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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MARCUS RUBEN ELLINGTON, Defendant and Appellant.	B289935 (Los Angeles County Super. Ct. No. YA095609)

APPEAL from a judgment of the Superior Court of Los Angeles County, Scott T. Millington, Judge. Affirmed and remanded for further proceedings.

Heather L. Beugen, 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, Senior Assistant Attorney General, Jaime L. Fuster and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant Marcus Ruben Ellington of two counts of possession of a collapsible baton (Pen. Code,[1] § 22210), criminal threats (§ 422, subd. (a)), and two counts of sexual battery (§ 243.4, subd. (e)(1)). Defendant admitted he had five prior strike convictions under the Three Strikes law (§§ 667, subds. (b)-(i) & 1170.12, subd. (a)-(e)), he had a prior serious felony conviction (§ 667, subd. (a)(1)), and he served a prior prison term (§ 667.5, subd. (b)). The trial court sentenced defendant to 55 years to life plus 360 days in state prison.[2]

On appeal, defendant contends the trial court erred in failing to instruct the jury, sua sponte, on the lesser included offense of attempted criminal threats; we must remand the matter to the trial court for it to exercise its section 1385 discretion whether to strike the section 667, subdivision (a)(1) five-year enhancement; and we should conduct an independent review of the sealed transcript of the trial court's in camera hearing conducted pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). We affirm the judgment and remand the matter to the trial court for it to exercise its section 1385

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1 All statutory references are to the Penal Code.

2 The trial court granted defendant's new trial motion as to one of defendant's convictions for possession of a collapsible baton and dismissed it in furtherance of justice pursuant to section 1385. It also dismissed the section 667.5, subdivision (b) enhancement in furtherance of justice pursuant to section 1385.

discretion whether to strike defendant's section 667, subdivision (a)(1) enhancement.

II. BACKGROUND

A. *The Prosecution's Case*

In February 2016, L.W. worked as an in-home caregiver for defendant's mother. On February 11, 2016, while L.W. was feeding defendant's mother in her bedroom, defendant approached and said to L.W. that he was going to fire all the other nurses, but that she seemed nice and could stay if she "got with the program." Additionally, defendant made a comment about "breaking him off." As he spoke, defendant "grabbed his private parts" over his clothing.

Later that day, as L.W. was mopping the kitchen floor, defendant walked behind her and touched the lower part of her left buttock, over her clothes, with his hand. Defendant then raised his hand towards L.W.'s hip as he kept walking. Near the end of her shift that day, as L.W. was leaving the bathroom, defendant stood by the doorway in such a position that L.W. would have to squeeze by him. As he stood by the door, defendant asked L.W. what her problem was and if he was too old for her. As defendant spoke, he put his hands between L.W.'s legs and rubbed her vagina over her clothes. L.W. put her hand on defendant's chest and pushed him away non-aggressively saying she was at work. She then gathered her belongings and waited by the door for her fiancé, James Sanders, to pick her up. She did not intend to continue to work for defendant's mother.

On the way home or later that evening, L.W. told Sanders what had happened to her at work. The next morning, L.W. and Sanders went to defendant's house to pick up L.W.'s paycheck. L.W. knocked on the door. Sanders stood off to the side. One of the night nurses answered, and L.W. asked to speak with defendant.

Defendant came to the door and spoke with L.W. as if nothing had happened. He had one hand behind his back. At some point, defendant's wife, Tifany Willis,[3] came from the back and tried to determine what was happening. Defendant turned around and shoved Willis, apparently trying to get her to go back in the house. When defendant turned, L.W. saw that he was holding a baton in the hand that had been behind his back. L.W. advised Sanders that defendant had the baton.

Willis did not go back in the house and asked L.W. what was happening. L.W. told Willis what defendant had done, that she would not work there any longer, and that she wanted her "last paycheck stub." Defendant said L.W. was lying.

When Sanders noticed the baton, he felt threatened and backed into the front yard. Defendant followed. Sanders asked defendant. "Why did you touch her? What's the issue? Why would you do that?" Sanders and defendant argued. Sanders was upset and his tone was a little aggressive. Defendant was loud and aggressive. Defendant denied that he had done anything.

Defendant threatened L.W. and Sanders, saying that he was going to get people to kill them, that he was a member of "Payback Crip," that he was a "gangbanger" and he would "have

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[3] During the defense case, Willis described herself as defendant's live-in girlfriend or fiancée.

this or that person do things to you," that he had guns in the back, that he knew where L.W. and Sanders lived, that he could "shoot up" their house, that he could "shoot up everyone," and that L.W. and Sanders could be "shot up."

After defendant said he was a member of "Payback Crip" and had guns in the back, Sanders remained in the front yard for 30 more seconds arguing with defendant about why he had touched L.W. before he and L.W. left. They left because there was nothing more to talk about and Sanders believed he might be shot. The entire incident lasted about two to three minutes.

As they drove away, Sanders and L.W. discussed the fact that L.W. had not been paid. Sanders said, "We came to get your paycheck. That's what we're going to get." Sanders texted Willis or defendant and was told he could return for the paycheck. Sanders believed that Willis would give him the paycheck.

When Sanders and L.W. returned to defendant's mother's house—about five minutes after they left—defendant was standing in the middle of the front yard, holding a check. As Sanders approached defendant, defendant dropped the check and walked away. Sanders picked up the check and left.

Sanders still felt threatened and was afraid that defendant could "harm . . . or hurt" him when he went back to defendant's mother's house to pick up L.W.'s paycheck. He did not know what made him go back except that he wanted L.W. to be paid for the work she had done and he expected to deal with Willis and not defendant. When Sanders returned and saw defendant and not Willis, he still stopped to get the paycheck explaining, "Basically, I just felt like she needed to get paid for the week, and I went back. Maybe it was a bad judgment, but I went back."

Sanders and L.W. deposited the check in their bank. They then went to the police department.

On February 23, 2016, Gardena Police Department Detective Karen Salas and other officers participated in a search of defendant's house. During the search, an officer advised Detective Salas that a baton—black, extendable, and 21 inches when extended—was found on a table. Willis told Detective Salas that the baton was hers—she was an Uber driver and used it for protection.

B. *The Defense Case*

On February 12, 2016, using defendant's security system, Willis viewed L.W. and Sanders at the door. Sanders's back was to the front door "as though like an ambush of some sort." Defendant went to the door and invited L.W. and Sanders inside. Sanders declined and challenged defendant to a fight. Perceiving a threat to defendant, Willis handed defendant the baton.

Willis could hear what defendant said to Sanders. Defendant did not say, "'It's Payback Crip.'" To Willis's knowledge, defendant did not say that he had guns in the back.

According to Willis, after Sanders left, he called and asked for L.W.'s check. Sanders apologized for his prior behavior and said that when he came back, he would be calmer, "calm enough to get the check, and he wouldn't do anything." It did not seem as though Sanders was afraid to come back to get the check.

III. DISCUSSION

A. *Lesser Included Instruction*

Defendant contends the trial court erred when it failed to instruct the jury, sua sponte, on attempted criminal threats as a lesser included offense to criminal threats. He concedes there was evidence that he threatened Sanders with serious bodily injury, but argues "there was a legitimate question as to whether that threat actually caused Sanders to be in sustained fear for his safety."

The trial court instructed the jury that to prove defendant guilty of making a criminal threat, "[T]he People must prove that: one, the defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to James Sanders; two, the defendant made the threat orally; three, the defendant intended that his statement be understood as a threat; four, the threat was so clear, immediate, unconditional, and specific that it communicated to James Sanders a serious intention and the immediate prospect that the threat would be be [*sic*] carried out; five, the threat actually caused James Sanders to be in sustained fear for his own safety; and six, James Sanders' fear was reasonable under the circumstances."

"A trial court has a sua sponte duty to instruct the jury on a lesser included uncharged offense if there is substantial evidence that would absolve the defendant from guilt of the greater, but not the lesser, offense. [Citation.]" (*People v. Simon* (2016) 1 Cal.5th 98, 132.) Attempted criminal threats is a lesser included offense of criminal threats. (*People v. Chandler* (2014) 60 Cal.4th 508, 513.) A defendant may be convicted of attempted

criminal threats when all the elements of criminal threats are proved but the victim did not have sustained fear upon hearing the threat. (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 607.)

"Sustained fear occurs over 'a period of time "that extends beyond what is momentary, fleeting, or transitory."' [Citation.] 'Fifteen minutes of fear . . . is more than sufficient to constitute "sustained" fear for purposes of . . . section 422.' [Citations.]" (*People v. Wilson* (2015) 234 Cal.App.4th 193, 201.) Fear that lasts as little as one minute can satisfy the sustained fear element of criminal threat. (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349 [threat to kill immediately coupled with display of weapon].)

We will assume for purposes of this opinion that the trial court erred in failing to instruct the jury on the lesser included offense of attempted criminal threats. (See*, e.g., People v. Larsen* (2012) 205 Cal.App.4th 810, 824 [""""Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused."""""]) Even assuming such error, a reversal is appropriate only if "'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred ([*People v.*] *Watson* [(1956)] 46 Cal.2d 818, 836.)" (*People v. Breverman* (1998) 19 Cal.4th 142, 178.)

"[E]vidence sufficient to warrant an instruction on a lesser included offense does not necessarily amount to evidence sufficient to create a reasonable probability of a different outcome had the instruction been given." (*People v. Banks* (2014) 59 Cal.4th 1113, 1161, abrogated on another point by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.) Thus, when there is "'some

evidence'" that a victim's fear was momentary, fleeting, or transitory, but the "far more plausible inference" is that the fear was sustained, the trial court's failure to instruct on attempted criminal threats is harmless. (See *ibid.*)

Sanders testified that when he saw the baton in defendant's hand, he felt threatened and backed into the front yard. Defendant followed. As they walked, Sanders kept his distance as he was concerned that defendant would hit him with the baton. Sanders asked defendant, "'Why would you come to the door with something behind your back if I'm just coming to talk to you?'" Sanders was scared of the baton.

When defendant told Sanders that he was a member of "Payback Crip" and that he had more guns in the back, Sanders took the claims as a threat that defendant was going to "shoot [him] next." When asked if he thought defendant was going to shoot him "right then," Sanders responded, "[Defendant] could have, yes." Sanders testified that he was "really scared" that defendant was going to shoot him and L.W. Sanders left because he believed it was possible that defendant was going to kill him and L.W.

When Sanders later returned for L.W.'s paycheck, he was still afraid that defendant could harm or hurt him. He returned because he believed that L.W. needed to be paid for the work she performed. Asked what made him feel as though he could return for the check and not be shot, Sanders responded, "Basically, when I came back, I just—I thought I was going to see [defendant's] wife. I didn't think I was coming back to see [defendant] outside. And at the same time I still felt threatened but I still came back." He further explained whoever responded to his text about returning to pick up the check said that there

would not be "an issue." When Sanders returned and saw defendant and not Willis, he still stopped to get L.W.'s paycheck explaining that he might have used bad judgment, but he believed L.W. needed to be paid for her work.

Defendant argues there was evidence that Sanders was not in sustained fear for his safety because he remained in defendant's yard and argued with defendant for 30 seconds after defendant threatened him and Sanders returned to defendant's residence minutes after leaving to get L.W.'s paycheck. Although this is "some evidence" that Sanders's fear was momentary, Sanders testified that he felt threatened when he saw the baton in defendant's hand, "really scared" when defendant threatened to shoot him, and continued to feel threatened when he returned to collect L.W.'s paycheck. The inference from Sanders's testimony that his fear was sustained was thus far more plausible than that it was momentary, fleeting, or transitory. Accordingly, even if we assume error, the error was harmless.

B. *Senate Bill No. 1393*

Senate Bill No. 1393, which became effective on January 1, 2019 (after defendant's sentencing), amended sections 667 and 1385 to give the trial court section 1385 discretion to strike five-year sentence enhancements under section 667, subdivision (a)(1) in furtherance of justice. Defendant contends that in light of Senate Bill No. 1393 we must remand this matter to the trial court to allow it to exercise its section 1385 discretion whether to strike his section 667, subdivision (a)(1) enhancement. The Attorney General agrees the new law applies in this case, but argues that remand is unnecessary as the trial court's

comments at sentencing clearly indicate that it would not strike the five-year enhancement.

"'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.'" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

At defendant's sentencing hearing, the trial court noted that defendant had a prior sexual battery conviction and three prior rape convictions and had two sexual battery convictions in this case. The trial court stated, "You're a predator on these women. You may not think so, but it's clear to this court you are." It added that defendant continued to deny the sexual batteries in this case and lacked remorse.

The trial court stated that it had "no desire" to dismiss any of defendant's prior strike convictions. Describing two of defendant's prior rape convictions, the trial court said, "I want the record to be very clear, I find these to be very serious, incredibly egregious prior offenses. Although they were committed in 1989, you were only paroled in 2014, and you committed these offenses within three years while you were still on parole, and as I indicated, in 1985 you were convicted of the same offense, sexual battery, and you were convicted in counts 3 and 4 here. So I want the record to be very clear, the court would

not under any circumstance exercise its discretion under 1385 and *Romero*[4] to dismiss those priors. They're just way too egregious based on those facts as well as your lengthy incarceration as well as committing the offense while you're on parole here."

The Attorney General argues the trial court's remarks at sentencing clearly indicate the trial court believed it would not have been in furtherance of justice to reduce defendant's punishment for any reason and, accordingly, the trial court would not have dismissed defendant's section 667, subdivision (a)(1) enhancement. However, at the same time the trial court made its remarks about the impropriety of striking any of defendant's prior Three Strikes convictions, it dismissed one of defendant's convictions for possession of a collapsible baton[5] and the section 667.5, subdivision (b) enhancement under section 1385 in furtherance of justice. Thus, it is unclear whether the trial court would have dismissed the section 667, subdivision (a)(1) enhancement if it had discretion to do so. Accordingly, we remand the matter to the trial court to permit it to consider whether to exercise its discretion to strike defendant's section 667, subdivision (a)(1) enhancement under section 1385.

C. *Pitchess Motion*

Before trial, the trial court granted defendant's *Pitchess* motion as to complaints that Detective Salas had falsified police reports and planted evidence. After an in camera review of

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4 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

5 See footnote 2 above.

Detective Salas's personnel file, the trial court concluded there were no discoverable records. Defendant contends, and the Attorney General agrees, we should conduct an independent in camera review of the sealed record. We have independently reviewed the transcript of the in camera proceeding and, based on the trial court's description of the contents of the personnel file, conclude the trial court did not abuse its discretion in finding there were no discoverable documents. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

IV. DISPOSITION

The cause is remanded to the trial court to permit the court to consider whether to exercise its discretion to strike defendant's section 667, subdivision (a)(1) enhancement under section 1385. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.