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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL GIPSON, Defendant and Appellant.	B259821 (Los Angeles County Super. Ct. No. YA082888)

APPEAL from a judgment of the Superior Court of Los Angeles County. Scott T. Millington, Judge. Affirmed.

Adrian K. Panton 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, Paul M. Roadarmel, Jr. and Amanda V. Lopez, Deputy Attorneys General for Plaintiff and Respondent.

Michael Gipson appeals from the judgment of conviction of assault with a deadly weapon. Appellant argues that the trial court erred and violated his fair trial and due process rights when it permitted the victim to testify concerning letters appellant wrote after he was arrested which portrayed him as a "violent bully." He also complains that the court erred in failing to instruct the jury on the lesser included offense of simple assault. As we shall explain, appellant has not demonstrated that any error in the admission of evidence resulted in prejudice. In addition, given appellant's use of a deadly weapon in the assault and his claim of self-defense, we find that the court was not required to instruct on simple assault. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Appellant and His Family*

Appellant and the victim, Versie Gipson (Versie)[1], are siblings. For nearly two decades, they, along with their brother, Aldo Gipson (Aldo), owned apartments in the same complex in Inglewood. Appellant and Aldo shared an apartment while Versie occupied another nearby unit.

The Gipson siblings struggled with addiction to illegal substances as well as mental health problems. Volatility and violence often permeated the family relationship. The Gipson siblings also had prior involvement with the criminal justice system. For example, in 1993, Versie suffered a conviction for firing a gun at Aldo, and in 1995, Versie shot appellant after a disagreement concerning appellant's apartment.

B. *The Crimes*

In the fall of 2011, Versie acted as the caregiver for Aldo, who suffered from terminal cancer.[2] At the time, appellant was in prison. A room in appellant's apartment

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[1] For the sake of clarity, not out of disrespect, we refer to individuals with the same surname by their first names.

[2] Aldo passed away in June of 2012.

had been rented to an individual known as "T-Man," and another person that also stayed there that Versie described as a cousin, Clarence Hoover. In mid-November 2011, appellant moved back into the apartment after his release from prison.

According to Versie, on the morning of November 22, 2011, she saw appellant smoking cocaine in his bedroom. Later that day at approximately 5:00 p.m., Aldo summoned Versie to the apartment. She found Aldo on the sofa crying. Aldo told Versie that appellant had threatened to kill him. At the time, Mr. Hoover and T-Man were sitting in the dining area of the apartment.

When Versie bent down to calm Aldo, appellant walked out of his bedroom and struck Versie under her left breast. Versie did not see anything in appellant's hand, and responded, "You hit like a bitch. What are you doing?" Versie then saw blood on her clothing and realized that appellant had cut her with something. She asked appellant, "You cut me? You cut me . . . you cut me?" Appellant responded loudly, "I'm gonna kill you, bitch," and walked towards her. He stabbed Versie in her left arm, saying "Die, bitch." Versie felt a sharp object stab her and saw that her arm was bleeding. Appellant said, "Ha ha ha, [I] told you I'm gonna kill you, bitch. Ha ha ha, I told you Imma [*sic*] kill you, bitch." Versie ran from the apartment, afraid that appellant was attempting to kill her.[3]

When the police arrived, appellant told them that Versie and two men with guns broke into the apartment to steal his cocaine. Appellant said he stabbed his sister with a pair of scissors, which he left on the floor of the apartment. The police found the scissors, but did not find any evidence of a break-in or forced entry. Police arrested appellant.

The information charged appellant with assault with a deadly weapon (Pen. Code,[4] § 245, subd. (a)(1)) (count 1), and alleged that appellant had inflicted great bodily injury upon Versie, within the meaning of section 12022.7, subdivision (a). The information

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[3] As a result of the attack, Versie received four stitches and had a small scar on her arm.

[4] All statutory references are to the Penal Code unless otherwise indicated.

also charged appellant with criminal threats (§ 422, subd. (a)) (count 2). It further alleged multiple enhancements, including that appellant had suffered two strike convictions within the meaning of California's "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and had served four recent prison terms. Appellant pleaded not guilty and represented himself at trial.

C. *Trial Proceedings*

Appellant testified at trial, relaying his version of the events of November 22, 2011. According to appellant, Versie, T-Man and Hoover had conspired to create a situation that would result in appellant's arrest or death. Appellant believed that Hoover was having an affair with his wife, that T-Man was angry because appellant had forced T-Man to move out of the apartment, and that Versie wanted to obtain appellant's cash and assets.

Appellant claimed that on November 22, Versie, Hoover, and T-Man broke into his apartment, using a crowbar to open the door. Appellant feared for his safety; he grabbed a pair of scissors to defend himself. The group "rushed" appellant, and in the chaos, he stabbed Versie several times. Although appellant did not see Versie with a weapon, he stabbed her because he thought she might have a gun.

The jury found appellant guilty of assault with a deadly weapon, but could not reach a verdict on the criminal threats charged in count 2. Consequently, the court declared a mistrial on count 2 and dismissed it. The jury found the prior conviction allegations true, and the allegation of great bodily injury not true, and sentenced appellant to a total term of 15 years in prison. Appellant timely appealed.

DISCUSSION

I. *Appellant Has Not Demonstrated That The Trial Court's Admission Of Versie's Testimony Concerning His Letters Resulted In Prejudice.*

Appellant claims that the trial court abused its discretion when it allowed Versie to testify concerning letters appellant wrote after his arrest. Appellant further claims that the admission of this testimony had the additional consequence of violating his rights to due process and a fair trial.

A. *Background*

The prosecution on the criminal threats charge (count 2) proceeded on the theory that appellant uttered the actionable threats on November 11, 2011, during and immediately after he stabbed Versie and that she remained in sustained fear of appellant from that day until the trial. Consequently, the prosecutor presented evidence from five letters appellant sent to Versie from December 22, 2011 through March 10, 2014, and another letter appellant wrote to Versie's niece's boyfriend in December 2011. Specifically, the court permitted Versie to read excerpts from the letters and to interpret them for the jury. According to Versie, appellant intended the letters (1) to intimidate and discourage her from testifying; (2) to threaten harm to Versie upon appellant's release from custody; (3) to "brag" that he would be acquitted; and (4) to warn Versie that he would report her to the Internal Revenue Service. Versie further testified that the statements in the letters caused her fear.

Appellant asserted 14 objections to four[5] of the letters, arguing that Versie's interpretations of his statements constituted speculation. He also asserted a hearsay objection to the letter addressed to Versie's niece's boyfriend. The court overruled the speculation objections, ruling that Versie's testimony was relevant to the state of mind element on the section 422 criminal threats charge—that the threat caused Versie to experience "sustained fear."[6] The court rejected the hearsay objection, ruling that the testimony was admissible to show Versie's "state of mind as to what she did." The court

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[5] Appellant did not object to Versie's testimony concerning his February 26, 2012 letter that contained statements similar to those in his other letters to Versie.

[6] Section 422, provides, in pertinent part:
"(a) Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is 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, and thereby causes that person reasonably to be in *sustained fear* for his or her own safety . . . shall be punished . . . ." (§ 422, subd. (a), emphasis added.)

also admonished the jury that it could consider Versie's testimony concerning the letters for "state of mind only" as to count 2.

B. *Analysis*

Appellant argues that the trial court erred in overruling his speculation and hearsay objections to Versie's testimony concerning the letters. He claims the evidence was irrelevant to the disputed issues in the case.

We need not determine the merits of appellant's claim because, even assuming error, he has failed to demonstrate prejudice. (See *People v. Hustead* (1999) 74 Cal.App.4th 410, 422 [admission of evidence over the defendant's objection will not warrant reversal unless the defendant shows a reasonable probability of a different result had the trial court excluded the evidence].) The jury did not convict him of the criminal threats charge. Therefore, appellant cannot complain that but for the admission of this evidence he would have obtained a more favorable verdict on that count. Similarly, we conclude that this evidence did not affect the verdict on the assault charge. The trial court admonished the jury that it could consider the evidence from the letters only on the criminal threats count. We have no reason to suspect that the jury failed to follow that instruction. (*People v. Chism* (2014) 58 Cal.4th 1266, 1299 [reviewing court presumes the jury followed the trial court's instructions]; see also *People v. Guiton* (1993) 4 Cal.4th 1116, 1127 ["[i]n analyzing the prejudicial effect of error . . . an appellate court does not *assume* an unreasonable jury"].) In addition, the evidence supporting the assault conviction was strong. Appellant confessed to the police and admitted at trial that he stabbed his sister with the scissors. In reaching this conclusion, we also reject appellant's argument that he suffered prejudice because the testimony created the impression of him as a "violent bully" who would commit an assault. Even if the court had sustained all of the appellant's objections to Versie's testimony, the jury would have received the same impression of appellant based on statements in his February 26, 2012 letter, to which he did not object. Given this evidence, absent the alleged error—the admission of Versie's testimony concerning appellant's letters—it is not reasonably probable that appellant would have received a more favorable result.

II. *The Trial Court Did Not Err In Failing To Instruct On Assault As A Lesser Included Offense Of Assault With A Deadly Weapon.*

Appellant also contends that the trial court erred in failing to instruct, sua sponte, on the lesser included offense of simple assault (§ 240). We disagree.

Simple assault—"an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another" (§ 240)—is a lesser included offense of "assault upon the person of another with a deadly weapon or instrument other than a firearm." (§ 245, subd. (a)(1); see *People v. Toledo* (2001) 26 Cal.4th 221, 226.) The only difference between the two crimes is the use of a deadly weapon. (Cf. §§ 240, 245, subd. (a)(1).)

The trial court must give an instruction on a lesser included offense only when substantial evidence exists to support a conviction of the lesser included offense. (E.g., *People v. Mendoza* (2000) 24 Cal.4th 130, 174.) The trial court should not instruct the jury on simple assault if, based on the evidence presented at trial, the jury could find a defendant either guilty of assault with a deadly weapon or not guilty at all. (*People v. Page* (2004) 123 Cal.App.4th 1466, 1474; see *People v. Kelly* (1990) 51 Cal.3d 931, 959.)

The record does not support an instruction on simple assault. The parties do not dispute that appellant used a deadly weapon when he stabbed Versie. Appellant testified, however, that he acted in self-defense. The argument appellant asserts in support of the simple assault instruction, namely, that Versie's suffered minor harm, relates to the extent of her injuries, not to whether the evidence supported an instruction on the lesser included offense. In light of the evidence in this case and appellant's defense, either appellant committed assault with a deadly weapon, or he did not commit a crime. Accordingly, the trial court had no duty to instruct on the lesser offense of simple assault.

III. *Appellant Has Not Demonstrated Cumulative Error*

Appellant contends that the cumulative effect of the claimed errors deprived him of due process and a fair trial. Whether considered individually or for their cumulative effect, none of the errors appellant alleges affected the process or accrued to his

detriment. (*People v. Sanders* (1995) 11 Cal.4th 475, 565.) As our Supreme Court has observed, a defendant is "entitled to a fair trial but not a perfect one. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) In this case appellant failed to show any cumulative error requiring reversal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.