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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WARREN PHILLIPS, Defendant and Appellant.	B265394 (Los Angeles County Super. Ct. No. MA062152)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard. Affirmed.

Mary Jo Strnad, 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, Assistant Attorney General, Shawn McGahey Webb and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Warren Phillips was convicted by jury of three counts of second degree robbery of a marijuana dispensary. (Pen. Code, § 211.)[1] His defense was that he committed the robbery under a credible threat of death to himself and his family. He contends on appeal that the trial court erred by failing to read back testimony requested by the jury and by incorrectly instructing the jury on the defense of duress. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Prosecution Evidence*

Hani Haddad ran the Waikiki medical marijuana dispensary and lived about a block away from it. Haddad was able to view a live feed of a surveillance video of the dispensary at his home. The dispensary had a security system which required customers to be buzzed in and out through two locked doors.

On February 16, 2014, Norman Walker and Amanda Ramirez were working at the dispensary. Around 5:40 p.m., Douglas McCoy was inside making a purchase.

Ramirez was helping a regular customer who seemed to be lingering, spending about ten to twenty minutes inside rather than his usual three minutes. The customer was a heavy-set African-American man wearing a black baseball cap. McCoy noticed that the man seemed nervous, "like he was up to no good." Haddad, viewing the scene on the

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[1] Further unspecified statutory references are to the Penal Code.

video from his home, thought the customer was stalling, so he texted Ramirez to ask why the man was taking so long.

When the customer left, he held the security door open, which allowed appellant and his 16-year-old niece Candice to enter the dispensary without being buzzed in. Appellant and Candice entered the store holding guns and yelled at everyone to get on the floor.[2] They took the dispensary's cash and glass jars containing medical marijuana and placed them in a black garbage bag, and they took cash from Walker and McCoy. Appellant took Ramirez's cell phone but put it aside after realizing it was not a wallet. Candice took the phone and put it in her pocket.

Around 5:40 p.m. on February 16, 2014, Haddad was at home monitoring the surveillance video when he heard a scream coming from the video. In the video, he saw appellant and another person holding guns and telling everyone in the dispensary to get on the floor. Haddad ran toward the dispensary and noticed a sheriff's vehicle pulling into a gas station across the street from his store. Roger Tompkins, a security officer for the Los Angeles County Sheriff's Department Parks Bureau, had stopped at the gas station to buy something to drink. Haddad told Tompkins that someone was robbing the store and then ran to the dispensary. Tompkins used his radio to request units to respond.

Haddad saw an orange vehicle in the parking lot of the dispensary with someone sitting inside. Haddad recognized him as the regular

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[2] The guns were plastic toy guns but appeared real.

customer who had held the door open for appellant and Candice. He pointed at the customer and said that he knew he was involved in the robbery.

When Haddad arrived at the dispensary, appellant and Candice were locked inside trying to get out. Appellant broke the lock on the door in order to exit. Haddad told appellant, "You're not going anywhere. The cops are here." Appellant dropped the trash bag containing the jars of medical marijuana and ran away with Candice. They ran down the street toward a nearby church. Haddad started chasing them, but he stopped when appellant pointed a gun at him.

Walker exited the store and saw glass, medical marijuana, and money scattered outside the door. He also saw appellant and Candice running down the street, and started to chase them.

Officer Tompkins, a sheriff's helicopter, and sheriff's deputies pursued appellant and Candice. Officer Tompkins ordered them at gunpoint to drop their weapons. Candice complied, and Officer Tompkins handcuffed her. Appellant turned and threw the gun over a fence before lying on the ground. He started crying and said the guns were not real. Sheriff's deputies took them into custody and recovered two plastic guns, money, and duct tape.

When McCoy left the dispensary, he saw the customer who had been wearing a black baseball cap get out of his car, an orange SUV, and pick up the marijuana that was on the ground.

Walker knew there was an African-American man named Vernon who was a regular customer of the dispensary. Vernon usually came to

the store about once a week, but after the robbery Haddad refused to serve him because he suspected Vernon was involved.

II. *Defense Evidence*

Appellant testified that he had been imprisoned in 2003 and 2011 for drug-related offenses he committed while selling drugs for someone he knew only as Vernon. Vernon was angry with appellant because appellant never paid him for drugs confiscated by the police when appellant was arrested.

On February 16, 2014, Vernon came to appellant's home and threatened to kill appellant, his two children, and the mother of his child "right now" if appellant did not carry out Vernon's plan to rob the dispensary. Vernon had a gun, which he showed to appellant. Vernon was accompanied by a stocky African-American man appellant had seen with Vernon before. Candice walked into the kitchen while Vernon was talking to appellant, and appellant told Vernon she did not need to be involved, but Vernon said she had "involved herself."

Appellant and Candice went with Vernon, who drove a white Nissan Altima, and the other man, who drove an orange truck, to a church. Vernon told appellant and Candice to take everything from the dispensary and bring it to him, and he gave each of them a pistol, which appellant realized was not real when he took it. Vernon instructed them to run back to the church after they finished, where he would be waiting in the Altima. Vernon then spoke to the man in the orange

truck, who drove away. Appellant had never been to the dispensary before.

Appellant and Candice left for the dispensary when Vernon instructed them to go. Appellant was surprised to see the man from the orange truck holding the door open for them. Appellant was afraid of the man because he knew the man had a gun and was the "enforcer," there to be sure appellant and Candice did what they had been told.

When appellant and Candice ran back to the church after the robbery, Vernon was not there. Appellant started crying when he was caught because he was afraid of what might happen to his family. Appellant told Officer Tompkins that Vernon had threatened to kill him and his family.

After his arrest, appellant told Deputy Richard Sanchez to send police officers to his house because he was afraid his family was in danger. Appellant told Deputy Sanchez Vernon's name, the type of car he drove and where he lived, and told him he had sold drugs for Vernon. Appellant did not know Vernon's last name so he could not give it to Deputy Sanchez, but he told Deputy Sanchez Vernon's gang affiliation and moniker.

III. *Rebuttal Evidence*

Officer Tompkins testified that appellant did not tell him Vernon had threatened him but instead stated, "Vernon made me do it."

Deputy Sanchez testified that appellant did not ask him to send police officers to his house or say that his family was in immediate

danger. Appellant told Deputy Sanchez Vernon's first name and said that Vernon lived in Quartz Hill. Appellant also told Deputy Sanchez he owed Vernon $1,000 from two years prior, but he thought Vernon had forgotten about it. He told Deputy Sanchez that Vernon had come to his house with a gun and threatened to hurt his family if he did not commit the robbery. Appellant further told Deputy Sanchez that Vernon had planned the entire thing and told appellant exactly what to do, gave him the guns, and told him to take everything and return to the car, but Vernon was gone when he returned. Appellant told Deputy Sanchez that Vernon was a Rolling 20's Blood from Los Angeles.

IV. *Procedural Background*

Appellant was charged with three counts of second degree robbery, one each for McCoy, Walker, and Ramirez. The information alleged that appellant had suffered eight prior strikes (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and serious felony convictions (§ 667, subd. (a)(1)) and served two prior prison terms (§ 667.5, subd. (b)).

The jury convicted appellant of all three counts. The trial court denied appellant's motion to dismiss the prior strike allegations, which was based on the argument that all eight strikes occurred on one day, when appellant was 18 years old. The court sentenced appellant to a term of 25 years to life on count 1, plus five years for the section 667, subdivision (a) allegation and one year for the prior prison term (§ 667.5, subd. (b)). The court imposed an identical consecutive term on

count 2 and an identical concurrent term on count 3, for a total term of 62 years to life. Appellant filed a timely notice of appeal.

DISCUSSION

I. *Readback of Testimony under Section 1138*

Appellant contends the trial court erred in failing to ensure the testimony requested by the jury was provided to them.

A. *Relevant Proceedings*

During deliberations, the jury asked, "Can we get a read back of Mr. Haddad's testimony of Vernon and whether Vernon and the customer with the hat are two different people?" The jury also asked for readbacks of the testimony of appellant and Walker. The following discussion ensued between the trial court, the prosecutor (Mr. Rochmes) and defense counsel (Mr. Cho).

"THE COURT: My Court Reporter searched through Mr. Haddad's testimony and she didn't find any reference to Vernon or any reference to the customer in the hat. Personally, I thought that maybe the jurors were a little confused because our witness [McCoy] was the one in the beer hat. [The evidence at trial showed that McCoy wore a hat made of beer cans.] [¶] I think that they are referring to the man in the orange car. So I had her search for that as well. And once again, she didn't find anything. I think that they were confused in terms of whose testimony that they were supposed to be looking at. . . . [¶] I think that what they were asking for in the first question actually

appears in the testimony of Mr. Walker as opposed to Mr. Haddad. . . . Does either of you have a different recollection with regard to Mr. Haddad's testimony?

"MR. ROCHMES: No.

"MR. CHO: Well, I do recall Mr. Haddad referencing the person in the truck and having that conversation with him on the street and also observing that person –

"THE COURT: I agree with you that Mr. Haddad testified about when he was coming to the shop, having a confrontation with the man in the truck. I think what she was looking for in terms of the customer was anything inside the store. The way that I interpreted their question was that – there was some discussion with Mr. Walker with regard to this prior customer Vernon and with regard to the man in the orange truck whether either of them had been back since the incident and things like that. I think their question was basically are those two the same people or different people. But I don't think it was Mr. Haddad that talked about that at all. [¶] If your recollection is different, then I'm sure you can meet with the court reporter and she can – . . . You can meet with the court reporter and go through it. But I think right now what I'm going to have her do is provide the readback of the two witnesses [defendant and Mr. Walker]. I'm going to indicate to the jury that we couldn't find the portion of Mr. Haddad's testimony that they are referring to. [¶] But if after this readback they have [*sic*] further clarification of that question, then they can submit that to us. I

think that's probably the best way to handle it at this point. Any disagreement?

"MR. CHO: Would the Court be inclined to include language that if they still have questions they can request readback of Mr. Haddad's testimony?

"THE COURT: No. I will indicate if they have a clarification that they can submit that to us. But I am not going to invite anymore readback . . . quite frankly, readback of the entire trial is very disruptive to the Court. I have one court reporter who has to not only prepare the readback but then give it to them. [¶] I am going to bring the jurors in and just explain to them that I'm going to send the reporter back with the readback. I'll also just explain Mr. Haddad's testimony. . . . [¶]

"MR. CHO: As far as Mr. Haddad's testimony, would the court be inclined to instruct the jury that there's no testimony in regards to Mr. Haddad referencing Vernon but there is testimony of Mr. Haddad referencing the person in the black hat driving the truck?

"THE COURT: Mr. Cho, I'm not going to direct them about Mr. Haddad's testimony period. I'm going to tell them that we can't find what they're asking for. And if they believe that there is something in that testimony, they need to phrase it differently so we can see what they're looking for. I'm not going to suggest to them what they are looking for or what's in the testimony. They are perfectly capable of asking for what they need as they've shown us by repeated requests here. [¶] So no, we're going to bring them in and tell them that if they

need testimony from Mr. Haddad they need to rephrase the question because we can't find what they've asked for here."

The court brought the jury in and said, "We searched Mr. Haddad's testimony and I couldn't find any testimony that's responsive to that question. So if – first of all, listen to the readback of the other witnesses because sometimes there's a confusion between what witness said what. But if you still have a question regarding Mr. Haddad's testimony and want[] some readback of a portion of that, would you please rephrase the question so that we can better search for the testimony itself. Because we just couldn't find testimony that was responsive to this question."

B. *Analysis*

Section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

"'Pursuant to section 1138, the jury has a right to rehear testimony and instructions on request during its deliberations. [Citations.] Although the primary concern of section 1138 is the *jury's* right to be apprised of the evidence, a violation of the statutory mandate implicates a defendant's right to a fair trial conducted

"'substantially [in] accord[ance] with law.'" [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 288; *People v. Solomon* (2010) 49 Cal.4th 792, 824 ["Section 1138 gives deliberating jurors the right to rehear testimony and instruction on request. [Citation.] It also implicates a defendant's fair trial rights."].) "'"A conviction will not be reversed for a violation of section 1138 unless prejudice is shown"' [citation]." (*People v. Robinson* (2005) 37 Cal.4th 592, 634.)

Appellant relies on *People v. Butler* (1975) 47 Cal.App.3d 273 (*Butler*), in which the trial court refused the jury's request to read back the testimony of five key witnesses on the ground that the readback would "'perhaps take a full day.'" (*Id.* at p. 279.) The appellate court reversed, reasoning that "[n]o attempt was made by the court to attempt a narrowing down to portions of the particular witnesses' testimony in order to satisfy the jury's request [citation] or to 'pinpoint' what the jurors wanted [citation]. Had such attempts been made, successfully, it is at least conceivable that the court and counsel, acting together, might have been able to reach stipulations as to the testimony or to prepare a summary for the jury, as was done in *People v. Dreyer* (1945) 71 Cal.App.2d 181, where compliance with a jury request would have required four hours to read the requested testimony. Absent strong supervision by the trial court, and in the face of an outright rejection of the jury's request, the appellate court is put in that position that we cannot say, or even speculate, what effect the rereading of the requested testimony would have had or what effect was created by the

failure to reread that testimony." (*Butler, supra*, 47 Cal.App.3d at p. 281.)

Appellant also relies on *People v. Litteral* (1978) 79 Cal.App.3d 790 (*Litteral*), in which the trial court rejected the jury's request to reread testimony "without explaining possible alternatives. The court merely stated 'there is just no way I can get the testimony for you.'" (*Id.* at p. 795.) The appellate court found prejudicial error and reversed, stating that "[t]he jury was deprived of the chance to rehear testimony it felt a need to rehear." (*Id.* at p. 796.) The court explained that "'[w]e cannot say, or even speculate, what effect the rereading of the requested testimony would have had or what effect was created by the failure to reread that testimony.' [Citation.] It cannot be said that it is reasonably probable the same result would have been reached had the testimony been reread, in light of the fact that even on first reading at least two jurors had reasonable doubts about the guilt of one or both of the defendants." (*Id.* at p. 797.)

Unlike *Butler* and *Litteral*, the trial court here did attempt to determine the testimony the jury requested. The court asked the court reporter to find testimony responsive to the jury's request for Haddad's testimony about Vernon and whether Vernon and "the customer with the hat are two different people." Our review of the record indicates that the court correctly concluded that Haddad did not testify about Vernon or the customer in the hat.

However, Haddad did testify about "the man in the orange car," who previously had been described as wearing a black baseball cap.

Haddad testified that when he saw the driver of the orange vehicle, he pointed at the driver and told him that "I knew he had something to do with this; that these were his people." Haddad further testified that he recognized the man, an African-American male, as a regular customer of the shop who previously patronized the shop weekly. Haddad saw the man stalling in the store and then holding the door for appellant and Candice on the surveillance video feed. Haddad therefore concluded the man was involved and refused to serve him when he returned to the store after the robbery.

Nonetheless, the court attempted to find testimony responsive to the jury's request. In addition, the court told the jury to rephrase the question if it still wanted a readback of Haddad's testimony after hearing the readback of the other witnesses' testimony. The jury did not make another request for Haddad's testimony. The jury, therefore, which had shown it "was quite capable of requesting extensive readback" (*People v. Cox* (2003) 30 Cal.4th 916, 969, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22), apparently concluded it did not need to rehear Haddad's testimony. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1027–1028 ["The court's inquiry whether the reading of additional testimony was needed occurred when the jury had not yet concluded its deliberations and thus at a time when clarification still would have been useful, had the jury felt it was needed."]; *People v. Gordon* (1963) 222 Cal.App.2d 687, 689 ["If the testimony actually read to [the jurors] did not contain the matters they wished to hear, they surely would have said so."].) After

hearing the readback of appellant's and Walker's testimony, the jury asked other questions, regarding the meaning of "duress" and "immediate," but did not ask again for Haddad's testimony. The jury thus appeared to be satisfied with the testimony it reheard.

In addition to giving the jury the option to request Haddad's testimony again, the court told defense counsel, "[y]ou can meet with the court reporter and go through it" if he wanted to find any testimony by Haddad that would be responsive to the jury's question. It does not appear from the record that defense counsel chose to do so. Defense counsel asked the court to instruct the jury that, although Haddad did not testify about Vernon, Haddad did testify about the person in the black hat driving the truck, but the court responded that it would not direct the jury about Haddad's testimony, pointing out that the jury was "perfectly capable of asking for what they need as they've shown us by repeated requests here." We conclude that "the trial court substantially complied with the jury's request." (*People v. Cooks* (1983) 141 Cal.App.3d 224, 261.)

Appellant contends that "[a] correct understanding that Vernon's partner was inside the dispensary before the robbery and in the parking lot both during and after the robbery was essential to the defense." Although this understanding might have been strengthened by a readback of Haddad's testimony, this was not the information sought by the jury. Instead, as the court reasoned, the jury's question appeared to be whether Vernon and the man in the orange truck were the same

person. We find no error in the court's response to the jury's request for readback of testimony.

II. *Jury Instruction on Duress*

Appellant contends the trial court erroneously instructed the jury on duress by adding elements favoring the prosecution's theory. Appellant is incorrect.

A. *Relevant Proceedings*

The trial court instructed the jury on duress as follows, based on CALJIC No. 4.40 and CALCRIM No. 3402: "A person is not guilty of a crime when he engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances: 1. Where the threats and menaces are such that they would cause a reasonable person to fear that his, or someone else's life would be in immediate danger if he did not engage in the conduct charged, and 2. If this person then actually believed that his, or someone else's life was so endangered. [¶] This rule does not apply to threats, menaces, and fear of future danger to his, or someone else's life. [¶] The defendant's belief that his or someone else's life was in immediate danger must have been reasonable. When deciding whether the defendant's belief was reasonable, consider all the circumstances as they were know[n] to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed. [¶] A threat of future harm is not sufficient; the danger to life must have been

immediate. [¶] The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of robbery."

During deliberations, the jury asked for "a copy of the legal definition of duress." Defense counsel suggested that the court reiterate the instructions found in CALJIC No. 4.40 and CALCRIM No. 3402, but the court responded that it had a duty to answer the question because the jury had found the instructions insufficient. The court explained that it had prepared a response based on *People v. Petznick* (2003) 114 Cal.App.4th 663 (*Petznick*), which stated that "[d]ecisions upholding the duress defense have uniformly involved '"a present and active aggressor threatening immediate danger."' [Citation.] A 'phantasmagoria of future harm' such as a threat of death to be carried out at some undefined time, will not diminish criminal culpability. [Citation.]" (*Id.* at pp. 676–677.) Based on this language in *Petznick*, the court proposed to instruct the jury that the duress defense "requires an active aggressor threatening immediate danger."

Defense counsel objected to the proposed instruction on several grounds, first asking the court to reiterate the definition of duress from CALJIC No. 4.40, which the court agreed to do. Defense counsel also argued that a defendant need only raise a reasonable doubt that he acted of his own free will and objected that the instruction confused the burden of proof, but the court stated that it had included a paragraph reminding the jury that the prosecution must prove beyond a reasonable doubt that the defendant did not act under duress.

The court then instructed the jury as follows: "The law holds that all the persons are capable of committing crimes, except those who have committed the act charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives or someone else's lives would be endangered if they refused. In other words, the defense of duress negates the intent or capacity to commit the crime charged. The defendant need only raise a reasonable doubt that he acted in the exercise of his free will. [¶] In order to show that his act was not the exercise of his free will, the defendant must show that he acted under an immediate threat or menace. [¶] Because of the immediacy requirement, a person committing a crime under duress has only the choice of imminent death or executing the requested crime. The person being threatened has no time to formulate what is a reasonable and viable course of conduct nor to formulate criminal intent. The duress intent requires an active aggressor threatening immediate danger. A threat of future harm, such as a threat of death to be carried out at some unspecified time, will not diminish criminal culpability."

After further deliberations, the jurors stated that they were deadlocked on one or two counts and would be unable to reach a verdict. Based on *Allen v. United States* (1896) 164 U.S. 492, relying on supplemental instructions from *People v. Whaley* (2007) 152 Cal.App.4th 968 and *People v. Moore* (2002) 96 Cal.App.4th 1105, the court instructed the jury to continue deliberating.

The jury subsequently asked, "Can we please get a legal definition of the [*sic*] 'immediate'?" The court responded, "Does this question refer to 'immediate' as used in the duress instruction ('immediate danger' in CALJIC No. 4.40), or as used in the robbery instruction ('immediate presence' in CALJIC No. 9.40), or both?" Instead of clarifying, the jury asked another question: "Can the continuous fear from the initial threat be considered valid to meet the requirements of CALJIC No. 4.40 when the active aggressor is removed?" In response, the trial court decided to instruct the jury on the defense of necessity, based on CALJIC Nos. 4.43 and 2.50.2.[3] The court gave the jury the new instructions and allowed both counsel to reargue. Thereafter, the jury convicted appellant of the charged three counts of robbery.

B. *Analysis*

"Under . . . 'section 1138 the court must attempt "to clear up any instructional confusion expressed by the jury." [Citation.]' [Citation.] 'This means the trial "court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and

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[3] "'The defense of duress, unlike the necessity justification, requires that the threat or menace be accompanied by a direct or implied demand that the defendant commit the criminal act charged.' [Citation.] In contrast, the necessity defense is available when the defendant reasonably believed there was a threat of harm and no other means to alleviate the harm, and the harm sought to be avoided by the defendant's conduct was greater than the harm sought to be prevented by the law defining the charged offense." (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 567.)

complete, the *court has discretion* under [Penal Code] section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. . . ." [Citation.]' [Citations.] Penal Code section 1138 does not demand elaboration upon the standard instructions by the trial court when the jury expresses confusion, but rather directs the court to 'consider how it can best aid the jury and decide whether further explanation is desirable, or whether the reiteration of previously given instructions will suffice.' [Citation.]

"Further, to resolve the claim of a defective jury instruction we must determine whether its 'meaning was objectionable as communicated to the jury.' [Citation.] '"Here the question is, how would a reasonable juror understand the instruction. [Citation.] In addressing this question, we consider the specific language under challenge and, if necessary, the charge in its entirety. [Citation.] Finally, we determine whether the instruction, so understood, states the applicable law correctly." [Citation.]' [Citations.]" (*People v. Yarbrough* (2008) 169 Cal.App.4th 303, 316-317 (*Yarbrough*).)

"We apply a de novo standard of review in assessing whether jury instructions correctly state the law or whether they effectively direct a finding adverse to a defendant by removing an issue from the jury's consideration. [Citation.] '[T]he proper test for judging the adequacy of instructions is to decide whether the jury was fully and fairly instructed on the applicable law.' [Citation.]" (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1418.)

Appellant takes issue with the use of the phrase "active aggressor" in the trial court's instruction, which was based on *Petznick*. He argues that the *Petznick* court erred in requiring the presence of an active aggressor because the presence or absence of an active aggressor was not at issue in the case from which *Petznick* drew that language, *People v. Otis* (1959) 174 Cal.App.2d 119 (*Otis*).

In *Otis*, the defendant, a prison inmate, claimed that a fellow inmate threatened him with violence "'at some future date'" if he did not conceal knives for him. (*Otis*, *supra*, 174 Cal.App.2d at p. 122.) At issue was whether the trial court properly instructed the jury the defendant could be acquitted if he believed "'that *his life would be then and there endangered* if he refused'" to comply with the fellow inmate. (*Id.* at p. 123.) The instruction proposed by the defendant did not include the requirement that the danger be "immediate or imminent." (*Ibid.*) The court reasoned that the cases upholding the duress defense all involved the situation of "a present and active aggressor threatening immediate danger." (*Id.* at p. 125.) Because the defendant's proposed instruction "failed to incorporate the element of immediacy of danger," the court held that the trial court did not err in declining to give the proposed instruction. (*Id.* at p. 126.) Thus, contrary to appellant's argument, *Otis* did hold that the duress defense has an immediacy requirement. (See, e.g., *People v. Sanders* (1927) 82 Cal.App. 778, 785 [upholding instruction stating that "[t]he danger must not be one of future violence, but of present and immediate violence at the time of the commission of the forbidden act."]; *People v. Martin* (1910) 13 Cal.App.

96, 103 [duress does not apply if the person doing the deed fears "not an imminent and immediate danger to his life, but a future and remote danger"].)

Moreover, the California Supreme Court has quoted with approval the language from *Otis* stating that "'the situation of a present and active aggressor threatening immediate danger'" has been present in "'all the decisions upholding [a duress defense].'" (*People v. Vieira* (2005) 35 Cal.4th 264, 290; see also *People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1191 [quoting *Otis*]; *People v. Casares* (2016) 62 Cal.4th 808, 844 ["'Because the defense of duress requires a reasonable belief that threats to the defendant's life . . . are both imminent and immediate at the time the crime is committed [citations], threats of future danger are inadequate to support the defense.'"].) The instruction therefore ""'states the applicable law correctly.'"" (*Yarbrough*, *supra*, 169 Cal.App.4th at p. 317.) Based on this line of authority, the trial court did not err in instructing the jury on the elements of duress.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.