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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM JAMES TASKER, Defendant and Appellant.	C067329 (Super. Ct. No. 10F01930)

Immediately after his 21-year-old son, defendant William James Tasker, fired three shots in his bedroom, another shot at the base of the telephone, and smashed his arm through a window while holding a rifle, Lawrence Tasker told the responding police officer that defendant had pointed a gun at him and said, "'I'm going to fucking kill you.'" At trial, he recanted his statement that defendant pointed the gun at him or threatened to kill him. The father's credibility was the focus of the trial.

A jury convicted defendant of assault with a deadly weapon with the personal use of a firearm, discharging a firearm with

gross negligence, malicious obstruction or severance of a telephone line with the personal use of a firearm, making a criminal threat with the personal use of a firearm, threatening a crime victim/witness, and misdemeanor carrying a loaded firearm in a prohibited place. On appeal, he alleges instructional error, prosecutorial misconduct, and sentencing error. The Attorney General concedes sentencing error. We accept the concession and, in all other respects, affirm the judgment.

FACTS

Defendant lived with his dad rent free, did not work, and did not go to school. He did smoke marijuana and he did own guns, courtesy of his uncle. Lawrence drank too much, but he professed his love for his son.

Following a heated telephone conversation with a friend on March 20, 2010, defendant told his father, “If he ever shows up here and threatens me, I’m going to shoot him.” Lawrence admonished his son not to threaten people, which only “set him off.” There is no dispute that defendant went into his room and fired two shots. Lawrence told him to “[k]nock it off.” He was on his way to call the sheriff when defendant fired a third shot.

Defendant came out of his room and told his father, “Go ahead and call them. I don’t give a fuck.” He fired a fourth shot with his pistol at the base of the cordless telephone, disabling it. Lawrence was standing six to ten feet from defendant when he fired the shot.

Defendant left the house, only to return to retrieve his rifle. He smashed the kitchen window with the butt of his rifle before leaving and lacerated his own hand. He was bleeding and Lawrence was attempting to bandage the wound when the police arrived. Defendant admitted he fired four shots.

The only dispute at trial was whether defendant pointed the gun at his father and threatened to kill him. Lawrence told the responding police officer that after defendant shot the telephone base he pointed the gun at him and told him he was "going to fucking kill him." Lawrence reported that he was scared and wanted defendant to go to jail because he needed help.

Later, however, he retracted his statements. He wrote a letter to the district attorney stating that he had embellished the account to get defendant the help he needed. At trial, he denied that defendant had threatened him or pointed the gun at him. Recorded conversations at the jail between defendant and Lawrence suggested otherwise.

DISCUSSION

I

No one at trial distinguished any of the shots from the others. Indeed, defendant himself told the responding police officer that he fired three shots in his bedroom and another at the base of the telephone. He offered no defense that differentiated the shots. Nor did the prosecutor elect any particular shot as the basis for discharging a firearm with gross negligence. (Pen. Code, § 246.3.)

Defendant contends on appeal that the trial court violated his constitutional right to a unanimous verdict by failing to give a unanimity instruction. (CALCRIM No. 3500.) His constitutional right to a unanimous verdict is undisputed. (*People v. Napoles* (2002) 104 Cal.App.4th 108, 114.) The question is whether the unanimity instruction was required when the evidence showed that multiple acts were in a continuous course of conduct. (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292.) We conclude it was not.

A continuous course of conduct exception applies "when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) Defendant insists that because he changed rooms and shot at the phone rather than the wall, he broke the continuity of his rampage. He did not, however, offer any defense consistent with his argument on appeal that the acts were distinguishable. For purposes of the unanimity instruction, they were not.

The four shots were fired in close temporal and physical proximity. Gross negligence is shown by reckless acts that create a high risk of death or great bodily injury. Defense counsel argued that the risk was mere speculation despite the fact that Lawrence was in the house and could have easily been shot by any of the bullets defendant angrily and randomly fired. Thus, there was no reasonable basis for the jury to distinguish between defendant's mental state or the potential for harm as to

each shot he fired. No one at trial suggested such a potential, and with good reason, the trial court did not give the unanimity instruction.

II

Defendant contends it is reasonably probable that the jurors would have acquitted him of discharging a firearm in a grossly negligent manner, threatening to commit a crime that would result in death or great bodily injury, and threatening or dissuading a crime victim if the judge had instructed them on the sufficiency of circumstantial evidence generally (CALCRIM No. 224) rather than the more circumscribed instruction on the sufficiency of circumstantial evidence for intent and mental state (CALCRIM No. 225). We agree with the Attorney General that the failure to give CALCRIM No. 224 was harmless.

Pursuant to CALCRIM No. 225, the court instructed the jury: "The People must prove not only that the defendant did the acts charged, but also that he acted with a particular intent or mental state. The instruction for each crime and allegation explains the intent or mental state required.

"An intent or mental state may be proved by circumstantial evidence.

"Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

"Also, before you may rely on circumstantial evidence to conclude that the defendant had the required intent or mental

state, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent or mental state. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required intent or mental state and anther reasonable conclusion supports a finding that the defendant did not, you must conclude that the required intent or mental state was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

While very similar, CALCRIM No. 224 is not limited to circumstantial evidence of intent or mental state only. Defendant argues that the prosecution relied on circumstantial evidence to prove that he created a risk of death or great bodily injury and to impeach his father's testimony at trial. We do not believe it reasonably probable that the additional instruction would have altered, shaped, or impacted the jury verdict.

After all, defendant readily admitted firing all four shots knowing that his father was in the house. There was no dispute as to where he fired the shots or where his father was. The only real issue at trial was whether he aimed the gun at his father and threatened to kill him. Thus, the court quite appropriately focused on the sufficiency of the circumstantial evidence to infer intent, and the jury was properly instructed

in that regard. Very little circumstantial evidence was needed to conclude that shooting random shots in an occupied house placed other occupants at grave or mortal risk. Similarly, little circumstantial evidence bore on Lawrence's credibility. The jurors listened to his testimony, observed his demeanor, listened to the officer he spoke to immediately following the incident, and listened to the tapes of his telephone conversations with his son. Circumstantial evidence played a minor, if not insignificant, role in determining his credibility.

Thus, any error in failing to instruct generally on the sufficiency of circumstantial evidence was harmless. Circumstantial evidence unrelated to intent or mental state played a de minimis role in this trial. CALCRIM No. 224 would not have added to the jurors' evaluation of the evidence or led to a different outcome.

III

Defendant displays a fine grasp of the law in making his arguments; it is just that the facts do not support application of the legal principles he cites. He accuses the prosecutor of misconduct and recognizes that misconduct is judged by an objective standard and requires the "use of deceptive or reprehensible methods to persuade either the court or the jury." (*People v. Price* (1991) 1 Cal.4th 324, 447, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165.) He contends that the prosecutor's rebuttal argument was reprehensible and rendered

his trial unfair because he mischaracterized defense counsel's argument and improperly referred to matters outside the record.

"If a prosecutorial misconduct claim is based on the prosecutor's arguments to the jury, we consider how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument. [Citations.] No misconduct exists if a juror would have taken the statement to state or imply nothing harmful." (*People v. Woods* (2006) 146 Cal.App.4th 106, 111.)

Defendant does not cite to a pattern of deceptive or reprehensible conduct. Rather, his sole complaint is the prosecutor's rebuttal to defense counsel's closing argument. In context, we conclude there is no misconduct because no reasonable juror would have taken the prosecutor's comments to state or imply anything harmful. To the contrary, his response was a measured and appropriate response.

Lawrence Tasker's credibility was hotly contested at trial because his trial testimony was at odds with the statements he gave immediately following the shooting rampage and in telephone conversations with his son in jail. Defense counsel argued, "Now, counsel representing the People has said to you in his argument that Mr. Tasker lied here in this courtroom. . . . [¶] So we have someone who the District Attorney's office put on the stand as their witness, their chief and only eyewitness, who they believe is a perjurer, that they want you to convict his son based upon a perjurer's word." Later he returned to the same subject, arguing: "Now, I think the key decision, the

first decision you all have to make is whether or not Mr. Tasker is a perjurer based upon counsel saying he lied here in court." And finally, he added: "Now, what you have before you is a man, if you believe the District Attorney's office, he is a perjurer, but he wants you to believe certain things that he said to an officer and that those things are absolutely true even though a number of his actions that day are not consistent with that as I've outlined."

Defendant insists that these remarks did not disparage the prosecutor because they did not accuse him of unethical or unlawful conduct. In rebuttal, the prosecutor responded: "Now Mr. Borkowski made somewhat of a comment on my ethical conduct, that I put up a witness that I believed was going to perjure himself. And it makes it sound like, hey, we're putting up a liar. We're trying to pull the wool over your eyes. And that is absolutely illegal, I will admit that wholeheartedly. For a prosecutor or any attorney to put up a witness and allow that witness to lie on the stand is ethically wrong. It is illegal. [¶] But that's not what happened here. We put up a witness and told him, 'You're lying.' This whole process was trying to find the truth through Lawrence Tasker's testimony. It was cross-examining him. The judge didn't stop me when I asked leading questions. It was allowed. Because we were trying to get to the truth. You were trying -- we were trying to present the truth to you. We weren't presenting perjured testimony as true. That's illegal. [¶] To present a witness who is going to lie and then cross-examined to get to the bottom of the truth is not

illegal and it’s not unethical. If it were, cases would be very difficult to prosecute because sometimes witnesses are scared.”

Defense counsel may not have overtly accused the prosecutor of unethical or unlawful conduct, but the clear implication of his remarks was just that. The prosecutor clarified that he was not attempting to pass perjury for the truth; rather, he was attempting to uncover the truth by exposing the father’s deceitfulness on behalf of his son. There is absolutely nothing untoward about the explanation the prosecutor gave to the allegations lodged at him by defense counsel during his closing.

Nor do we accept defendant’s argument that the prosecutor improperly testified or referred to matters outside the record. Defense counsel had placed him in a very difficult position by accusing him of relying on perjured testimony to make his case. In response, the prosecutor reminded the jurors of aspects of human nature -- fear and the desire to protect family and friends. The prosecutor continued in his rebuttal: “It’s very reasonable, common sense tells you -- I’m not telling you, I won’t testify -- common sense tells you that when somebody’s been shot at, they might be scared. And they might get on that stand because the person’s their neighbor or their son and say, ‘No, that didn’t happen.’ Out of fear. [¶] Does that mean that all of those cases have to be dismissed? All of those domestic violence cases have to be dismissed because a female may be scared of her husband? Or a man may be scared of his wife? Or a child may be scared of their parent?”

We agree with the prosecutor that assessing a father's credibility involves common sense. It is a matter of common knowledge that victims will testify falsely to protect their loved ones. The prosecutor was simply pointing out that cases can be prosecuted even when a victim recants. Given that defense counsel had suggested something nefarious in the use of a witness who would perjure himself, the prosecutor was at liberty to admonish the jurors to ignore perjured testimony and to rely on the statements made by a victim at or near the time of the violent act by a loved one. We can find no misconduct in this record.

IV

Defendant was charged with carrying a loaded firearm in a public place. (Pen. Code, § 12031, subd. (a)(1).) The jury inquired whether a private driveway could be a public place. Relying on *People v. Yarbrough* (2008) 169 Cal.App.4th 303 (*Yarbrough*), the court instructed the jury: "A private driveway may be a public place under Penal Code §12031(a)(1) if it is reasonably accessible to the public without a barrier." Defendant contends that *Yarbrough* is distinguishable and the court's response to the jury's inquiry violated his right to bear arms under the Second Amendment to the United States Constitution. Defendant is mistaken.

Defendant insists that *Yarbrough* is factually distinguishable because the accused in that case did not own or reside in the house, but had merely clustered around a car on a private driveway. Because he was in his own driveway, a mere

extension of his castle, defendant argues he was entitled to greater rights than the mere interlopers in *Yarbrough*.

Not so, explained the court: "We are also persuaded that to limit the definition of 'public place' in Penal Code section 12031 to publicly owned property, as defendant suggests, would frustrate the purpose of the law, which is to provide protection from those who carry firearms in areas available or exposed to public use. A limited bright-line definition of 'public place' that excludes all privately owned property would allow those who carry firearms to avoid the proscription of the law simply by moving a few steps off a road or sidewalk onto open, accessible private property, although they pose as much of a threat to the public there as anywhere else. [Citations.] We conclude that the trial court properly advised the jury that a private driveway may be a 'public place if it is reasonably accessible to the public without a barrier.'" (*Yarbrough*, *supra*, 169 Cal.App.4th at pp. 318-319.) We agree.

The defendant in *Yarbrough*, as here, argued that allowing a jury to find that a private driveway constitutes a public space violated his Second Amendment right to bear arms as embodied in *District of Columbia v. Heller* (2008) 554 U.S. 570 [171 L.Ed.2d 637]. We cannot improve on the *Yarbrough* court's rejection of the Second Amendment claim: "[W]e discern nothing in the decision in *Heller* that restricts the permissible scope of Penal Code section 12031 to publicly owned property or otherwise renders the trial court's instruction erroneous. To the contrary, the *Heller* opinion explicitly approved of 'some

statutory restrictions—the types of people who may exercise this freedom; *the places where this freedom may be exercised*; and, the ability to buy and sell the objects of this freedom—"whose constitutionality under a strict scrutiny standard would be far from clear." [Citation.]' [Citation.] Found violative of the Second Amendment in *Heller* was a law that imposed an 'absolute prohibition of handguns held and used for self-defense in the home,' but the court endorsed traditional regulations restricting firearm possession that are designed to promote and maintain public safety on government property or in publicly sensitive areas. [Citations.] Defendant's act of carrying a loaded firearm while among a group of people congregated on a residential driveway open and available to public use in direct violation of Penal Code section 12031 does not find refuge in the Second Amendment. We conclude that the trial court's definition of public place was both a correct statement of law and constitutionally permissible." (*Yarbrough*, *supra*, 169 Cal.App.4th at p. 319.)

V

The Attorney General concedes that defendant's sentence for obstruction or severance of a telephone line should have been stayed pursuant to Penal Code section 654 because the single act of shooting the telephone was the same act by which defendant dissuaded a witness. The court should have imposed sentence only on the offense carrying the higher punishment -- dissuading a witness.

DISPOSITION

The trial court is directed to stay the sentence imposed on count three, malicious obstruction or severance of a telephone line with the personal use of a firearm. The court is further directed to amend the abstract of judgment accordingly and to send a certified copy thereof to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

RAYE, P. J.

We concur:

BUTZ, J.

MURRAY, J.