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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ALFRED P. ROMO, Defendant and Appellant.	B266104 (Los Angeles County Super. Ct. No. VA137336)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed as modified.

Renee Rich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Alfred P. Romo of assault with a deadly weapon and making a criminal threat and found true a special allegation he had personally used a deadly weapon in committing the threat offense. On appeal Romo contends the trial court erred in denying his request for a pinpoint jury instruction on voluntary intoxication in connection with the criminal threat crime. We modify Romo's sentence to correct an error in the trial court's calculation of presentence custody credits and affirm in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

An information filed December 4, 2014 charged Romo with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] and making a criminal threat (§ 422, subd. (a)) and specially alleged he had used a deadly or dangerous weapon, a knife, in committing the threat offense (§ 12022, subd. (b)(1)). The information, as amended, also specially alleged Romo had suffered four prior serious felony convictions within the meaning of section 667, subdivision (a)(1), and the three strikes law (§§ 667, subds. (b)-(j); 1170.12)[2] and had served five separate prison terms for felonies (§ 667.5, subd. (b)). Romo pleaded not guilty and denied the special allegations.

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[1] Statutory references are to this code.

[2] The information initially alleged Romo had suffered three prior serious felony convictions within the meaning of section 667, subdivision (a)(1). It was amended at trial to add the fourth conviction, which had already been alleged under the three strikes law.

2. *The Trial*

According to the evidence at trial Eileen Bonilla, Romo's niece, had moved in with Romo in September 2014 to help him care for his 92-year-old mother (Bonilla's grandmother). On October 17, 2014 Romo became angry at Bonilla for failing to help with household cleaning or chores. He threw her things into the front yard and told her he wanted her to move out of the house. Bonilla ignored him. Romo then threatened to kill her, but Bonilla dismissed his threats as "just ranting." Bonilla became frightened, however, when Romo grabbed her from behind holding a kitchen knife. Bonilla escaped Romo's grasp, pushed him down and fled to her grandmother's room, telling her grandmother that Romo was going to kill her. Romo followed Bonilla, screaming at her that she had messed with the wrong person and that he was going to kill her. Safely behind the locked door of her grandmother's room, Bonilla used her cell phone to call her cousin, Sandra Velasquez, who called the 911 emergency number on Bonilla's behalf.

Los Angeles County Deputy Sheriff Andrew Debondt and his partner arrived at the house and had difficulty persuading Romo to come outside. When Romo finally came to the door, Deputy Debondt was able to grab and handcuff him. Deputy Debondt smelled alcohol on Romo's breath and believed Romo, who continued to yell and act belligerently, was drunk. Once handcuffed, Romo was able to walk to the deputies' vehicle without difficulty. Sheriff's deputies found the knife Romo had used in the kitchen drawer. Velasquez arrived at the house after Romo had been taken into custody. Velasquez testified that Romo was "going crazy and yelling at us and threatening us" and had "looked a little wild."

During a recorded telephone conversation while in custody the next day, Romo told his mother he had fought with Bonilla and "pulled a knife on her" because he "got mad."

Romo did not testify or present any witnesses in his defense.

3. *Jury Instructions, the Verdict and Sentence*

At the close of evidence Romo's counsel requested a pinpoint instruction on voluntary intoxication directed to the specific intent element of the offense of making a criminal threat, citing Deputy Debondt's testimony that Romo had appeared to be drunk. No specific form of instruction was proposed. The court denied the request, explaining there was no evidence that Romo's mental faculties had been affected by his consumption of alcohol.

The jury convicted Romo of assault with a deadly weapon and making a criminal threat and found true the special allegation he had used a knife when making the criminal threat. In a bifurcated proceeding Romo admitted he had suffered one prior serious felony conviction for burglary. The court held a court trial on the other specially alleged prior convictions and found true Romo had also suffered one prior serious felony conviction for robbery within the meaning of both section 667, subdivision (a)(1), and the three strikes law. The prosecutor did not attempt to prove the prior prison term allegations after the court stated it did not intend to impose that enhancement. Romo's motion to dismiss one or more of his prior qualifying strike convictions was denied,[3] and Romo was sentenced as a

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[3] In denying Romo's motion to dismiss one or more of his qualifying strike convictions, the court observed that 71-year-old Romo "has suffered 19 convictions. Eight of those are felonies.

third strike offender to an aggregate indeterminate state prison term of 36 years to life.

DISCUSSION

1. *The Denial of Romo's Request for a Pinpoint Instruction on Voluntary Intoxication Does Not Compel Reversal of His Conviction for Making a Criminal Threat*

a. *Governing law and standard of review*

To establish the crime of making a criminal threat, the People have the burden of proving beyond a reasonable doubt "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228; see generally *People v. Chandler* (2014) 60 Cal.4th 508, 521-523.)

Approximately one every other year of his entire life. And some of those years he was in prison. So his record is long and continuous and essentially without interruption . . . . The court believes it would be an abuse of its discretion to strike the strike."

The offense of making a criminal threat, therefore, is a specific intent crime. (§ 422, subd. (a); see *People v. Toledo, supra,* 26 Cal.4th at p. 227.) Evidence of voluntary intoxication, while inadmissible for most purposes (§ 29.4, subd. (a)), is admissible solely on the question whether the defendant actually formed a required specific intent when a specific intent crime is charged. (§ 29.4, subd. (b); see *People v. Williams* (1997) 16 Cal.4th 635, 677; see generally *People v. Williams* (2001) 26 Cal.4th 779, 790 [evidence of voluntary intoxication is admissible solely on the question of specific intent, not general criminal intent]; *People v. Atkins* (2001) 25 Cal.4th 76, 81 [same].)

"'[A]n instruction on the significance of voluntary intoxication [on specific intent] is a "pinpoint" instruction that the trial court is not required to give unless requested by the defendant.'" (*People v. Verdugo* (2010) 50 Cal.4th 263, 295; accord, *People v. Myles* (2012) 53 Cal.4th 1181, 1217 ["absent a defense request, the trial court ha[s] no duty to instruct" on "how voluntary intoxication may have affected his ability to form the [requisite] specific intent"].) Even when requested, the court is obligated to instruct on voluntary intoxication "'only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's "actual formation of specific intent."'" (*Verdugo,* at p. 295; accord, *People v. Williams, supra*, 16 Cal.4th at p. 677.) Evidence that the defendant consumed alcohol or other intoxicating substances, without more, is not sufficient to warrant the instruction; there must be some evidence from which a reasonable jury can infer that the consumption of the substance affected the defendant's actual

formation of specific intent. (*Verdugo,* at p. 296; *Williams,* at pp. 677-678; *People v. Horton* (1995) 11 Cal.4th 1068, 1119.)

"In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.'" (*People v. Salas* (2006) 37 Cal.4th 967, 982.) We review the record de novo and independently determine whether it contains substantial evidence supporting the requested instruction. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; *People v. Sisuphan* (2010) 181 Cal.App.4th 800, 806.)

b. *The failure to give the pinpoint instruction on voluntary intoxication was not prejudicial error*

Romo did not propose a specific instruction on voluntary intoxication at trial. On appeal he contends the court should have given the jury a modified version of CALCRIM No. 3426[4]

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[4] CALCRIM No. 3426 provides, "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted [or failed to do an act] with ____<*insert specific intent or mental state required . . . .*> [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] In connection with the charge of____ , < *insert first charged offense requiring specific intent or mental state*> the People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with ____ <*insert specific intent or mental state required. . . .*> If the People have not met this burden, you must find the defendant not guilty of ____ <*insert first charged offense requiring*

because Deputy Debondt's testimony that Romo smelled of alcohol and seemed to him to be "drunk" was substantial evidence from which the jury could have inferred he was intoxicated and unable to form the requisite specific intent at the time he threatened to kill Bonilla.

The trial court denied Romo's request on the ground there was scant, if any, evidence that alcohol had affected Romo's mental state. That ruling appears to have been correct: There was no evidence, for example, as to when Romo consumed alcohol, the type or quantity of alcohol he consumed or whether his "belligerent" behavior was inconsistent with his actions while sober. (See *People v. Marshall* (1996) 13 Cal.4th 799, 848 [no error in failing to give intoxication instruction; "[a]lthough the offenses were committed . . . after [the defendant] had drunk an unspecified number of alcoholic drinks over a period of some hours, evidence of the *effect* of defendant's alcohol consumption on his state of mind was lacking]"; *People v. Williams, supra,* 16 Cal.4th at p. 677 [court not required to give defendant's requested pinpoint instruction on voluntary intoxication despite evidence defendant was "'doped up'" and "'probably spaced out'"; "[a]ssuming this scant evidence of defendant's voluntary intoxication would qualify as 'substantial,' there was no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent"].)

Even if Deputy Debondt's testimony during cross-examination, particularly his belief that Romo was drunk at the time of his arrest, was sufficient to warrant a pinpoint

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specific intent or mental state.> [¶] You may not consider evidence of voluntary intoxication for any other purpose."

instruction on voluntary intoxication in connection with the criminal threat offense, it is not reasonably probable the failure to give such an instruction affected the verdict on that count. (See *People v. Pearson* (2012) 53 Cal.4th 306, 325, fn. 9 ["[t]he failure to give a fully inclusive pinpoint instruction on voluntary intoxication did not . . . deprive [defendant] of his federal fair trial right or unconstitutionally lessen the prosecution's burden of proof"; accordingly, if instructional error is shown, reversal is required only if it is reasonably probable the jury would have reached a result more favorable to the defendant absent the error]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1134-1135 [failure to properly instruct on voluntary intoxication subject to standard for state law error]; *People v. Larsen* (2012) 205 Cal.App.4th 810, 830-831 ["erroneous failure to give a pinpoint instruction is reviewed for prejudice under the *Watson* harmless error standard"; the question in such circumstances "'is not what a jury *could* have done, but what a jury would *likely* have done if properly instructed'"].)

Here, not only was there no evidence as to when Romo had consumed alcohol or the quantity he had consumed, but also the evidence of actual intoxication was thin and of Romo's unimpaired mental state, strong. (See *People v. Mendoza, supra,* 18 Cal.4th at p. 1134 ["[e]vidence of intoxication, while legally *relevant*, may be factually unconvincing"].) As Bonilla spoke to emergency personnel over the telephone, Romo, comprehending her call for help, told her to go ahead and call the police, he was "not afraid." Romo had no difficulty walking—he fell down only after Bonilla had pushed him—and Deputy Debondt testified he was able to walk to the car without any problem. Bonilla, who had been with Romo before the attack, was not asked, and did not

testify, that Romo had been drinking nor did Romo's counsel argue to the jury that Romo had been drunk and too impaired to form specific intent.[5] Moreover, when describing the incident to his mother, Romo stated he had threatened Bonilla because she had made him "mad," not because he had been drunk and did not know what he was doing. The evidence was undisputed that Romo, holding a large kitchen knife, threatened to kill Bonilla, telling her she had "messed with" the wrong person. On this record the failure to give a pinpoint instruction on voluntary intoxication does not compel reversal of Romo's conviction for making a criminal threat.

2. *The Trial Court Did Not Improperly Exclude Evidence Relating to Romo's Drug Use*

Romo asserts the trial court improperly excluded evidence of his drug use. In fact, the court made no such ruling. Prior to trial the court stated, "The court has had [a] discussion with counsel regarding some evidentiary issues and it has been agreed that the following will not be gone into without the express[] permission of the court. First of all, there will be no testimony

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[5] The court's ruling denying Romo's request for a pinpoint instruction did not preclude Romo's counsel from arguing that Romo was intoxicated at the time of the offense and unable to form the requisite specific intent. (See *People v. Larsen, supra,* 205 Cal.App.4th at p. 831 [court's ruling denying request for pinpoint instruction on effect of mental illness on element of specific intent did not preclude counsel from either introducing evidence of mental impairment or arguing that impairment affected defendant's ability to form specific intent]; see also *People v. Ervin* (2000) 22 Cal.4th 48, 91 [arguments of counsel relevant in applying *Watson* test].)

about Mr. Romo being involved in drugs. . . ." At no time did Romo seek to introduce evidence of his drug use, nor did he make any offer of proof as to what that evidence would have been. Accordingly, Romo has not shown error or otherwise demonstrated any entitlement to relief. (See *People v. Holloway* (2004) 33 Cal.4th 96, 133 ["[a] tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the evidence itself"]; see also Evid. Code, § 354 ["[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence" unless the error resulted in a miscarriage of justice and the "substance, purpose, and relevance of the excluded evidence was made known to the court"].)

3. *Romo's Sentence Is Modified To Correct a Miscalculation in Presentence Custody Credits*

A defendant is entitled to actual custody credit against his or her sentence for all days spent in custody while awaiting sentencing, up to and including the date sentence is imposed. (§ 2900.5, subd. (a); *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48.) In addition, a defendant may earn additional presentence credit for performing assigned labor and complying with applicable rules and regulations (conduct credit). For those defendants convicted of nonviolent felonies—felonies not specified in section 667.5, subdivision (c)—the rate of accumulated conduct credit is one to one. That is, a "term of four days will be deemed to have been served for every two days spent in actual custody . . . ." (§ 4019, subd. (f); cf. § 2933.1 [limiting

good conduct credit to no more than 15 percent of actual custody credit for persons convicted of specified violent felonies].)

The trial court awarded Romo 155 days of presentence custody credits and 23 days of conduct credit. As the Attorney General concedes, neither calculation is correct. Romo, who was arrested and booked into custody on October 17, 2014 and sentenced on July 30, 2015, spent 287 days in actual custody and was entitled to 287 days of actual custody credit.[6] As for conduct credits, the 15 percent limitation for persons convicted of violent felonies was not applicable to Romo as neither of Romo's felonies (assault with a deadly weapon and making a criminal threat) is specified in section 667.5, subdivision (c). (See *People v. Thomas* (1999) 21 Cal.4th 1122, 1130 [although defendant sentenced to life imprisonment as a recidivist, and a life sentence is one of the categories enumerated in section 667.5, subdivision (c), the limitation on conduct credit in section 2933.1 applies only when the defendant's current conviction is subject to life imprisonment, "not when it is so punishable solely due to his status as a recidivist"].) The trial court should have awarded Romo 286 days of conduct credit. (See *People v. Whitaker* (2015) 238 Cal.App.4th 1354, 1358-1360 [a defendant who was in actual custody for an odd number of days does not receive conduct credit for final day of actual custody]; *In re Marquez* (2003) 30 Cal.4th 14, 25-26 [same].) Accordingly, we modify the judgment to award 287 days

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[6] After the Attorney General cited some ambiguity as to when Romo was booked into custody, we granted Romo's motion to augment the record with a document from the Los Angeles County Sheriff's Department Inmate Information Center, indicating Romo was arrested and booked on October 17, 2014.

of custody credit and 286 days of conduct credit for a total of 573 days of presentence credit.

DISPOSITION

The judgment is affirmed as modified. The superior court is directed to prepare a corrected abstract of judgment to reflect an award of 287 days of actual custody credit and 286 days of conduct credit and forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.