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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MARKEITH ANTIONE CLINTON, Defendant and Appellant.	B267193 (Los Angeles County Super. Ct. No. BA428025)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed as modified.

Linda L. Gordon, 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, Assistant Attorney General, Victoria B. Wilson and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Markeith Antione Clinton appeals the judgment following his conviction for domestic violence, burglary, criminal threats, and evading police. He claims reversal is warranted because the trial court refused to grant him a midtrial continuance to secure attendance of two witnesses. Alternatively, he claims his counsel was ineffective for failing to convince the court a continuance was necessary. We reject his contentions, correct certain sentencing errors, and affirm the judgment as modified.

PROCEDURAL BACKGROUND

Appellant was charged with injuring a former cohabitant (Nika C.) by a person with a previous conviction for domestic violence (Pen. Code, § 273.5, subd. (f)(1); count 2);[1] first degree burglary with a person present (§ 459; count 3); criminal threats (§ 422, subd. (a); count 4); first degree residential robbery (§ 211; count 5); grand theft of an automobile (§ 487, subd. (d)(1); count 6); and evading an officer with willful disregard (§ 2800.2, subd. (a); count 7). For count 2, it was alleged he personally inflicted great bodily injury under circumstances involving domestic violence. (§ 12022.7, subd. (e).) It was further alleged he had suffered three prior "strike" convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)); had suffered two prior serious felony convictions (§ 667, subd. (a)(1)); and had served five prior prison terms (§ 667.5, subd. (b)).

A jury found him guilty of counts 2, 3, 4, and 7 and not guilty of counts 5 and 6. The trial court found the prior conviction allegations true and sentenced him to 35 years to life on count 2, consisting of 25 years to life under the "Three Strikes"

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[1] All undesignated statutory citations are to the Penal Code unless otherwise noted.

law, plus two 5-year enhancements for the prior serious felonies, and a consecutive term of 16 months on count 7. The court imposed and stayed 25-year-to-life terms on counts 3 and 4. Appellant timely appealed.

FACTUAL BACKGROUND

The victim Nika C. and appellant had known each other since childhood. They got married in May 2012, and lived together for five days between September and October 2012 before they separated. Although their relationship ended in October 2012 and they were separated, they were not divorced. According to Nika C., appellant stalked her for about a year starting in October 2012.

On August 4, 2014, Nika C. lived in a duplex in Los Angeles with her six-year-old daughter Erica. Appellant did not live at the duplex, and Nika C. never listed him on the lease as a tenant. That morning, however, appellant's blue duffle bag was at Nika C.'s home because he had asked if he could wash his clothes there. After he finished his laundry, he left and told Nika C. he "was going on about his way."

Nika C. owned a black 2007 Chevy Tahoe, which was at an automotive body shop that day. After appellant left the duplex, he went to the shop, then returned to tell Nika C. the truck was ready. He left again. Nika C. picked up the truck and began to run errands. Appellant called her and asked if they could talk about letting him stay at her home and him giving her his "in-home support check." She told him she wanted him to go and take his things with him. He continued to call and text her throughout the day, and she continued to tell him to leave.

At approximately 5:00 p.m. that day, appellant returned to the duplex with his adult daughter Kia Nichols and met Nika C.

there. Nika C. told him she would give him back the $150 he had given her from his in-home support check. Appellant became angry and said he did not want the money back. He said she owed him more money and he was not going to leave the duplex. She told him once again she wanted him to leave and she drove away to continue her errands. Appellant walked away.

Nika C. returned home around 8:00 p.m. Appellant was there with Nichols. He said he was going to the store and would return. Nika C. told him to take his belongings, but he refused. She said she would put them on the porch, which she did.

Around 1:00 a.m., Nika C. was watching television in one of the bedrooms (the first bedroom) and Erica was asleep in another bedroom (the back bedroom). Nika C. heard noises like "things being knocked over," so she ran into the back bedroom and found appellant climbing through the window saying, "Bitch, I'm going to kill you," which scared her. Once inside, he charged at her, put his hands around her neck, and lifted her off the ground. He said, "[Y]ou put my things on the porch. Bitch, I'm going to kill you." He told her to go to the kitchen. She complied because he was larger than her and she was afraid of him. (She was four feet 11 inches tall and weighed 180 pounds; he was six feet four inches tall and weighed 300 pounds.) He hit her and "split [her left] eye open." She almost lost consciousness and blood obscured her vision.

She saw her young daughter Erica standing in the hallway. Appellant told Erica to go lie down, and she complied. Appellant kept hitting Nika C. and then told her to go into the back bedroom. She did. Appellant continued saying things like she was the "devil," "bitch, I'll kill you," and "you thought you were going to put my things out and take my money, bitch." He said if

she screamed, he was "going to cut Erica into a hundred pieces." Nika C. kept quiet and did not fight back, fearing he would kill her. He continued hitting her and threatening her, and he threatened to kill her neighbor Dorothy G., who lived in the other unit of the duplex.

After about an hour and a half, appellant stopped the attack. He told her she was "ugly" and to go take a bath. He also told her to give him her house keys, cell phone, and car keys. She gave him the items and went into the bathroom while he moved toward the front door. After taking a bath, she called her neighbor Dorothy G., jumped out of a window, and went to Dorothy G.'s back door. Between 1:00 and 2:00 a.m., Nika C. called 911 and told the operator she was in a domestic violence incident and appellant was "trying to kill" her. Approximately 10 minutes later, Dorothy G. called 911 and put Nika C. on the line, who pleaded with the operator and paramedics to help because her daughter Erica was still inside her home. When the paramedics arrived, they went with Nika C. to retrieve Erica next door. One of the paramedics saw someone drive away in a black car. Dorothy G. told Nika C. that appellant took her Tahoe.

Nika C. was taken to the hospital. She had suffered multiple injuries: her left eye was swollen shut; her left eyelid was split open and required stitches; her jaw was fractured; her mouth was split in two places; and her right pinky finger was dislocated. Her face and left eye remained swollen for approximately four months. When interviewed by police at the hospital, she said she had spent the last two years trying to reconcile with appellant and he assumed the role of father to Erica. She also said appellant would visit from time to time and

stay for a few days. And she said the incident began when appellant claimed she had cheated on him.

At around 1:30 a.m. on the night of the altercation, two Los Angeles police officers were on patrol in a marked police vehicle when one of them saw Nika C.'s black Tahoe travelling at a high rate of a speed—at least 25 miles per hour over the speed limit. They attempted to execute a traffic stop, but appellant did not stop. They pursued appellant for approximately 20 to 30 minutes, joined by two other police vehicles and a police helicopter. During the pursuit, appellant violated multiple traffic laws, including speeding, making unsafe lane changes, and running red lights. Even after he drove over a spike strip that deflated the Tahoe's tires, he kept driving. Once he stopped, he exited the Tahoe and ran until he was caught and arrested. Nika C. had not given him permission to drive her vehicle that day.

DISCUSSION

1. Request for a Continuance

Appellant contends the trial court abused its discretion and violated his constitutional rights to present a defense when it denied his request for a continuance during trial to secure the attendance of two witnesses. Alternatively, he argues that if we find the trial court properly denied the continuance, his counsel was ineffective for failing to demonstrate good cause for the continuance. We reject both contentions.

A. Background

The prosecutor ultimately presented only two witnesses in his case-in-chief, one of which was Nika C. As relevant here, when defense counsel cross-examined her, he asked her whether

appellant had given her $150 in cash. She said yes, and the following exchange occurred:

Defense counsel: "And after he gave you the money, you told him he could not stay at the duplex?"

Nika C.: "No, I in turn asked him did he want it back because he had watched me pay $700 rent, and $700 for my car note, and I told him he could have his $150 back."

Defense counsel: "Did you give him his $150 back?"

Nika C.: "He didn't want it."

Defense counsel: "Because he contributed to helping pay for the rent and for the car payment; correct?"

Nika C.: "No."

Defense counsel: "Well, did you use any of the money towards food, car payment or rent?"

Nika C.: "No, I paid my car note and my rent with my checking account. And, in turn, I had $500 in my drawer. But when he asked me for money, I told him I didn't have any."

Later, after the prosecution's two witnesses testified, the prosecutor advised defense counsel and the court he may rest the case-in-chief by that afternoon. The court asked whether defense counsel would be presenting an affirmative defense. Counsel responded: "There possibly would be an affirmative defense. I had witnesses lined up. Unfortunately, last night after I spoke to the People, I attempted to contact my witness Evette Laws. She's a nurse and they're having an assessment done at the hospital [where] she works. And also, she's having car problems. I attempted to get the investigator that was appointed on behalf of Mr. Clinton to see if he could make arrangements to get transportation for Ms. Laws, but he's unavailable today as well."

The court asked what Laws would say, and counsel replied: "Ms. Laws would testify regarding some of the rent, food and car payments that Mr. Clinton did. That she was aware that he went shopping for the family, that he was very close with Erica, Nika's daughter. That it was Mr. Clinton who moved out of the residence because of the abusive environment which was created by Nika. That Mr. Clinton received a settlement from a car accident and that he went back—" The court interrupted, "How is any of that relevant to what he did on the day in question?" It added, "At best, it's impeachment on collateral issues, was he paying rent, was he not paying rent." Counsel continued, "And then I had Kia Nichols who was present that day and I've been—I was unable to contact her last night. I left several messages and that's—" The court inquired whether counsel could get her over the lunch hour. Counsel said yes.

After the lunch break defense counsel informed the court: "It's my understanding that the People may rest at this time. And I did receive a phone call from them yesterday around 6:00 p.m. indicating that they may be concluding with their presentation of their case in chief and that I should have witnesses available by the afternoon. [¶] I attempted to contact my two witnesses. I was unable to get Ms. Yvette[2] Laws in. She had car problems and a work issue. And I was unable to contact Kia Nichols, although I left several messages for her since 6:00 o'clock last night indicating that we would be in Department 104 and that her testimony would be helpful and beneficial to the defense and that we requested that she be in the criminal courts

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2 Laws's first name is spelled as both "Evette" and "Yvette" in the reporter's transcript.

building at 1:30 on the 9th floor in Department 104. She's not here. I tried to call her over the lunch hour as well and I've had no successful contact with her."

Counsel confirmed Nichols had not been subpoenaed and the last time he had spoken to her was "Friday, which would have been July 31st, indicating that we were going to be sent out for trial on Tuesday and that her testimony would be necessary, and I have not spoken to her since Tuesday. I tried to leave a message for her on Tuesday, which is yesterday, letting her know the People's case would be concluding today, Wednesday, and that we would need her, but I've not spoken to her since July 31st which was a Friday. [¶] I gave her my cell phone number. I left messages, including my cell phone number, with her up until today at the lunch hour and have not had any successful contact."

Counsel claimed Nichols "was a percipient witness on the day in question. She was the one who dropped off Mr. Clinton." The court confirmed, however, that she was there earlier in the day, not "when [appellant] allegedly broke into the house." Defense counsel clarified "she was present during a little bit of [the] words being exchanged between Nika and Mr. Clinton." The court stated, "All right. So she really wasn't there for the events that are the subject of this case."

Turning again to Laws, defense counsel explained Laws was appellant's aunt "who is also referred to in Nika's testimony regarding some of the food that he had gotten and some of the payments that he had received to make contributions for Nika and her children." The court asked, "But she was not present on the day of the events?" Counsel confirmed she was not. The court asked if she was under subpoena, and counsel explained: "No. Each of them I spoke to and they both indicated that they

would agree to come in when called upon. And I tried to get the investigator to subpoena them, but he's been very busy. Mr. Clinton was pro per up until, I think, July 18th or 19th."

The court concluded: "Well, I just don't see that they would add much to the case. I think we ought to keep moving forward. Neither one was a percipient witness to the events. I don't feel that there's anything to be really discussed regarding motive on the part of the alleged victim. I mean, she's clearly beaten up. It's hard to believe she did that to herself. I think we ought to go forward. So if this is a request for a continuance, it is denied." Appellant did not testify or present any affirmative evidence in his defense.

After he was convicted, appellant moved for a new trial, arguing he had been denied a fair trial because the court refused to grant him "an additional day to call a defense witness, who had already been interviewed by the appointed private investigator." He claimed the additional witnesses would have been relevant to show Nika C.'s testimony was false and misleading. His defense theory was that Nika C. attacked him with a knife when he arrived to pick up his things and he struck her in self-defense. He did not attach declarations from the witnesses, but he attached reports from interviews conducted by the investigator.[3] Nichols reported appellant lived with Nika C. in June or July of 2014 and shared rent, food bills, and took care of Erica. While there, appellant had keys and had driven Nika C.'s truck several times. Nichols claimed Nika C. was jealous and threatened appellant several times while intoxicated.

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[3] Appellant attached a report of an interview with a third individual, Bridgette Tate, but he does not address her testimony in his appellate briefs.

Nichols did not believe appellant had ever stalked Nika C. or would ever harm Erica. Laws reported she had gone with appellant to shop for food for Nika C.'s house while he lived there. She claimed he had moved out to get away from Nika C., who was verbally abusive, but he later moved back in to help with finances. She denied he would ever harm Erica. The court denied the new trial motion, noting the witnesses were not present at the incident and there was no indication they would have been available had the court granted a trial continuance.

B. Denial of Continuance

"Continuances shall be granted only upon a showing of good cause. Neither the convenience of the parties nor a stipulation of the parties is in and of itself good cause." (§ 1050, subd. (e).) "Motions to continue the trial of a criminal case are disfavored and will be denied unless the moving party, under Penal Code section 1050, presents affirmative proof in open court that the ends of justice require a continuance." (Cal. Rules of Court, rule 4.113.) Under state law, we review the denial of a continuance for abuse of discretion, which occurs " 'only when the court exceeds the bounds of reason, all circumstances being considered.' " (*People v. Fuiava* (2012) 53 Cal.4th 622, 650.) In assessing claims under federal law, we "consider[] the circumstances of each case and the reasons presented for the request to determine whether a trial court's denial of a continuance was so arbitrary as to deny due process." (*People v. Doolin* (2009) 45 Cal.4th 390, 450.)

"When a continuance is sought to secure the attendance of a witness, the defendant must establish 'he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the

testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.' [Citation.] The court considers ' "not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion." ' " (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037 (*Jenkins*).)

The trial court did not abuse its discretion by denying a continuance for appellant to secure the attendance of Laws or Nichols. As the trial court correctly recognized, their testimony was collateral because neither of them was a percipient witness to the events on the night appellant attacked Nika C. Nonetheless, appellant claims their testimony was directly relevant to material issues because, in contrast to Nika C.'s testimony, it would have shown (1) he lived at the duplex, thereby providing a defense to burglary (see *People v. Smith* (2006) 142 Cal.App.4th 923, 930 (*Smith*) [one cannot burglarize one's own residence]); and (2) he acted in self-defense after Nika C. attacked him with a knife. Neither point is persuasive.

As to the burglary count, Laws's and Nichols's testimony did not show appellant had an "unconditional possessory right" to enter the duplex on the night of the assault. (*Smith, supra*, 142 Cal.App.4th at p. 931.) At best, it showed he contributed in some way to Nika C.'s rent and other bills, had driven her car occasionally, and had lived in her house at some point. But that does not contradict Nika C.'s testimony he was not listed as a tenant on the lease and did not live in the house on the night of the assault; she had told him multiple times that day to leave; and she had left his things in a duffle bag on the front porch that

night. She also testified without contradiction he broke into the duplex through a bedroom window in the middle of the night, which was inconsistent with him living there.

Similarly, Laws's and Nichols's testimony was not probative of self-defense because appellant's theory of self-defense was purely speculative. Although defense counsel raised the possibility Nika C. had attacked appellant with a knife, he offered no evidence whatsoever to substantiate that theory. Each time Nika C. was asked about that at trial, she denied it. Her uncontradicted testimony demonstrated appellant—who was physically much larger than her—broke into her house, threatened her, and brutally attacked her for an extended period of time, leaving her gravely injured, all while her young daughter was present. Then he took her Tahoe, fled the scene, and evaded police. While Nichols may have been present for an interaction between appellant and Nika C. earlier in the day, she provided no detail as to what occurred. Thus, even if Nichols or Laws testified that Nika C. had been abusive to appellant in the past, that would have done nothing to establish appellant acted in self-defense on the night of the attack.

Appellant also failed to show he could have secured Laws's and Nichols's appearance at trial within a reasonable time. (*Jenkins, supra*, 22 Cal.4th at p. 1038 [defendant must show continuance "would be useful in producing specific relevant mitigating evidence within a reasonable time"].) Defense counsel explained the problems he encountered attempting to get Laws to appear, who had work obligations and car trouble, and he was unable to get in touch with Nichols. He never explained when the witnesses might have become available, if at all. We have some doubt they would have been available within a reasonable

time, given appellant was apparently unable to obtain declarations from them to support his new trial motion, even though he filed the motion more than a month after trial.

Because appellant has not shown Laws's and Nichols's testimony was material and they would have been available within a reasonable time, the trial court's denial of a continuance was not so arbitrary as to violate appellant's due process rights. (*Jenkins, supra*, 22 Cal.4th at pp. 1039-1040.)

C. Ineffective Assistance of Counsel

Alternatively, appellant argues his counsel was ineffective for failing to secure a continuance. To show ineffective assistance, a defendant must demonstrate "counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) To establish prejudice, a defendant must show a reasonable probability that, but for counsel's failings, the result of the proceeding would have been more favorable to the defendant. (*Id.* at p. 694.)" (*People v. Hinton* (2006) 37 Cal.4th 839, 876.)

We need not decide whether defense counsel performed deficiently because our discussion above makes clear appellant suffered no conceivable prejudice. (See *People v. Holt* (1997) 15 Cal.4th 619, 703 [if defendant cannot show prejudice, then the court need not address whether counsel's performance was deficient].) As we have explained, Laws's and Nichols's proposed testimony was not probative of appellant's proposed defenses, so it would have done nothing to rebut the overwhelming uncontradicted evidence of defendant's guilt of the counts for which the jury found him guilty. Again, Nika C. testified he broke into her house through a bedroom window, threatened to

kill her and cut her daughter into pieces, and brutally assaulted her for an hour and a half with her daughter present. Her testimony was corroborated by her statement on the 911 call that she was in a domestic violence incident and appellant was "trying to kill" her. She suffered serious injuries, including a torn eyelid that required stitches, a fractured jaw, cuts in her mouth, and a dislocated finger. And once she escaped to a neighbor's house to call 911, appellant fled the scene and led police on a chase, violating numerous traffic laws in the process. Laws's and Nichols's proposed testimony would not have cast doubt on any of these facts, so a continuance to secure their attendance at trial would have had no impact on the outcome. Thus, appellant's ineffective assistance of counsel claim fails.

2. Five-Year Enhancement for Juvenile Adjudication

As part of appellant's sentence, the trial court imposed a five-year enhancement pursuant to section 667, subdivision (a)(1) for a prior juvenile adjudication in case No. J555186. The parties agree, as do we, that a juvenile adjudication does not qualify as a prior conviction triggering section 667, subdivision (a)(1). (*People v. West* (1984) 154 Cal.App.3d 100, 110.) This five-year enhancement must be stricken.

3. Indeterminate Abstract of Judgment

The record contains an abstract of judgment for the determinate term for count 7, but it does not contain an abstract of judgment for the indeterminate term imposed on count 2 or the indeterminate terms imposed and stayed on counts 3 and 4. An indeterminate abstract of judgment should be issued to reflect these indeterminate sentences. (§ 1213, subd. (a).)

DISPOSITION

The five-year enhancement under section 667, subdivision (a)(1) for the juvenile adjudication in case No. J555186 is stricken. The clerk of court is directed to issue an indeterminate abstract of judgment reflecting appellant's corrected sentences for counts 2, 3, and 4. As amended, the judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.