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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE, Plaintiff and Respondent, v. BENJAMIN MICHAEL BENNETT, Defendant and Appellant.	C067356 (Super. Ct. No. NCR79498)

By amended information, defendant Benjamin Michael Bennett was charged as follows: Count I, making criminal threats against Matthew Lane; count II, making criminal threats against Amy McCarty; count III, corporal abuse of a cohabitant (McCarty); and count IV, false imprisonment by violence (McCarty). A jury acquitted defendant of count I; acquitted him of making criminal threats in count II, but convicted him of the included offense of attempted criminal threats; acquitted him of cohabitant abuse in count III, but convicted him of the included offenses of assault and battery; and convicted him of false

imprisonment in count IV. Out of the jury's presence, defendant admitted a prior serious felony strike conviction and having served three separate prior prison terms.

Sentenced to 13 years 8 months in state prison, defendant appeals, contending (1) the trial court abused its discretion when it denied his motion for a mistrial, which was based upon the jury's hearing a recording that referenced defendant's being on parole; (2) his counsel was prejudicially ineffective for failing to discover the parole reference in the recording; and (3) the trial court violated Penal Code section 654 by separately punishing him for both the attempted criminal threats and the false imprisonment convictions. We reject defendant's first two contentions, but we agree with him on the third.

FACTS

Matthew Lane, Amy McCarty, Dennis Cahalan, and defendant were living together in an apartment at the Crystal Motel in Red Bluff in 2010. Lane and McCarty were romantically involved, but the relationship ended and he moved out of the apartment after he struck her in the face and broke her nose. McCarty then became sexually involved with defendant.

According to McCarty, on June 1, 2010, about 4:00 p.m., McCarty was outside the apartment when she was approached by Lane and the two began conversing. Defendant came out of their apartment and demanded that Lane leave. McCarty talked with defendant and the two returned to the apartment, but a few minutes later defendant went back outside. Defendant returned

after a few minutes, and as they spoke, she noticed he had a knife in his hand.

Officer Sean Baxter testified Lane told him that when defendant came back out he had a knife, defendant threatened to kill Lane, Lane ran, and defendant could not catch him. Lane, however, testified that defendant never threatened him or chased him, nor did he tell Officer Baxter that such had occurred.

Later that same evening, McCarty was speaking with a woman outside the apartment when defendant came outside and asked to see McCarty's cell phone; she thought defendant wanted to find out whether she had been sending text messages to Lane. When defendant discovered text messages from Lane, he broke McCarty's cell phone and threw it at her, picked her up by her hair, carried her into the apartment, and dropped her on the floor. Defendant placed his hands around McCarty's throat, lifted her up so that her feet were not touching the floor, threw her on a couch, and slapped her. When McCarty tried to get up, defendant jumped on her and told her to "Sit the fuck down" because he did not want to hurt her. McCarty managed to calm defendant by telling him she knew "he didn't mean to [hurt her]."

The next morning, June 2, defendant told McCarty that if he saw her and Lane together, he would kill them both.

DISCUSSION

I

Defendant contends the trial court's denial of his motion for a mistrial was an abuse of discretion and denied him due process. We disagree.

During the direct examination of McCarty, the prosecutor played a portion of a CD recording of a conversation between her and defendant made while she was visiting defendant in the county jail. The CD and a transcript of the CD were each to have been redacted to exclude any reference to defendant's being on parole. The parole reference was excluded from the transcript but not from the CD. Defendant moved for a mistrial, arguing that because the case was close, the error was prejudicial. The trial court denied the motion, concluding that the error was inadvertent and the brief reference to defendant's parole status "did not [rise] to a level to declare a mistrial."[1]

On appeal, defendant iterates his argument made in the trial court that the error prejudiced him because the case was close. He also adds a contention that the error caused such prejudice that it violated his due process rights to a fair trial. The People respond that defendant's due process argument is forfeited because he failed to advance it in the trial court, and in any event, the error was harmless. We conclude the due process argument is not forfeited, but agree with the People that the error was clearly harmless.

Defendant's due process argument is not forfeited because his argument in the trial court was that this was a close case because of the contradictory statements made by the witnesses

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[1] Defendant did not want, nor did the trial court give, an instruction directing the jury not to consider his parole status.

and that informing the jury of defendant's parole status, an undeniable error, was so prejudicial that it could not be considered harmless error. In other words, defendant was arguing that the error was such that he could not receive a fair trial. This is essentially a due process argument: "'[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*.'" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229 (*Albarran*), quoting *People v. Partida* (2005) 37 Cal.4th 428, 439.) Consequently, defendant may argue the error violated his due process rights.

If defendant demonstrates the admission of evidence violated his due process rights to a fair trial, then the burden is on the People to show the error was harmless beyond a reasonable doubt. (*Albarran*, *supra*, 149 Cal.App.4th at p. 229.) But on this record defendant has not, and cannot, make such a demonstration. The error obviously did not affect the jury's decision on the charge of making criminal threats against Matthew Lane (count I) because the jury acquitted defendant on that count. Similarly, the jury acquitted defendant of the primary charges in counts II (criminal threats against McCarty) and III (domestic violence against McCarty), and found him guilty only of lesser included offenses.

Moreover, contrary to defendant's claim, this was not a close case. McCarty's trial testimony was consistent with what she had told the police about defendant assaulting her. The transcript of McCarty and defendant's conversation at the jail

contains implied admissions by defendant to having done something physical to McCarty.[2] Additionally, the transcript reveals attempts by defendant to keep McCarty and Lane from coming to court to testify, clearly suggesting guilt.[3] Consequently, the error was harmless because there is no reasonable likelihood that in the absence of the error defendant would have obtained a more favorable result. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

II

Defendant contends he received ineffective assistance of counsel due to his counsel's failure "to have carefully listened" to the CD recording wherein the reference to his parole status was made. To establish ineffective assistance of counsel a defendant must demonstrate "'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

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[2] The transcript contains the following: "BB [defendant]: I don't want to hurt you. [¶] AM [Amy McCarty]: I know. I know you didn't mean to but fucking shit fucking happens I'm sorry, you know. [¶] BB: I was mad at Matt and I laid out on you and that's wrong." "AM: Yeah, they [referring to the police] took pictures there was nothing on me I just (inaudible). [¶] BB: (inaudible) your ankle. They said your ankle's swollen and this, that and the other and if I hurt . . . [¶] AM: Yeah it fucking hurts though. You stepped on it on accident. [¶] BB: I didn't mean it." Referring to defendant and Lane: "AM: . . . [Y]ou guys got to learn not to hit. [¶] BB: Yeah, Amy I'm sorry (inaudible)."

[3] "BB: It better, the best thing, the best thing for everyone is you guys just don't come forth. [¶] AM: (inaudible) [¶] BB: They can't find you."

different.'" (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) In part I we determined that the reference to defendant's parole status did not contribute to the verdict. Consequently, we reject defendant's ineffective counsel claim.

III

Defendant contends the trial court violated Penal Code section 654 (section 654) when it punished him for the convictions of both attempted making of criminal threats and false imprisonment. Because of a lack of clarity in the record, we agree.

For the false imprisonment, the trial court imposed a term of six years (the upper term of three years doubled because of the strike). For the attempted making of criminal threats, the trial court imposed a consecutive effective term of eight months (four months doubled because of the strike).

Section 654 provides, in pertinent part: "(a) An 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." "[I]t is well settled that '[s]ection 654 bars multiple punishments for separate offenses arising out of a single occurrence where all of the offenses were incident to one objective.'" (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507.)

The People presented evidence of two instances upon which the jury could find defendant guilty of making criminal threats against McCarty (count II): on June 1, when defendant

threatened to harm McCarty if she did not remain on the couch, and on June 2, when defendant told her that he would kill her and Lane if he saw them together. The People argued either instance would suffice. Specifically, the prosecutor argued defendant was guilty of making criminal threats in count II, where "she was on that couch, he threatened her. She was in fear for her safety. He was making threats." In closing argument the prosecutor argued defendant "is guilty of making criminal threats against Ms. McCarty for the incident where he threatened to kill her, and again threatened her the next day if he saw her again with Mr. Lane."

The court instructed the jurors that to convict defendant of making criminal threats, they must unanimously agree on at least one of these sets of facts.[4]

While we presume the jury unanimously agreed on at least one, if not both, sets of facts, there is no way to tell from the record which set of facts the jury based its conviction upon. If the jury based its finding of guilt solely on the threats made by defendant while he was forcing McCarty to remain on the couch, the threats were, as the People concede, a means

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[4] The court instructed the jury: "The defendant is charged with Criminal Threats in Count II sometime during the period of June 1, 2010 to June 2, 2010. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed."

for obtaining his objective of falsely imprisoning her, and the punishment for the threats would have to be stayed pursuant to section 654. However, if the jury based its finding of guilt on the threat the following day when there was no false imprisonment, section 654 would have no application.

Since there is no way of determining which set of facts the jury based its unanimous finding on, we shall order the punishment for the attempted making of criminal threats conviction stayed.

DISPOSITION

The punishment for the attempted making of criminal threats in count II is stayed. The Tehama County Superior Court is directed to prepare an amended abstract of judgment reflecting this modification and to forward a certified copy thereof to the Department of Corrections Rehabilitation. In all other respects, the judgment is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

BUTZ, J.