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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CHARLES JEFFREY DAVIS, Defendant and Appellant.	B268174 (Los Angeles County Super. Ct. No. NA098670)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero and Jesse I. Rodriguez, Judges. Affirmed.

Kyle D. Smith, 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, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Charles Jeffrey Davis was convicted by a jury of committing a battery on a cohabitant, making criminal threats, and possession of a firearm by a felon. Davis contends on appeal that his sentence for battery on a cohabitant should have been stayed under Penal Code section 654[1] because he had a single criminal intent and objective in committing the battery and making the criminal threat. He also contends that *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) requires that a jury make the factual finding whether or not a defendant has the requisite separate intents or objectives for section 654 to apply. Davis asserts ineffective assistance of counsel with respect to his conviction for possession of a firearm by a felon based on his trial counsel's failure to object to the trial court's response to a jury question. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

The second amended information charged Davis with corporal injury on a cohabitant (§ 273.5, subd. (a); count 1), making criminal threats (§ 422, subd. (a); count 2), assault with a firearm (§ 245, subd. (a)(2); count 3), and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 4). The information alleged as to counts 2 and 3 that Davis personally used a firearm in the commission of the offenses (§ 12022.5, subd. (a)) and he suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1). The information alleged as to all counts that Davis suffered a prior serious or violent felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(j),

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[1] All further statutory references are to the Penal Code.

1170.12). Davis pleaded not guilty and denied the special allegations.

B. *The Prosecution Case*

Davis lived with his girlfriend, Ynitta Andrews, and their young daughter in an apartment in Harbor City. On the afternoon of March 21, 2014 Andrews was on the bed in the bedroom of their apartment with their daughter, who was taking a nap beside her. Davis accused her of cheating on him, and searched through her cell phone, questioning her about what was on her phone. Then Davis "just snapped" and punched her in her face with the hard cast he had on his left arm. Andrews cried, and Davis left the room. Their daughter continued to sleep. Andrews's face had a reddish bruise and started to swell.

Less than a minute later Davis came back into the bedroom. He said, "I'm tired of your shit. I'm tired of putting up with it. I'm not gonna deal with your shit no more. I'm gonna kill you." Andrews was scared. She walked toward the bathroom and waited until Davis "finished ranting [and] raving." Davis then went into the living room while Andrews stayed in the bedroom. Andrews was unable to reach her mother to call for help, so she called a coworker and asked the coworker to call her mother and the police. Andrews's mother received a text saying that Davis "ha[d] a gun to her head." She talked to Andrews briefly, then called the police.

Andrews left the apartment and took their daughter to the front of the apartment building. She was outside when Los Angeles Police Officers Danny Shry and Carlos Meza arrived. Andrews told the officers Davis was upstairs, then took them up to the apartment. She also told the officers that Davis kept a gun in the kitchen cabinet. Andrews went downstairs while the officers

searched the apartment. When the officers looked inside, Davis was not there. One kitchen cabinet door was ajar, and the officers observed a bottle of gun cleaner and a gun-cleaning tool inside the cabinet, but no gun.

While Andrews waited outside, Davis approached her from behind, coming from the direction of the carport. As the officers took Davis into custody, he told Andrews, "Baby, tell them I didn't do anything." The officers then searched the carport and found a loaded handgun under the tire of a vehicle. Andrews confirmed the gun was the one Davis used to threaten her.[2]

After the officers took Davis into custody, Andrews told them that Davis had hit her and threatened her with a gun in the past. According to Meza, Andrews "was scared, nervous, a little confused, upset [and] crying." Meza testified that Andrews told the officers the incident started after she confronted Davis about his cheating on her. She told Davis she was leaving him and started to pack. Davis hit her, and said he was "not going to let any bitch do this to [him]." Andrews believed this referred to her leaving and taking the baby. At trial Andrews denied she told this to the officers.

On April 16, 2014 Davis called his mother from jail, which call was recorded. He stated as to the gun: "Okay the part about me having a gun, I always had a gun mom, I ain't going to lie to you, I had a gun since you been there you know." He added: "It's

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[2] Andrews testified that when Davis returned to the bedroom, he had a gun and held it to her head as he threatened to kill her. However, the jury found the allegation that Davis used a firearm in the commission of the crime of making criminal threats not true and returned a not guilty verdict on count 3 for assault with a deadly weapon.

never in the house. It's always been outside stashed and she know that. I always had a gun . . . . I had it for protection." Davis added, "But I never [waved] the gun at her or anything like that you know . . . ."

C. *The Defense Case*

The manager of the apartment complex in which Davis and Andrews lived saw Andrews frequently at the apartment. He never received complaints of fighting in the apartment, and he never saw Andrews with any injuries.

Marissa Tipton, the girlfriend of Davis's brother, was close to Andrews. She knew Andrews for about two-and-a-half years, and saw her two to three times a week. Tipton never saw Andrews with any injuries; neither did Andrews ever complain that Davis beat her.

D. *Jury Verdict and Sentencing*

The jury found Davis guilty on count 1 of the lesser included offense of misdemeanor battery on a cohabitant (§ 243, subd. (e)(1)) and on count 2 of making criminal threats. However, the jury found the allegation that Davis used a firearm in the commission of the offenses charged in counts 2 and 3 not true. The jury found Davis not guilty on count 3 of assault with a firearm and guilty on count 4 of possession of a firearm by a felon.

Davis admitted he suffered a prior conviction for robbery (§ 211), which was a serious or violent felony under the three strikes law (§§ 667, subds. (b)-(j), 1170.12), and a serious felony for purposes of sentencing under section 667, subdivision (b). The trial court denied Davis's motion to strike the prior conviction. (§ 1385; *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.)

The trial court selected count 2 (making criminal threats) as the base term and sentenced Davis to the upper term of three years, doubled as a second strike, plus five years under section 667, subdivision (b), for the prior serious felony conviction, for a total of 11 years on this count. The court sentenced Davis to a consecutive term of eight months on count 4 (one-third of the middle term of two years), doubled as a second strike, for an additional one year four months. Finally, it imposed a consecutive one-year term on count 1, for a total aggregate term of 13 years four months.

DISCUSSION

A. *The Trial Court Did Not Err in Refusing To Stay Davis's Sentence for Battery on a Cohabitant Under Section 654*

Section 654, subdivision (a), provides that "[a]n 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."

As the Supreme Court has stated: "'"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."'" (*People v. Capistrano* (2014) 59 Cal.4th 830, 885 [crimes of carjacking and home invasion robbery could be separately punished even though they occurred in temporal proximity because the defendant had two distinct purposes in committing the crimes], overruled on other grounds by

People v. Hardy (2018) 5 Cal.5th 56, 104; accord, *People v. Jackson* (2016) 1 Cal.5th 269, 354 [crimes of burglary-robbery and murder were punishable as "'two distinct crimes of violence'" accomplished through separate actions]; *People v. Britt* (2004) 32 Cal.4th 944, 951-952 [§ 654 barred punishment for violation of two sex offender registration requirements for a single act of moving without reregistering].) However, section 654 does not bar multiple punishment "when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous." (*Britt*, *supra*, at p. 952.)

1. *Apprendi Does Not Require the Jury To Make Factual Findings Under Section 654*

Davis contends the determination whether he harbored multiple criminal objectives should have been made by the jury under *Apprendi*. The United States Supreme Court in *Apprendi* held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490.)

Davis urges us to disavow our reasoning in *People v. Cleveland* (2001) 87 Cal.App.4th 263 (*Cleveland*), in which we concluded that *Apprendi* does not apply to factual findings under section 654. (*Cleveland, supra*, at p. 265.) We stated: "[S]ection 654 does not run afoul of the rule announced in *Apprendi*. The question of whether section 654 operates to 'stay' a particular sentence does not involve the determination of any fact that could increase the penalty for a crime beyond the prescribed statutory maximum for the underlying crime." (*Id.* at p. 266.) We explained: "Unlike in the 'hate crime' provision in *Apprendi*, section 654 is not a sentencing 'enhancement.' On the contrary, it

is a sentencing 'reduction' statute. . . . [W]hen section 654 is found to apply, it effectively 'reduces' the total sentence otherwise authorized by the jury's verdict." (*Id*. at p. 270.)

Every court that has considered this issue has similarly concluded that because section 654 operates to decrease the punishment for a crime, *Apprendi*'s requirement that the jury make certain factual findings does not apply. (See *People v. Deegan* (2016) 247 Cal.App.4th 532, 547 ["*Apprendi* does not apply to determinations made by a trial court under section 654 because that statute entails sentencing reduction rather than a sentencing enhancement."]; *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1229 ["The rule of . . . *Apprendi* . . . does not apply to the determination that defendant does not come within section 654 because that finding is not a factual determination made by a judge that increases the maximum statutory penalty for the particular crime or crimes."]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1022 [following the reasoning in *Cleveland*]; see also *People v. Jackson*, *supra*, 1 Cal.5th at p. 354 ["Intent and objective are factual questions for the trial court, which must find evidence to support the existence of a separate intent and objective for each sentenced offense."].)

Our reasoning in *Cleveland* remains sound, and we decline to adopt a different rule.

2. *Substantial Evidence Supports the Trial Court's Determination That Section 654 Did Not Bar Punishment for Davis's Conviction for Battery on a Cohabitant*

Davis contends section 654 barred punishment for both battery on a cohabitant and making criminal threats because he harbored a single criminal objective in the commission of both

crimes—expressing his "anger about allegations of infidelity." We disagree.

"'Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence.'" (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1378; accord, *People v. Osband* (1996) 13 Cal.4th 622, 731.)

Although the trial court did not make an explicit finding that Davis had a separate objective in committing the battery and making a criminal threat,[3] on appeal we will uphold the trial court's implied finding that the defendant had multiple criminal objectives if it is supported by substantial evidence. (*People v. Osband*, *supra*, 13 Cal.4th at p. 731 ["substantial evidence supports the implicit determination that [the defendant] held the dual objectives of rape and murder during his attack on [the victim]"]; *People v. Islas* (2012) 210 Cal.App.4th 116, 129 ["When a trial court sentences a defendant to separate terms without making an express finding the defendant entertained separate objectives, the trial court is deemed to have made an implied finding each offense had a separate objective."].)

Here, the evidence established that Davis punched Andrews in her jaw, left the room, then returned and threatened to kill her.

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[3] The trial court stated only that there was no connection between the battery and the making of a criminal threat because the jury found the gun was not used in connection with either offense.

Although Davis returned to the room less than a minute after he hit her, "'[i]t is [the] defendant's intent and objective, not temporal proximity of his offenses, which determine whether the transaction is indivisible.'" (*People v. Capistrano*, 59 Cal.4th at p. 886.)

There is substantial evidence to support an implied finding that Davis hit Andrews out of anger over her cheating (or her accusation of him cheating), but returned to threaten her to prevent her from leaving him and taking their daughter. Although Andrews denied at trial that the incident occurred after she told Davis she was leaving him because of his cheating, Meza testified Andrews told him this just after the incident. We must presume the existence of facts "'the trial court could reasonably deduce from the evidence.'" (*People v. Ortiz*, *supra*, 208 Cal.App.4th at p. 1378.)

In addition, there was substantial evidence to support a finding by the trial court that Davis had time "'to reflect and to renew his . . . intent before committing the next [offense].'" (*People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1289 [§ 654 did not bar punishment for arson and concealing the arson from his insurance carrier, but did bar punishment for arson and vandalism arising from a single act of setting the victim's house on fire]; accord, *People v. Felix* (2001) 92 Cal.App.4th 905, 915 [§ 654 did not bar punishment for two criminal threats made two hours apart on the same day].)

The cases relied on by Davis in which there was a single attack are distinguishable. For example, in *People v. Flowers* (1982) 132 Cal.App.3d 584, the court concluded section 654 applied where the defendant had one purpose to rob the victim, and committed an assault to "perfect the robbery." (*Id.* at p. 589.) In *People v. Pitts* (1990) 223 Cal.App.3d 1547, where the defendant

hit the victim and slashed her with a box cutter, the People conceded "'there was only one act'" and therefore the defendant could not be separately punished for mayhem and assault. (*Id*. at pp. 1552, 1560.)

The facts here are more similar to those in *People v. Nubla* (1999) 74 Cal.App.4th 719, in which, after an argument, the defendant pushed his wife onto the bed, then pointed a gun at the back of her head, then into her mouth. (*Id*. at p. 730.) The court concluded the defendant's act in pushing his wife onto the bed was not done as a means of putting the gun into her mouth. Rather, similar to the commission of multiple sex offenses, the crimes of corporal injury on a spouse and assault with a deadly weapon were separate acts for purposes of section 654. (*Nubla*, at p. 731.)

Here too the criminal threat did not further the battery; neither did the battery facilitate the criminal threat. The fact that both were done in succession does not mean Davis had the same criminal objective. We conclude substantial evidence supports a finding to the contrary. Accordingly, the trial court did not err in sentencing Davis for both crimes.

B. *Davis Has Not Shown Ineffective Assistance of Counsel Based on His Trial Counsel's Failure To Object to the Trial Court's Response to the Jury's Question as to Count 4*

1. *Proceedings Below*

During deliberations, the jury submitted two questions regarding count 4 for possession of a firearm by a felon: "Do we need 2 pecies [*sic*] of evidence for Count 4? Does Count 4 apply to only this gun?" At the time of the question the prosecutor was in the courtroom; defense counsel was not. The trial court[4] read the

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[4] Judge Jesse I. Rodriguez was sitting in for the trial judge.

jury's questions to defense counsel over the speaker phone. Both the prosecutor and defense counsel stated they understood the questions. The court stated its intention that it would "not respond in writing, just read to them instruction 2511 dealing with count No. 4."

Defense counsel indicated he was driving and did not "understand what that instruction is about." The court explained that CALCRIM No. 2511 was the instruction "dealing with count 4 only." Defense counsel responded, "I understand it now, yes." He added, "I'm fine with what the court wants to do. I think that's the only thing we should do, anyway." The prosecutor also agreed.

The court then reinstructed the jury with CALCRIM No. 2511 as to the elements of possession of a firearm by a felon.[5] It told the foreperson, "At first glance, it appears to this court, subject to the discussions that I have had with the attorneys, that this is applicable to your two questions." The court added that if the jury had any other questions, the foreperson should put them in writing. The foreperson responded, "I do. However—" The trial court interrupted by stating, "If you have any other questions, you must put them in writing." The foreperson responded, "Okay." The jury did not ask any additional questions regarding count 4; its only additional question was what to do if it was deadlocked as to the "greater" charge on count 1 (corporal injury to a cohabitant).

The trial court had previously instructed the jury with CALCRIM No. 359 that "[t]he defendant may not be convicted of

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[5] The court instructed the jury in pertinent part: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant possessed a firearm; [¶] 2. The defendant knew that he possessed the firearm; [¶] AND [¶] 3. The defendant had previously been convicted of a felony."

any crime based on his out-of-court statements alone. You may rely on the defendant's out-of-court statements to convict him only if you first conclude that other evidence shows that the charged crime was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed." The trial court did not reread this instruction.

2. *Applicable Law*

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to show that (1) his or her """"counsel's representation fell below an objective standard of reasonableness under prevailing professional norms""" and (2) he or she """"suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome.""" (*People v. Johnson* (2016) 62 Cal.4th 600, 653; accord, *People v. Mickel* (2016) 2 Cal.5th 181, 198; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-692.)

""""[I]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.""" (*People v. Johnson, supra*, 62 Cal.4th at p. 653; accord, *People v. Carrasco* (2014) 59 Cal.4th 924, 982.)

3. *Davis Has Not Met His Burden To Show Ineffective Assistance of Counsel*

Davis contends his attorney did not comport with professional norms by failing to object to the trial court's response to the jury's questions. Specifically, Davis argues that the trial court failed to "define the number of pieces of evidence by which

count four was required to be proven" or to provide "an instruction clarifying that the jury could not convict [Davis] on count four based solely on the statements he made in the recorded jail phone call."[6]

Section 1138 provides in pertinent part that if the jury "desire[s]to be informed on any point of law arising in the case, . . . the information required must be given . . . ." However, as the Supreme Court has explained, the court's duty under section 1138 to help the jury understand applicable legal principles "does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97 (*Beardslee*); accord, *People v. Brooks* (2017) 3 Cal.5th 1, 97 [trial court did not abuse its discretion in refusing to elaborate on jury instruction concerning mitigation relating to death sentence].)

The court in *Beardslee* cautioned: "But a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation

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[6] Davis also states that the trial court failed to answer the second question by clarifying whether count 4 applied "exclusively to the firearm discovered in the carport." However, Davis does not argue that his trial counsel was ineffective for failing to request clarification as to this question. Further, at trial there was only mention of a single gun, the one found in the carport. We therefore focus on the first question as to Davis's out-of-court statement.

is desirable, or whether it should merely reiterate the instructions already given. This court did not do so." (*Beardslee*, *supra*, 53 Cal.3d at p. 97.) In *Beardslee*, the Supreme Court concluded the trial court erred by failing to consider whether it would be desirable to explain to the jury how the instruction on deliberate and premeditated murder would apply where the defendant was an aider and abetter, but found no prejudice to the defendant. (*Id.* at pp. 97-98.)

Although Davis's trial counsel did not request the trial court to clarify specifically that the jury could not convict Davis on count four based solely on his statements on the recorded call from jail, that is precisely what CALCRIM No. 359, as read to the jury, says: "The defendant may not be convicted of any crime based on his out-of-court statements alone." Nothing in the record suggests the jury did not understand that a recorded call made from jail is not a statement made in court. Rather, Davis appears to argue that the trial court should have reread CALCRIM No. 359.[7] While it may have been a better practice for the trial court to have reread both CALCRIM No. 2511 and CALCRIM No. 359, in light of the fact the jury was already properly instructed, the failure of defense counsel to object to the trial court's proposed response did not fall below professional standards.

Moreover, on the record before us we cannot tell if there was a tactical reason for defense counsel not to request the trial court to reread CALCRIM No. 359, for example, so that the trial court

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[7] Davis asserted this argument—that the trial court should have reread CALCRIM No. 359 in response to the jury's question—in his written motion for a new trial on count 4. The trial court denied the motion, noting that the jury had previously been instructed with CALCRIM No. 359.

would not highlight Davis's confession to his mother on the recorded call. Where the record is silent as to why trial counsel acted or failed to act in a specific manner, the claim of ineffective assistance of counsel fails "'"unless there simply could be no satisfactory explanation."'" (*People v. Johnson, supra*, 62 Cal.4th at p. 653.)

Davis argues that his trial counsel was confused about the trial court's proposed response because he was driving at the time of the discussion with the trial court. However, although defense counsel initially indicated he did not understand the instruction the trial court intended to reread, after the trial court described the instruction, defense counsel responded, "I understand it now, yes." Further, defense counsel affirmatively agreed that this was the proper course, stating, "I think that's the only thing we should do, anyway."

The record does not support Davis's additional contention that the jury was confused by the trial court's response. Davis emphasizes that after the trial court reread CALCRIM No. 2511 and asked the foreperson whether he understood, the foreperson responded, "I do. However," at which point the trial court interrupted him to tell the jury they should put any further questions in writing. Davis seeks to read into the word "however" a sense of confusion. But this is mere speculation; we do not know what the foreperson intended to say. What we do know is that after the trial court told the jury to put further questions as to count 4 in writing, they did not.

Moreover, even if Davis could satisfy the first prong of the test for ineffective assistance of counsel, he cannot show that he "'"suffered prejudice to a reasonable probability."'" (*People v. Johnson*, *supra*, 62 Cal.4th at p. 653.) Given that the jury was properly instructed with CALCRIM No. 359, the jury was

informed that it could not find Davis guilty based solely on his out-of-court statement on the recorded call.

Because Davis cannot meet his burden as to either prong, he cannot prevail on his claim for ineffective assistance of counsel. (*People v. Johnson*, *supra*, 62 Cal.4th at p. 653.)

DISPOSITION

The judgment is affirmed.

FEUER, J.

We concur:

PERLUSS, P. J. SEGAL, J.