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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND MICHAEL HENNINGS, Defendant and Appellant.	B278087 Los Angeles County Super. Ct. No. MA066955

APPEAL from a judgment of the Superior Court of Los Angeles County, Joel L. Lofton, Judge. Affirmed with directions.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Raymond Michael Hennings of second-degree robbery, assault with a deadly weapon other than a firearm, and misdemeanor battery, and it found true an allegation that defendant personally used a deadly and dangerous weapon during the robbery. The trial court sentenced defendant to 21 years in prison. On appeal, defendant raises the following arguments: (1) the court erred in allowing the prosecution to introduce evidence of prior uncharged acts of domestic violence between defendant and the victim to prove the robbery charge; (2) the court erred in instructing the jury with respect to the evidence of prior acts of domestic violence; and (3) the court should have awarded defendant an additional day of presentence custody credit. We affirm defendant's convictions and direct the court to correct defendant's abstract of judgment to reflect that he is entitled to an additional day of custody credit.

FACTUAL AND PROCEDURAL BACKGROUND

1. Prosecution Evidence

1.1. The Robbery

Around 2009, defendant met Mey Saelee in Redding. About a year later, after they had started dating, defendant and Saelee had a "secret wedding." In 2013, Saelee left defendant on several occasions, but he repeatedly tracked her down.

In late August 2013, defendant and Saelee went on a late-night walk in Redlands. Defendant threw a bottle of beer and then pushed Saelee to the ground. Defendant assaulted Saelee a second time in February 2014 while they were in Indio. After finding Saelee in a parking lot, defendant became angry. He hit Saelee's head with his own head a couple times, causing her to

become dizzy. After her friends called the police, Saelee obtained a restraining order against defendant.

In September 2015, Saelee was homeless and living in a tent in Lancaster. On September 13, 2015, defendant found Saelee after he tracked the location of her phone. Defendant entered Saelee's tent and stayed with her until the next morning.

On September 14, 2015, Saelee and defendant went grocery shopping. As they were leaving the store, Saelee dropped a jar of pickles. Defendant became angry and told Saelee that he would "beat [her] up" when they got back to her tent. Saelee, who was carrying a purse or a backpack,[1] became scared and ran toward town. Defendant returned to Saelee's tent.

When Saelee later returned to her tent, she found defendant standing near his car. Defendant became angry and started to chase Saelee, who started to scream and run toward the tent of her friend, Lydia Sanchez. Defendant caught up to Saelee, grabbed her left shoulder, and took her purse. As defendant grabbed her, Saelee saw a knife in defendant's right hand. Defendant immediately put the knife away after he took Saelee's purse.

As defendant was asking Saelee to return to his car, Sanchez approached. After defendant and Sanchez spoke for a while, defendant left with Saelee's purse.

Sanchez then called her friend, Leroy McComb, who also lived nearby. When McComb appeared, Saelee and Sanchez looked anxious. A short time later, defendant returned to the scene. Defendant looked aggressive, like he was going to attack, so McComb tried to restrain him. As he was grabbing defendant's

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[1] The witnesses interchangeably refer to the item as a "purse" and a "backpack." For the sake of convenience, we refer to the item as a purse throughout this opinion.

shirt, McComb slipped to the ground. While on the ground, McComb saw that defendant was holding a pointed object covered by a handkerchief. Defendant told Sanchez and Saelee, "Get him off me or I'm going to cut him" or "I'm going to stab him." After McComb asked Sanchez to give him a knife that she carried, defendant ran away, still carrying Saelee's purse. McComb then called the police.

When the police contacted defendant, they found a set of car keys and a multi-tool gadget that contained a three- to four-inch blade in the pockets of defendant's pants. Defendant admitted the multi-tool gadget belonged to him. The police found Saelee's purse in the trunk of a nearby car using the keys found on defendant.

1.2. Defendant's Jail Calls

While he was in custody, defendant called Saelee several times and wrote her about 14 letters.[2] On October 23, 2015, defendant called Saelee and told her not to save any of his letters. Defendant said that the prosecution was pursuing "robbery at gunpoint," to which Saelee responded, "Yeah you had two different knives, you remember?" Defendant replied, "did you think I was going to stab you? Is that what you thought?"

On October 24, 2015, defendant told Saelee not to talk to anyone but his investigator. He told Saelee he would "never hurt [her] again, I promise." When Saelee told defendant "you always say that," defendant replied, "Believe me this time, okay[.] You always do something."

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[2] The record contains the redacted transcripts of four of the calls defendant made to Saelee, but it does not contain any of the letters defendant wrote to her. The transcripts of the calls were provided to the jury before it listened to the phone calls.

On November 1, 2015, defendant told Saelee not to tell anyone about his letters or phone calls. Defendant also told Saelee that he would not have to serve any time if Saelee did not testify against him. When Saelee responded that she would have to go to court if the prosecution wanted her to, defendant told her she was not required to appear.

During the same call, defendant asked Saelee if she saw the knife in his hand when he took her purse, to which she responded "Yeah. . . . [¶] . . . [¶] Yeah you do." When defendant said that he couldn't remember whether he had a knife with him, Saelee replied, "I saw you had two different knives that you, you come, um, you come to my tent, you have different knife on your hand, and then you tell me, you chase me with a different knife." Defendant corrected Saelee: "No honey . . . I only had one, there's only one and it's a MacGyver. It's not a knife, it's [a] MacGyver, it has a knife in it, it's a pocket knife."

Toward the end of the call, defendant told Saelee she needed to protect him. Saelee reminded defendant that he had threatened to kill her in the past. Defendant responded that he never meant it when he said he would kill Saelee and told her that "the worst I've ever done to you . . . is slap you once in a while." Before the end of the call, defendant told Saelee to expect a visit from his investigator and reminded her not to talk to anybody else about the case.

Defendant called Saelee again on November 5, 2015. He asked her to change her phone number and told her several times not to talk to anybody about his case.

2. Defense Evidence

Sanchez testified that she could not remember much of what happened during the incident in Lancaster in September 2015. Sanchez remembered that a man and a woman, whom Sanchez believed were friends with McComb, were arguing in the

middle of the night. Sanchez called McComb because his "friends are all fighting here." After McComb arrived, Sanchez "kind of just faded out of the picture." Sanchez claimed she never saw a man wielding a knife "at any time that night."

3. Prosecution Rebuttal

One of the officers who responded to McComb's 911 call testified that he interviewed Sanchez on the night of the incident. Sanchez reported that on September 14, 2015, she had seen Saelee screaming and running toward her. Sanchez told the officer that she saw defendant grab Saelee by the arm and take her purse, and that Saelee looked scared during the encounter.

4. The Charges, Jury Trial, and Sentencing

The People charged defendant with second-degree robbery (Pen. Code,[3] § 212.5, subd. (c); count 1), misdemeanor battery (§ 243, subd. (e)(1); count 2), and assault with a deadly weapon other than a firearm (§ 245, subd. (a)(1); count 3).[4] As to count 1, the People alleged defendant personally used a deadly and dangerous weapon, a knife, during the commission of the robbery. The People further alleged that defendant had suffered two prior serious felony convictions as defined by section 667, subdivision (a)(1), and served seven prior prison terms as defined by section 667.5, subdivision (b).

A four-day jury trial commenced in June 2016. The jury found defendant guilty on counts 1 through 3 and found true the

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[3] All undesignated statutory references are to the Penal Code.

[4] The People added count 3 to the information after they presented their case-in-chief. Saelee is the victim in all three counts, each of which arose out of the incident when defendant grabbed her and took her purse.

allegation that he personally used a deadly and dangerous weapon during the commission of the robbery.

Before sentencing, the People decided not to proceed on the prior prison term allegations. After defendant waived a jury trial on the remaining prior conviction allegations, the court found defendant had suffered two prior serious felony convictions. The court struck one of defendant's prior convictions for purposes of the Three Strikes law.

The court sentenced defendant to a total term of 21 years in state prison, consisting of (1) the high term of five years on count 1, doubled to ten years under the Three Strikes law; (2) one year for the personal use of a deadly weapon allegation; and (3) 10 years for defendant's two prior serious felony convictions. As to count 2, the court imposed a one year term and, as to count 3, it imposed an eight year term, consisting of the high term of four years doubled to eight years under the Three Strikes law. The court stayed execution of defendant's sentences on counts 2 and 3 under section 654.

Defendant filed a timely appeal.

DISCUSSION

1. Admission of Prior Domestic Violence Evidence

Defendant contends the trial court abused its discretion when it allowed the People to introduce evidence of his prior acts of domestic violence against Saelee to prove he committed the robbery charged in count 1.[5] Specifically, defendant argues the court should have excluded the evidence as to count 1 because it was inflammatory and unduly prejudicial.

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[5] Defendant does not challenge the admission of the evidence as it applies to counts 2 and 3.

1.1. Applicable Law and Standard of Review

Generally, evidence of prior criminal acts is inadmissible to prove the defendant's conduct on a specific occasion. (See Evid. Code, § 1101, subd. (a); see also *People v. Cole* (2004) 33 Cal.4th 1158, 1194.) However, in a criminal action where the defendant is charged with an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible to prove the defendant's propensity to commit crimes involving domestic violence if such evidence is not inadmissible under Evidence Code section 352. (See Evid. Code, § 1109; *People v. Brown* (2011) 192 Cal.App.4th 1222, 1232.) Courts have recognized that " ' "[t]he propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked." ' [Citation.]" (*People v. Cabrera* (2007) 152 Cal.App.4th 695, 705–706 (*Cabrera*).) Evidence of prior acts of domestic violence should be excluded under Evidence Code section 352 "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." (Evid. Code, § 352.)

We review the trial court's admission of evidence of prior acts of domestic violence for abuse of discretion. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531.)

1.2. The trial court properly admitted the evidence of prior domestic violence.

The trial court did not abuse its discretion when it admitted evidence of defendant's prior acts of domestic violence against Saelee. First, that evidence was highly probative. It involved the same victim in this case and included acts of violence that were similar to those giving rise to the underlying robbery charge. Saelee testified that, in each of the two prior instances, defendant became angry with her and then physically attacked her. Defendant engaged in a similar pattern of conduct in this case: he became angry with Saelee after she dropped a jar of pickles, which triggered a series of events resulting in defendant grabbing Saelee and taking her purse while brandishing a knife. The evidence of the prior instances of domestic violence also shows that defendant has engaged in a pattern of escalating violence, with the acts giving rise to the robbery charged in this case being the most violent. (See *Cabrera*, *supra*, 152 Cal.App.4th at p. 706.)

Defendant argues the prior incidents of violence bear no similarity to the robbery charge in this case because he did not take anything from Saelee during those incidents. Rather, defendant asserts, "[w]hat the prior incidents show . . . is that [he] had a tendency to become angry with Saelee and physically harm her." But defendant's second point shows precisely why the evidence of his prior acts of violence are probative of the robbery charge: defendant tends to engage in violence when he becomes angry with Saelee, as he did in this case. The fact that defendant committed an act in this case that he did not perform during the prior incidents—i.e., taking property from Saelee—does not render the evidence of his prior acts of violence any less probative. (Cf. *People v. James* (2010) 191 Cal.App.4th 478, 481, 483–484 [although burglary is not a crime of domestic violence on

its face, the trial court properly found that under the facts of the case, prior acts of domestic violence were admissible, even though some of them did not involve burglary, because the defendant intended to commit domestic violence when he committed the charged burglary].)

Second, introducing evidence of defendant's prior acts of domestic violence did not consume an undue amount of time. The prosecution introduced the evidence through a single witness, Saelee, and it did not call any law enforcement officers who may have responded to the prior assaults or anyone else who may have witnessed those assaults. Indeed, Saelee's testimony concerning the prior incidents spans only 8 pages of the reporter's transcript, while the rest of her testimony spans about 150 pages.

Finally, evidence of defendant's prior assaults was not unduly prejudicial. Defendant's conduct in the prior incidents was no more inflammatory or aggravated than his conduct during the assault in this case. In the prior incidents, defendant's attacks were shorter than the one giving rise to the robbery charge in this case, and there is no evidence that Saelee suffered any serious or long term injuries during those prior incidents.

Because the probative value of defendant's prior acts of domestic violence against Saelee significantly outweighed any potential prejudice, the trial court did not abuse its discretion in admitting that evidence.

2. Instructional Error

Defendant next contends the court erred when it instructed the jury on how, and for what purpose, it may consider the evidence of his prior acts of domestic violence. Specifically, defendant argues the court improperly instructed the jury that evidence of the prior acts of domestic violence, on its own, is not sufficient to support a finding that defendant committed the robbery beyond a reasonable doubt, while not providing a similar

instruction as to the assault with a deadly weapon and misdemeanor battery charges. Based on the court's instruction, defendant asserts, "the jury could conclude that evidence of uncharged domestic violence was sufficient to find [him] guilty of assault with a deadly weapon and battery, thus lowering the [People's] burden of proof."

2.1. Relevant Proceedings

The instruction that defendant challenges was modeled after CALCRIM No. 852A, the standard instruction addressing evidence of uncharged acts of domestic violence. Without any objection from defendant, the court instructed the jury as follows:

> "The People presented evidence that the defendant committed domestic violence that was not charged in this case. 'Domestic violence' means abuse committed against an adult who is a person who dated or is dating the defendant. 'Abuse' means intentionally or recklessly or attempting to cause bodily injury or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else. You may only consider this evidence if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence.
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> "Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not the fact is true. If the People have not met this burden of proof, you must disregard this evidence entirely.

> "If you decide the defendant committed the uncharged domestic violence, you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed the robbery alleged in count 1 . . . .
>
> "[¶] . . . [¶]
>
> "[The] [a]ssault in count 3 and the battery in count 2.
>
> "Remember, however, that evidence of uncharged domestic violence is not sufficient alone to find the defendant guilty of robbery. [The] People must still prove each and every element of the robbery beyond a reasonable doubt.
>
> "So, instruction, 852, uncharged domestic violence can be used in your determination whether he's guilty of the three alleged counts."[6]

Before the court instructed the jury with its version of CALCRIM No. 852A, it read CALCRIM No. 220, the standard instruction on reasonable doubt, and CALCRIM No. 224, which informed the jury that, before it may rely on circumstantial evidence to conclude a fact necessary to find the defendant guilty of a charged crime, it must be convinced that the People proved each fact essential to that crime beyond a reasonable doubt. The court also instructed the jury on each element of the offenses

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[6] The written instruction that the court gave to the jury makes no reference to the battery or assault charges.

charged in counts 1 through 3, as well as the personal use of a deadly weapon allegation.

2.2. Forfeiture and Standard of Review

Before discussing the merits of defendant's claim, the People insist his failure to object to the instruction at trial forfeited the error. We disagree.

As defendant correctly points out, an appellate court may review any claim of instructional error that affects his substantial rights even if he never objected to the instruction in the trial court. (§ 1259 ["appellate court may also review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; *People v. Hudson* (2006) 38 Cal.4th 1002, 1012.) Whether a defendant's substantial rights were affected, however, can only be determined by deciding if the instruction as given was flawed and, if so, whether the error was prejudicial. (*Hudson,* at pp. 1011–1012 [forfeiture rule does not apply to incorrect statements of law].) That is, if defendant's claim has merit, it has not been forfeited. Therefore, we must necessarily review the merits of defendant's claim that there was instructional error.

We review claims of instructional error de novo. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.)

2.3. Any error in the court's instruction on evidence of defendant's prior acts of domestic violence was harmless.

The People acknowledge that the court misspoke when it omitted any reference to counts 2 and 3 in the limiting portion of the court's instruction on the evidence of defendant's prior acts of domestic violence. The People contend, however, that the court's omission of counts 2 and 3 from this portion of the instruction

was harmless because it is not reasonably likely the jury would have interpreted the instruction as lowering the People's burden of proof as to those counts. As we explain below, any error in the court's instruction was harmless beyond a reasonable doubt based on the facts and circumstances of this case.

The First District addressed a similar instructional issue in *People v. James* (2000) 81 Cal.App.4th 1343 (*James*), which held that a former version of CALJIC No. 2.50.02 (the CALJIC analogue of CALCRIM No. 852) violated a defendant's "federal constitutional right to due process by permitting a conviction based on proof of prior offenses, rather than proof of each element of the charged offense." (*James*, at pp. 1352–1357.)[7] The instruction at issue in *James* informed the jury that, if it found the prosecution proved that the defendant committed prior uncharged acts of domestic violence by a preponderance of the evidence, the jury could, but was not required to, "infer that the defendant had a disposition to commit the same or similar type offenses. If [the jury found] that the defendant had this disposition, [it could] but [was] not required to, infer that he was likely to commit and did commit the crime of which he [was] accused." (*Id.* at p. 1350.)

The court in *James* began its analysis by recognizing the well-settled principle that "[d]ue process demands that each element of a charged offense be proven beyond a reasonable doubt." (*James*, *supra*, 81 Cal.App.4th at p. 1352.) The court explained that a defendant's due process rights are "substantially eroded by instructions suggesting that a defendant's prior

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[7] The same court addressed the same instruction in *People v. Younger* (2000) 84 Cal.App.4th 1360, adopting its analysis from *James* to hold that the instruction given in *Younger* was also erroneous. (See *Younger*, at pp. 1380–1384.)

offenses may be sufficient to convict him of the charged crime" because "[t]he tendency of propensity evidence to 'overpersuade' the jury is beyond dispute." (*Id.* at p. 1353.) The court observed that, while it is constitutionally proper for the jury to consider prior acts of domestic violence as propensity evidence that may corroborate other evidence directly addressing the elements of the charged crime, "[t]he jury must be reminded that propensity evidence alone cannot meet the prosecution's burden of proving the elements of the charged offense. Otherwise, the jury is prompted to use evidence of prior offenses in precisely the wrong way, as a substitute for proof of the current offense." (*Ibid.*) The court held that the version of CALJIC No. 2.50.02 used by the trial court was improper because it permitted the jury to infer guilt based on "the defendant's conduct on other [prior] occasions, [and diverted] the jury's attention away from the elements of the current offense." (*Id.* at p. 1357.)

The version of CALCRIM No. 852A that the court read to the jury in this case differs from the instruction at issue in *James* in several respects. For example, the instruction in this case did not expressly inform the jury that it could rely on propensity evidence to infer that defendant had a disposition to commit crimes of domestic violence, and that it could, in turn, infer from defendant's disposition that he was guilty of the charged crimes of assault and battery. Instead, the instruction in this case informed the jury that it could consider the evidence of defendant's prior acts of domestic violence and "weigh it together with all the other evidence" to determine whether defendant committed the crimes charged in those counts. The instruction also included limiting language with respect to count 1, informing the jury that it could not rely solely on the evidence of prior acts of domestic violence to convict defendant of robbery and that the prosecution still needed to prove each element of that offense

beyond a reasonable doubt, but it did not include such language with respect to counts 2 and 3. Although not included in the written instruction, the court reiterated that the propensity evidence "can be used in [the jury's] determination [of] whether [defendant is] guilty of the three alleged counts."[8]

Thus, unlike in *James*, the issue posed by the instruction in this case is not that the court expressly invited the jury to infer directly from propensity evidence that defendant committed the charged crimes of assault with a deadly weapon and battery. Rather, it is whether, by failing to include language requiring the jury to consider evidence directly addressing those crimes—i.e., evidence of the facts surrounding the September 2015 incident in Lancaster—the instruction would have led the jury to believe it could rely solely on propensity evidence to convict defendant of those crimes.

We need not decide whether the instruction in this case lead the jury to believe it could rest its finding of guilt on counts 2 and 3 on propensity evidence alone because, even assuming the instruction was erroneous, such error was harmless beyond a reasonable doubt. Where an erroneous instruction permits, but does not require, the jury to draw an improper inference of guilt

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[8] Indeed, the instruction read by the court in this case largely mirrors the instruction that the court in *James* proposed to remedy the issues raised by the instruction at issue in that case. (See *James*, *supra*, 81 Cal.App.4th at p. 1357, fn. 8.) The instruction in this case differs from that proposed instruction in a significant way, however. As noted, it did not inform the jury that evidence of defendant's prior acts of domestic violence was not sufficient, by itself, to find defendant committed the crimes of battery and assault and that the prosecution still needed to prove each element of those crimes beyond a reasonable doubt.

based on propensity evidence, we apply *Chapman*'s[9] harmless beyond a reasonable doubt standard to determine whether the defendant was prejudiced by the instruction. (*James*, *supra*, 81 Cal.App.4th at p. 1363.) "[W]e may conclude the error did not contribute to the verdict either if the evidence is so strong that the effect of the inference from propensity alone is insignificant, or if the evidence is such that we are convinced beyond any reasonable doubt that the jury did not actually draw the improper inference." (*Ibid.*)

Defendant does not dispute that the jury was properly instructed on how to consider the propensity evidence with respect to the robbery charge. Defendant also does not contend that the jury was improperly instructed with respect to the personal use of a deadly weapon allegation or that insufficient evidence supports the jury's true finding as to that allegation. Because the jury found defendant guilty of robbery and found true the personal use allegation, it necessarily found the prosecution proved every element of robbery and the personal use of a deadly weapon allegation beyond a reasonable doubt *based on* the facts surrounding the robbery, and not based solely on the propensity evidence. Both the battery charged in count 2 and the assault with a deadly weapon charged in count 3 arose out of the same altercation that gave rise to the robbery, which is reflected by the trial court's decision to stay execution of defendant's sentences on counts 2 and 3 under section 654.[10] Under the facts

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[9] *Chapman v. State of California* (1967) 386 U.S. 18, 24.

[10] Section 654 provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

of this case, we are satisfied beyond a reasonable doubt that the jury would not have found defendant guilty of robbery and found true the personal use of a deadly weapon allegation based on the facts surrounding the September 2015 incident in Lancaster, while finding defendant guilty of assault with a deadly weapon and battery based solely on evidence of defendant's prior acts of domestic violence.

As noted, the jury was instructed on the elements of robbery, battery, assault with a deadly weapon, and the personal use of a deadly weapon allegation. Relevant here, the jury was instructed that, to find him guilty of robbery, defendant had to take property against Saelee's will through the use of "force or fear." The evidence in this case was undisputed that, as Saelee was running away from him, defendant forcefully grabbed her by the shoulder and removed her purse while he was wielding a knife. Importantly, there was no evidence that defendant obtained Saelee's purse without using force—i.e., without touching Saelee. Thus, by finding defendant guilty of robbery, the jury necessarily would have found that defendant also "willfully touched . . . Saelee in a harmful or offensive manner," as required by the court's instruction on battery. Accordingly, the jury made the necessary findings to convict defendant of battery based on the facts surrounding that crime due to its finding of guilt on the robbery charge.

Similarly, because of its findings on the robbery charge and the personal use of a deadly weapon allegation, we are satisfied beyond a reasonable doubt that the jury convicted defendant of the assault based on the facts surrounding that crime, and not based solely on the propensity evidence. With respect to the personal use of a deadly weapon allegation, the jury was instructed that defendant had to "[d]isplay[] the weapon in a menacing manner" or "[h]it[] someone with the weapon." There

was no evidence that defendant "hit" Saelee with the knife. Thus, the jury necessarily found defendant displayed the knife in a menacing manner. As to the assault charge, the jury was instructed that in order to convict defendant, it needed to find he "did [a willful] act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person," and that, "[w]hen [he] acted he was aware of facts that would lead a reasonable person to realize tha[t] his act by its nature would directly and probably result in the application of force to someone." The jury was also instructed that, when defendant acted, he must have "had the present ability to apply force [with] a deadly weapon other than a firearm." Because the jury found defendant used force to remove Saelee's purse from her shoulder while wielding a knife in a menacing manner, it made the findings necessary to convict defendant of assault with a deadly weapon based on the facts surrounding that crime.

3. Defendant is entitled to an additional day of presentence custody credit.

Finally, defendant contends, and the People agree, that defendant is entitled to one additional day of presentence custody credit than what is reflected in his abstract of judgment. Defendant was arrested on September 14, 2015, and he was sentenced on September 23, 2016. Accordingly, defendant was in custody for 376 days before he was sentenced. The court's September 23, 2016 minute order and defendant's abstract of judgment, however, state that defendant was awarded only 375 days of presentence custody credits. We therefore direct the trial court to modify its September 23, 2016 order and correct defendant's abstract of judgment to reflect that defendant is entitled to 376 days of presentence custody credit.

DISPOSITION

The judgment is affirmed. The trial court shall forward a corrected copy of defendant's abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, 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.