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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANILO HERNANDEZ REYES, Defendant and Appellant.	B271586 (Los Angeles County Super. Ct. No. MA065881)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa M. Chung, Judge. Affirmed as modified.

Julie Jakubik for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In the early morning of February 22, 2015, defendant Danilo Hernandez Reyes forced entry into the home of his ex-girlfriend M.R. and threatened her with a knife. He was charged and convicted of first degree burglary, criminal threats, and violation of a court order. He was acquitted of the charge of assault with a deadly weapon.

Defendant argues on appeal that: (1) substantial evidence did not support a finding of his felonious intent at the moment of entry necessary for a burglary conviction; (2) the trial court abused its discretion by not excluding unduly prejudicial evidence of uncharged acts under Evidence Code section 352; (3) he received ineffective counsel because his attorney did not request a jury instruction on diminished actuality; and (4) the trial court should have stayed, under Penal Code section 654, the concurrent sentence for violation of the restraining order.[1] We affirm but order his sentence for disobeying a court order stayed pursuant to section 654.

FACTS AND PROCEDURAL BACKGROUND

1. The Prior Bad Act and Restraining Order

In June 2014, M.R. reported abusive behavior by defendant, and requested a restraining order against him. M.R.'s application described defendant's angry and violent behavior toward her when he was driving with M.R. and her seven-year-old child in the car. Defendant screamed at M.R., threw papers at her, and grabbed her by the throat in front of her child. M.R. ended her relationship with defendant, and a trial court ordered defendant not to approach or harass her.

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[1] All further statutory reference are to the Penal Code unless otherwise stated.

2. The Acts Underlying the Convictions

Eight months later, in the pre-dawn hours of February 22, 2015, defendant went to M.R.'s residence in Palmdale. He did not announce his presence. Instead, defendant used a knife to cut his way through a locked security door and then surreptitiously entered M.R.'s bedroom. M.R.'s three children lay sleeping just a few feet down the hall. Defendant marched to the foot of M.R.'s bed and she woke to him standing over her with his knife still in hand. He told her that he wanted to talk to her. Alarmed and afraid, M.R. agreed to speak with him in the living room.

Their interaction lasted approximately thirty minutes. During this period, M.R.'s thirteen year-old son woke to the sound of his mother's sobbing, peered into the living room, and watched the adults converse. The son placed an emergency 911 call from the closet of his bedroom and reported that defendant was in their home, threatening to kill his mother with a knife. Defendant fled the scene before police arrived, taking M.R.'s phone with him. M.R. told the police that defendant relentlessly demanded she take him back and threatened to kill her if she did not agree to get back together with him. She did not mention defendant being intoxicated. Defendant's friend later returned M.R.'s phone, along with funds to repair the door defendant had damaged.

Detective Nelson Rios of the Los Angeles County Sheriff's Department conducted a follow-up interview with M.R. approximately six weeks after the incident. M.R. reiterated that defendant threatened to kill her and added that he held the knife against her body. She again did not say that defendant was intoxicated. M.R. agreed to testify at trial.

3. The Subsequent Uncharged Acts of Domestic Violence

In the months following the charged attack, defendant stalked and threatened M.R. twice more, once in May and again in August of 2015. On May 8, 2015, M.R. noticed defendant following her on the freeway and became nervous and afraid. After he trailed her for several miles, she pulled off the freeway and stopped at a school near her home. M.R. thought of calling the police but was paralyzed by fear. Defendant approached her vehicle from the passenger side and took her keys and phone, rendering her unable to leave or call the police. He then got into M.R.'s van and repeatedly demanded that she have sex with him because she was "his woman." When she refused, he shouted insults at her, grabbed her by the arm, and threatened to hit her. Defendant eventually left with her keys and phone. As he was leaving, he yelled at her that he would go to her house to kill her and her children. M.R. enlisted help from a stranger to call the police and translate to the dispatcher what had transpired. M.R.'s phone and keys were later returned.

Three months later, on August 26, 2015, defendant intercepted M.R. as she was leaving her place of work. He told her he wanted to talk to her and got into her van. M.R. drove to a nearby gas station. When she went inside to pay for gas, defendant again took her keys and phone. Scared, M.R. then attempted to run away from defendant and he chased after her. She tripped and fell to the ground in the road, drawing the attention of a bystander who called the police. Defendant again fled, this time driving away in M.R.'s van. The van, along with her phone and keys, later turned up returned to M.R.'s residence.

Defendant was not apprehended until December of 2015.

4. Defendant's Telephone Calls From the Jail

Even after defendant was in custody, he continued to harass M.R. He telephoned her from jail over two hundred times.

The transcript of one of the calls reflects that defendant directed M.R. to recant aspects of her account of the crimes. Defendant demanded she testify she was scared because he was drunk and that he had not threatened to kill her.

5. The Charges and the Trial

Defendant was charged by information with first-degree burglary (§ 459) with personal use of a dangerous and deadly weapon (§ 12022, subd. (b)(1)) and with another person present in the residence (§ 667.5, subd. (c)(21)); criminal threats (§ 422, subd. (a)) with personal use of a dangerous and deadly weapon (§ 12022, subd. (b)(1)); disobeying a court order (§ 166, subd. (a)(4)); and assault with a deadly weapon (§ 245, subd. (a)(1)). Defendant pled not guilty and the case proceeded to jury trial.

At trial, M.R. testified that defendant broke into her home, that she woke to find him holding a knife, and that he pled persistently that she get back together with him. She denied that defendant threatened to kill her. She acknowledged that defendant had contacted her regarding the content of her testimony after he had been apprehended and a transcript of the jail call was presented to the jury.

Pursuant to Evidence Code section 1109, the prosecution introduced evidence of the three uncharged incidents to establish defendant's propensity to commit domestic violence. The trial court admitted the testimony over defense counsel's Evidence Code section 352 objection, finding the other incidents were probative due to the similar manner in which defendant had victimized M.R. and were not overly prejudicial.

Defendant presented no evidence.

The jury convicted defendant of burglary, criminal threats, and violation of a court order. The weapon enhancements and other person present allegation were found true. The jury

acquitted defendant of assault with a deadly weapon. The court sentenced defendant to an aggregate term of eight years; six years (the high term) for the burglary plus one year for the weapon enhancement, a consecutive eight months (one-third the mid-term) for the criminal threats, plus a consecutive four months weapon enhancement (one-third the mid-term). The court imposed a concurrent sentence of one year for disobeying a court order. The court did not expressly mention the applicability of Penal Code section 654. Defendant filed a timely notice of appeal.

DISCUSSION

1. Substantial Evidence Supports the Specific Intent Element of the Burglary Conviction

Defendant contends insufficient evidence supported his burglary conviction because of a lack of substantial evidence of the intent necessary to commit the charge.

First degree burglary is defined as (1) entry into a structure presently being used for dwelling purposes (2) with the intent to commit a theft or any felony. (§§ 459, 460; *People v. Anderson* (2009) 47 Cal.4th 92, 101.) Although intent at the time of entry is necessary to sustain a conviction of burglary, there is commonly no direct evidence of the defendant's intent upon entry. The intent to commit a felony may often be "inferred from the circumstances of the charged offense." (*People v. Holt* (1997) 15 Cal.4th 619, 669 (*Holt*).) We " ' "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." ' " (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.) We presume the truth of every fact the jury could reasonably infer in support of the intent to commit a felony required to sustain the

burglary conviction. (*People v. Thompson* (2010) 49 Cal.4th 79, 113).

Here, substantial evidence supported a finding the defendant entered M.R.'s home with the intent of making criminal threats toward her, a felony (§ 422). The jury's finding is adequately supported by defendant's ensuing actions within the home, which resulted in conviction of criminal threats with personal use of a weapon. The fact that the defendant threatened M.R. with a knife shortly after entering her home allowed the jury to reasonably infer that he had the intent to do so upon entering. (See *Holt*, *supra*, 15 Cal.4th at pp. 669-670 [substantial evidence supported intent of sexual assault and theft based on the actual commission of those offenses inside the property]; see also *In re Matthew A.* (2008) 165 Cal.App.4th 537, 541.) Defendant's felonious intent is further supported by his forceful and furtive entry into M.R.'s home. (See *People v. Matson* (1974) 13 Cal.3d 35, 41-42 [holding the defendant's stealthy entry and approach of the victim were independently sufficient to support intent of rape necessary for burglary conviction].) Finally, defendant's intent was reinforced by evidence of his pattern of similar threatening behavior both before and after the charged events. (See *People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1765 [intent of the defendant to indecently expose himself to a victim in her home was reasonably inferred from the fact that he later repeated this behavior].)

Defendant argues the prosecution failed to present sufficient evidence of intent upon entry "because the evidence actually supports a finding that [defendant] entered the home with the intent only to talk to [M.R.]." Whether evidence can be viewed as consistent with another motive is not the test upon review. " 'It is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt.

" 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' " (*Holt, supra,* 15 Cal.4th at p. 668, citation omitted.) The defendant positing an alternative theory that he just wanted to talk, perhaps plausible, does not erase from the record facts the jury used to reasonably infer otherwise based on its own assessment of the evidence.

2. The Trial Court Did Not Abuse Its Discretion by Admitting Evidence of Uncharged Acts of Domestic Violence Under Evidence Code Section 1109

Defendant contends the trial court abused its discretion by admitting uncharged acts of domestic violence under Evidence Code section 1109, subdivision (a)(1) (section 1109), because the court did not adequately weigh the prejudicial effect of the acts against their probative value pursuant to Evidence Code section 352 (section 352). Section 352's analysis is expressly required in section 1109. Section 352 gives a trial court broad discretion to exclude evidence otherwise admissible under section 1109, "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352; *People v. Falsetta* (1999) 21 Cal.4th 903, 916; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) The probative value of evidence of uncharged acts is "increased by the relative similarity between the charged and uncharged offenses, the close proximity in time of the offenses, and the independent sources of evidence (the victims) in each offense." (*Falsetta,* at p. 917 [applying § 352 to the parallel § 1108 exception for uncharged sexual offenses].) Similarity of the uncharged acts to the charged offense is " ' "[t]he

principal factor affecting the probative value of an uncharged act." ' " (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531.) On the other hand, the more heinous the uncharged acts compared to the charged conduct is a factor that tends to show prejudice. (*People v. Harris* (1998) 60 Cal.App.4th 727, 737-738.)

We review the trial court's decision to admit evidence under Evidence Code section 352 for abuse of discretion. (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.) The trial court's ruling is upheld unless it "exceeds the bounds of reason." (*People v. Fuiava* (2012) 53 Cal.4th 622, 650.) While "the record must affirmatively show that the trial court weighed prejudice against probative value in admitting evidence of prior bad acts [citations omitted], the trial judge 'need not expressly weigh prejudice against probative value—or even expressly state that he has done so [citation.].' " (*People v. Padilla* (1995) 11 Cal.4th 891, 924, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800.) Rather, comments made or arguments heard by the trial court allow us to "infer that the court was aware of the Evidence Code section 352 issue and thus of its duty to weigh probative value against prejudice." (*Ibid.*)

The defendant contends the court did not sufficiently consider all the Evidence Code section 352 factors. The record does not support this contention. Although the court need not expressly do so on record, here the court orally referenced section 352 and performed a detailed inquiry to construct a timeline of events and of the parties involved. It noted, for example, that each incident involved the same victim. The court's comments show it weighed the various factors with regard to the uncharged acts, including the sources of the evidence, the proximity of time, and the principal factor affecting probative value, similarity to the charged crimes. It concluded that the similarity of the uncharged acts made the incidents significant propensity

evidence that corroborated initial statements made by M.R. to police. In particular, it pointed to "the taking of the phone, the threats, the physical abuse" as directly corresponding to accounts of the alleged crimes and determined this probative value was not outweighed by prejudice to the defendant.

Defendant challenges this conclusion, suggesting the trial court put too much weight on the factor of similarity, failed to notice the ways in which the prior offenses were dissimilar from the charged offenses, and undervalued the danger of jury confusion. He also argues that the court should have sanitized the uncharged May 2015 incident sua sponte, excluding defendant's demand for sex from his victim because of the potential for this detail to inflame jurors' sensibilities. We conclude, as the trial court apparently did, that the uncharged conduct was not significantly more serious than the charged crimes.

That defendant would weigh the factors differently does not mean the court abused its discretion. This is especially true when the record demonstrates the court considered the factors at length.

Defendant also contends specifically that the trial court erred when it concluded physical abuse in other acts was similar to the charged offense because there was "no allegation of physical abuse in the current offense." Not so. Although the defendant was not convicted on this count, assault with a deadly weapon was nonetheless among the alleged offenses. Other instances of physical abuse were relevant to the defendant's propensity to commit that offense.

We conclude there was no abuse of discretion.

3. Defendant's Counsel Did Not Render Ineffective Assistance of Counsel by Failing to Request a Voluntary Intoxication Jury Instruction

Defendant challenges his convictions of burglary and criminal threats on the grounds that his counsel was ineffective by failing to request the jury be instructed it could consider voluntary intoxication in deciding whether the defendant formed the requisite felonious intent. "A defendant has the burden of proving a claim of ineffective assistance of counsel by showing that (1) his or her trial counsel's representation fell below an objective standard of reasonableness and (2) he or she was prejudiced (i.e., there is a reasonable probability that a more favorable determination would have resulted in the absence of counsel's deficient performance)." (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1372.) We maintain a strong presumption the assistance defendant received was reasonable. (*Strickland v. Washington* (1984) 466 U.S. 668, 689-690.) A defendant's counsel is not unreasonable, and therefore not ineffective, merely by failing to advance futile requests of the trial court. (*People v. Price* (1991) 1 Cal.4th 324, 387.) Here, we need not address the question of prejudice because the defendant has failed to show his counsel's representation was unreasonable.

Defendant was entitled to an instruction on voluntary intoxication only if " 'there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's "actual formation of specific intent." ' [Citations.]" (*People v. Verdugo* (2010) 50 Cal.4th 263, 295.) " 'Substantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 645.)

Here, the only evidence of defendant's intoxication was M.R.'s testimony that she noticed a smell of alcohol when she woke to the defendant in her bedroom. M.R. never mentioned the alcohol to police, and only testified to it after defendant called her from jail and suggested it to her. Even if the defendant did smell of alcohol, no evidence was presented at trial demonstrating how it affected his mental state. Defendant managed to cut his way through a door and creep into M.R.'s bedroom undetected. He maintained a calm tone of voice through a lengthy conversation and displayed rationality by taking his victim's phone when attempting to escape unreported. A general suggestion on appeal that defendant may have consumed alcohol does not equate to the substantial evidence necessary to persuade a jury he was so intoxicated he did not form the intent to burglarize or threaten M.R. Without evidence that the defendant's intoxication affected his formation of intent, defendant's counsel did not fail to meet an objective standard of reasonableness by not requesting an instruction, which certainly would have been refuted. (See *People v. Pensinger* (1991) 52 Cal.3d 1210, 1241 ["showing that the defendant had consumed alcohol . . . before the offense, without any showing of [its] effect on him, is not enough to warrant an instruction . . ."].)

4. The Trial Court Erred in Failing to Stay Defendant's Sentence for Disobeying a Court Order

Defendant contends the trial court erred under section 654 by failing to stay his concurrent sentence for disobeying a court order because his conviction on that count resulted from the same conduct for which he received a sentence for burglary. Section 654, subdivision (a), provides no act will be punished under multiple provisions of law. (§ 654, subd. (a).) A trial court is precluded from issuing multiple punishments where a defendant committed multiple crimes within an "indivisible course of

conduct." (*People v. DeVaughn* (2014) 227 Cal.App.4th 1092, 1112). If a case results in multiple convictions for the same conduct, the trial court is required to stay execution of the sentence for the lesser of those offenses. (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 713.)

A trial court is given broad discretion in determining whether section 654 applies. We " ' " 'view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence.' " ' " (*DeVaughn, supra,* 227 Cal.App.4th at p. 1113, citations omitted.) If the trial court did not make an express finding, we review its implicit factual findings underlying the sentencing order for substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338.) However, when reviewing whether the convictions resulted from the same conduct, we look at the conduct presented to the jury, not a post hoc interpretation of the conduct offered to justify the sentence imposed by the trial court but otherwise indiscernible from the record. (*People v. Jones* (2012) 54 Cal.4th 350, 359.)

Defendant argues that the same conduct which formed the basis for his burglary conviction—breaking into M.R.'s house—also formed the basis of his conviction for violating the restraining order. We agree. As the order required that defendant stay away from M.R. altogether, at the moment defendant entered the home of M.R. in order to harass her he violated the court order to stay away from M.R. His entry also resulted in his conviction for first degree burglary. The conviction on these two counts arose from the same act or course of conduct and therefore the trial court was required to stay the sentence for violation of the restraining order under section 654. (Cf. *People v. Soto* (2016) 245 Cal.App.4th 1219 [precluding

sentences for both driving on a suspended license and driving under the influence of alcohol on section 654 grounds].)

The prosecution presented the same theory to the jury in closing, that defendant breaking into M.R.'s home and entering her bedroom constituted a violation of the court order. His singular entry into the home and his criminal behavior inside represent the entire scope of the alleged offenses. Defendant was not charged with violating the restraining order and burglarizing his victim based on separate visits to the home, for example. (Cf. *McCoy, supra,* 208 Cal.App.4th 1333 [upholding the trial court's discretion to impose dual sentences for violation of a restraining order and burglary based on the defendant going to his victim's house in violation of the order, then leaving when police were summoned only to return that night to break-in and assault the victim].)

Respondent argues that the conduct resulting in the conviction for violation of a court order was distinct from the burglary because defendant violated the order a second time when he decided to take M.R.'s phone. The Attorney General suggests this conduct showed that defendant harbored a distinct criminal motive to surveil M.R. separate from his entry a half-hour earlier. At trial, however, the prosecution made no mention of defendant taking the phone as the basis of violation of the court order or of any separate criminal motive by defendant to later monitor his victim. Nor was any evidence presented that would indicate the defendant used the phone to surveil M.R. Instead, the prosecution posited a contrary theory in closing that taking the phone was intended by defendant to prevent her contacting the police about the burglary. There was no evidence the taking of the phone was part of a divisible course of conduct. Accordingly the trial court was required to stay the sentence of count 3 pursuant to section 654.

DISPOSITION

Defendant's sentence on count 3 is stayed under section 654. The trial court is directed to prepare an amended abstract of judgment reflecting the modified sentence and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P.J.

GRIMES, J.