innocence"'"].)

To sum up, we have held under the governing standard of review that it was error not to give an instruction on the lesser included offense of attempted criminal threats and that the error was prejudicial. But we have also held substantial evidence supported the jury's finding of guilt on the criminal threats charge and we have rejected defendant's other assertions of error. The upshot of these holdings is that there was necessarily a proper evidentiary basis on which the jury could have convicted defendant of the lesser included attempted criminal threats offense. Thus, we have here the scenario described in *People v. Kelly* (1992) 1 Cal.4th 495: "When a greater offense must be reversed, but a lesser included offense could be affirmed, we give the prosecutor the option of retrying the greater offense, or accepting a reduction to the lesser offense." (*Id.* at p. 528.) Those will be our remand directions.

DISPOSITION

The judgment is reversed, and the matter is remanded for further proceedings consistent with this opinion. If, after issuance of the remittitur, the People do not elect to retry defendant within the time limit set forth in section 1382, subdivision (a)(2), the trial court shall proceed as though the remittitur constitutes a modification of the judgment to reflect a conviction of only the lesser included offense of attempted criminal threats in violation of sections 664 and 422. If the People opt against retrying the case, it will be necessary to resentence defendant regardless of whether the sentence to be imposed is likely to be materially different.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KIN, J.*

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