

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

JERRY WAYNE GENTRY,

Defendant and Appellant.

C068095

(Super. Ct. No. 10F7304)

A jury acquitted defendant Jerry Wayne Gentry of attempted murder but convicted him of the following six offenses arising from an incident in which he used some "muscle" over a drug debt: false imprisonment; criminal threats; two counts of assault with a deadly weapon (knife and flashlight); battery with serious bodily injury; and sexual battery by restraint. (Pen. Code, §§ 236, 237, 422, 245, subd. (a)(1), 243, subd. (d), and 243.4, subd. (a), respectively.)¹ Enhancements were found

¹ Undesignated statutory references are to those sections of the Penal Code in effect at the time of defendant's April 22, 2011 sentencing.

for personal use of a knife in the false imprisonment, criminal threats, and sexual battery offenses; for personal infliction of great bodily injury in the flashlight assault; for a prior strike conviction; for a prior serious felony conviction; and for three prior prison terms. (§§ 12022, subd. (b), 12022.7, subd. (a), 1170.12, 667, subd. (a)(1), 667.5, subd. (b).)

Sentenced to a prison term of 25 years, defendant appeals. He contends the trial court erroneously: (1) admitted evidence of prior misconduct; (2) excluded defense evidence; (3) paraded before the jury a prosecution witness who refused to testify; (4) refused to instruct on discovery delays and juror unanimity, but instructed about not speculating why others were not being prosecuted; (5) denied a posttrial *Pitchess*² motion; and (6) sentenced incorrectly in light of section 654. We shall affirm the judgment.

FACTUAL BACKGROUND

The principal prosecution witnesses were Michael Ebert (the victim), April Collins, and Devin Chandler (through prior testimony).

Ebert testified that defendant summoned him one night in October 2009 to a rural location known as "the Ranch." Collins and Chandler took him there. Ebert owed defendant money on a methamphetamine deal.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

Upon arrival, around midnight, Ebert was greeted with a punch in the mouth by some "bigger" guy, and told to sit in a chair. About 30 minutes later, defendant appeared. Things only went downhill from there.

Defendant, who had apparently just gotten "really high" with Collins, directed someone to get "ties." The "ties" were furnished, in the form of leather straps and a mouth ball. Then defendant, along with another person who had arrived, Jesse Bacon, proceeded to kick, punch, and beat Ebert, at times using a heavy (Maglite) flashlight.

During the lengthy ordeal, defendant, armed with a knife, also threatened to cut Ebert from head to toe, threatened to cut Ebert up and throw him in the woodpile, and, after pulling down Ebert's pants, tried to cut Ebert's penis with the knife and tried to sodomize Ebert with the flashlight. Defendant repeatedly asked Ebert if he wanted defendant to "screw him." At one point, Ebert was stabbed in the elbow with the knife. During the beating, Ebert was knocked out several times.

The beating eventually ended when others on the premises implored defendant and Bacon to stop.

When Ebert was outside leaving, defendant told him if he did not return with the marijuana plants (which Ebert had offered as payment), defendant would find him and kill him.

Collins corroborated much of Ebert's account, but, during her short glimpses into the living room from her position in the

kitchen, she never saw a knife or reported defendant with a flashlight (she did hear defendant, however, threaten to cut Ebert open).

After Chandler refused to testify at trial, some of his preliminary hearing testimony was read to the jury. Contrary to what he had told the police, Chandler testified at the preliminary hearing that he never saw anyone use restraints on Ebert, or anyone put a knife to Ebert's penis, or defendant or Bacon hit Ebert with anything.

Around 10 days after the incident, Ebert reported it to Agent Robert Carrell, his contact on the Shasta Interagency Narcotics Task Force (SINTF), for which Ebert had been an informant. And, according to jailhouse Deputy Sheriff Jack McCormick, defendant stated to him after the incident—perhaps jokingly, while asking McCormick to make photocopies of some police reports in this matter—that he (defendant) never did anything with a flashlight, but he grabbed the man's genitals and threatened to cut them off with a knife. McCormick did not write a report about this until six months later, and only then at Agent Carrell's prompting.

We will set forth other pertinent facts as we discuss the issues involving them.

DISCUSSION

I. Evidence of Defendant's Prior Misconduct Admitted on Criminal Threats Charge

Defendant contends the trial court erroneously admitted on the criminal threats charge—under Evidence Code sections 1101 and 352—evidence of four instances of prior misconduct on his part.

In reviewing this contention, we ask whether the trial court abused its discretion in admitting this evidence. (*People v. Memro* (1995) 11 Cal.4th 786, 864 [Evid. Code, § 1101]; *People v. Branch* (2001) 91 Cal.App.4th 274, 282 [Evid. Code, § 352].) As we shall explain, the court did not.

Evidence Code section 1101 forecloses evidence of a defendant's prior misconduct to show he committed the current offense, but permits such evidence, in limited fashion, to show a state of mind, such as intent or knowledge. (Evid. Code, § 1101, subds. (a), (b).) Under Evidence Code section 352, a trial court weighs the probative value of such evidence against any undue prejudicial effect.

The trial court admitted the following challenged testimony from the victim, Ebert: (1) Ebert had heard about defendant "being so dangerous," a "bigwig in the drug game . . . the drug world"; (2) Ebert said defendant once became "very, very mad" and threatened to kill a person who had driven around in a car containing defendant's fingerprint-laden meth lab (in this escapade, Ebert had been a passenger in the car); (3) Ebert testified that a "lot of people get work through [defendant],

meaning work, meaning dope"; and (4) according to Ebert, "a lot of the convicts . . . would do anything for [defendant]."

In line with relevant state of mind evidence under Evidence Code section 1101, Ebert provided this testimony in the context of why he "reasonably [was] in sustained fear for his . . . own safety" from defendant's threats, which is one of the elements of the Penal Code section 422 criminal threats charge. (Pen. Code, § 422, subd. (a).) Such testimony was admissible to show Ebert's fear from defendant's threats. (*People v. Garrett* (1994) 30 Cal.App.4th 962, 967-968.) As *Garrett* further noted, "[s]eldom will evidence of a defendant's prior criminal conduct be ruled inadmissible when it is the primary basis for establishing a crucial element of the charged offense." (*Id.* at p. 967.)

Defendant disputes that this testimony was admissible under Evidence Code sections 1101 and 352, arguing, "[t]here was no need to tie [defendant's] supposed violent reputation to any of these matters—persistent high level drug dealing, drug manufacturing, and prison associations. . . . [T]he details served as improper backdoor proof [defendant] was the sort of person (indeed a drug dealer and convict) who would commit the sorts of acts . . . reported by . . . Ebert." However, the challenged testimony showed that defendant's violent reputation arose out of his drug dealing activities. And defendant allegedly threatened Ebert for failing to pay a drug deal debt.

Consequently, Ebert's challenged testimony was relevant to his fear from defendant's threats.

Furthermore, defendant argues that his "claimed 'attack on Ebert was so horrific that it, standing alone, was sufficient evidence from which the jury could reasonably conclude that Ebert was in . . . reasonable sustained fear as a result of [defendant's] threats.'" Hence, the challenged testimony was unnecessary under Evidence Code section 1101 and unduly prejudicial under Evidence Code section 352. This argument, we think, actually shows the nonprejudicial nature of the challenged testimony: evidence of defendant's drug dealing dangerousness paled in comparison to the admittedly "horrific" claimed attack on Ebert.

Finally, defendant disputes the efficacy of the limiting instruction the trial court provided concerning this challenged testimony. We think the trial court explained the matter rather well to the jurors, stating as pertinent (after the first item of the challenged testimony was presented—the defendant "being so dangerous," a "bigwig in the drug game"): "What [this] information is being admitted for is to allow Mr. Ebert here to explain his state of mind to you. . . . [T]hat information is not for you to consider for the truth of [the] matter asserted because we don't know whether it's true or not. I'm not sure Mr. Ebert would know whether it's true or not. It's only state of mind information. . . . To that extent, you may consider it."

We conclude the trial court did not abuse its discretion in admitting this challenged testimony from Ebert.

II. Exclusion of Three Evidentiary Items Proffered By Defense

Defendant contends the trial court abused its discretion in excluding three lines of evidence he proffered. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201 [setting forth this review standard].) We disagree.

First, defendant sought to have Marlana Benson testify that Ebert, the victim here, had bragged to her that he had struck one Leslie Calvert over the head with a flashlight, and that he could get away with "murder" because of his informant status with SINTF. The trial court excluded the statement of getting away with murder because, as even defendant conceded at trial and again on appeal, there was no real evidence of murder (the "flashlight battery" occurred in April 2006 and Calvert apparently died in the fall of 2009). But the trial court allowed Benson to testify that Ebert had told her "he could just get away with anything," apparently because of his informant status with SINTF.

The trial court did not abuse its discretion in this regard. Defendant proffered this evidence to show Ebert's ability and willingness to manipulate his police handlers. The evidence the trial court allowed in did just that, and did so without raising the unsupported issue of actual murder.

Second, defendant sought to have a Mr. Hillhawkins testify that Devin Chandler had told Hillhawkins that Agent Robert

Carrell of SINTF had told Chandler that Carrell would help Chandler make a deal.

Defendant argued at trial that this double hearsay was admissible to show Chandler's state of mind. We cannot say the trial court abused its discretion in excluding this tangential evidence under Evidence Code section 352; moreover, Agent Carrell testified at trial and could have been asked about any offer he made to Chandler.

Third, and last, defendant sought to have Joshua Mason and Mark Hence impeach Ebert's denial on cross-examination that he (Ebert) had told Agent Carrell that what defendant had done to him to enforce the drug debt was the kind of thing Ebert used to do in his juvenile days. The trial court precluded this proffered testimony, deeming it confusing and collateral under Evidence Code section 352 since Agent Carrell could be asked this matter directly. We find no abuse of discretion in this regard. And, indeed, the defense called Agent Carrell, who confirmed that Ebert had made such a statement to him.

III. Devin Chandler Was Seen But Not Heard

Defendant contends the trial court erred when it had Devin Chandler take the witness stand to formally declare he would not testify, even with a grant of immunity. After this appearance, Chandler was deemed unavailable and his preliminary hearing testimony was presented.

Defendant argues that, without a limiting instruction such as CALJIC No. 2.11.5 (telling jurors there are many reasons why

another person who may have been involved in the crime is not on trial, and not to speculate about this), the jurors here would impermissibly infer from Chandler's muted appearance that defendant was threatening witnesses.

However, the trial court did instruct the jury with the CALCRIM version of the CALJIC No. 2.11.5 instruction, CALCRIM No. 373, which says virtually the same thing. Consequently, even if we assume error in this regard, we find no prejudice.

IV. Refusal to Instruct on Prosecution's Purported Discovery Delays

The trial court refused defendant's request to instruct the jurors that they "may consider the effect, if any, of [the] late disclosure" of certain information by the prosecution (CALCRIM No. 306). This instruction, defendant argues in his opening brief, was "based on prosecution delays in disclosing: 1. [T]he name and address of a percipient witness who was not called (one of Mr. Ebert's family members who saw him soon after the alleged offenses); 2. [S]everal pieces of information in Mr. Ebert's informant file later ordered disclosed by the court; and 3. [T]he details of deals and consideration contemplated in Ebert's 2009 DUI case not long before the alleged offenses."

In his brief on appeal, defendant does not argue these points or even specifically identify the information he is talking about. Consequently, he has forfeited these points by not providing argument about them. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

In any event, when we turn to the People's brief, we learn, regarding these three alleged discovery delays: (1) the name of the family member witness who was not called, and the fact that two other similarly situated family members did testify; (2) that defendant had every SINTF person testify who had any institutional experience with Ebert; and (3) that defendant had the deputy district attorney testify who handled Ebert's DUI case. In light of these facts, the trial court's refusal to instruct with CALCRIM No. 306 did not deprive defendant, as he argues, of a viable defense theory.

V. Unanimity Instruction Refused

Defendant contends the trial court erred prejudicially in refusing defendant's request to instruct on juror unanimity regarding "the charge of criminal threats with personal use of a knife" (count 3-§ 422), plus the knife use enhancement (§ 12022, subd. (b)). We disagree.

In a criminal case, the constitutional right to jury unanimity requires that when a defendant is charged with a single criminal act and the evidence shows more than one such act, either the prosecution must select the specific act relied upon to prove the charge, or the jury must be instructed that it must agree unanimously that defendant committed the same act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Deletto* (1983) 147 Cal.App.3d 458, 471-472.)

"The unanimity instruction is not required when the acts alleged are so closely connected as to form part of one

transaction. [Citations.] Th[is] 'continuous conduct' rule [also] 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.)

Here, the evidence showed that defendant, during one violent episode while armed with a knife, threatened to cut Ebert from head to toe, threatened to cut Ebert up and throw him on the woodpile, and tried to cut Ebert's penis. At one point during this episode, defendant also stabbed Ebert in the elbow with the knife. And after this episode ended, when Ebert was outside leaving, defendant threatened Ebert that he (defendant) would find and kill him if Ebert did not return with his offered payment of marijuana plants.

The trial court properly refused to instruct on juror unanimity concerning the count 3 charge of criminal threats enhanced by personal knife use, because this offense falls within the "continuous conduct" rule. The threats comprising this offense encompassed those uttered by defendant, while armed with the knife, during the single violent episode noted above. The evidence of the other threat—the one occurring after this violent episode ended when Ebert was outside leaving—did not show the use of a knife. And the knife stab to the elbow concerned its own charge—assault with a deadly weapon (a knife) (count 4—§ 245, subd. (a)(1)), as the prosecutor argued and defendant concedes.

Furthermore, the defense here was that Ebert had lied about what had happened—i.e., defendant offered essentially the same defense to each of the criminal threat acts and there was no reasonable basis for the jury to distinguish between the threats comprising the charge of criminal threats with knife use.

Finally, defendant faults the People for not discussing *People v. Melhado* (1998) 60 Cal.App.4th 1529. There was no need to. The continuous conduct rule did not apply in *Melhado*, and an instruction on juror unanimity was required there, because the evidence showed *two distinct* criminal threats—one at 9:00 a.m. and the other at 11:00 a.m. (*Id.* at pp. 1533-1536.)

We conclude the trial court properly refused to instruct on juror unanimity regarding the charge of criminal threats enhanced by personal knife use.

VI. Instruction Not to Speculate About Other Prosecutions

Defendant claims the trial court erred prejudicially by instructing with CALCRIM No. 373, as follows: "The evidence shows that another person may have been involved in the commission of the crimes charged against the defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether that other person has been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crimes charged."

Defendant argues that CALCRIM No. 373 improperly foreclosed the jury from discussing or considering whether April Collins or

Devin Chandler were testifying against defendant in exchange for not being prosecuted themselves. Because of such concern, case law has concluded that a pre-2004 version of this instruction should not be given when an uncharged participant in the crime testifies against the charged defendant. (*People v. Hernandez* (2003) 30 Cal.4th 835, 875-876.)

Even if we assume for the sake of argument that the trial court erred in this regard in giving CALCRIM No. 373, we would not reverse for three reasons. First, the jury knew that Chandler had been granted immunity, and that Collins had not been implicated in the actual beating of Ebert. Second, defendant has argued in this appeal (see pt. III. of the Discussion, *ante*, at pp. 9-10) that an instruction such as CALCRIM No. 373 was needed here so that jurors would not impermissibly infer from Chandler's muted appearance at trial that defendant was threatening witnesses. And, third, the discredited pre-2004 version of this instruction (CALJIC No. 2.11.5) stated, as pertinent, that jurors were "*not [to] discuss or give any consideration* as to why the other person is not being prosecuted in this trial or whether [he or she] has been or will be prosecuted" (italics added); CALCRIM No. 373, as given here, is phrased more innocuously—jurors merely are not to "*speculate* about whether [the] other person has been or will be prosecuted" (italics added).

We conclude the trial court did not err prejudicially in giving CALCRIM No. 373.

VII. Posttrial *Pitchess* Motion

Defendant claims the trial court abused its discretion in denying his posttrial *Pitchess* motion. (*Pitchess, supra*, 11 Cal.3d 531.) Pursuant to *Pitchess*, defendant wanted the court to examine in private the employment records of jailhouse Deputy Sheriff McCormick. McCormick testified at trial that defendant stated to him—perhaps jokingly, while asking McCormick to make photocopies of some police reports in this matter—that he (defendant) never did anything with a flashlight but he grabbed the man’s genitals and threatened to cut them off; McCormick did not write a report about this statement until six months later, and only then at Agent Carrell’s prompting.

In his *Pitchess* motion, defendant contends that Deputy McCormick fabricated defendant’s jailhouse admission to curry favor with his (McCormick’s) employer because he had recently failed a drug test.

The standard of review on the denial of a *Pitchess* motion is abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228.) Under *Pitchess*, though, a defendant need satisfy only a “‘relatively low threshold’” to have the trial court undertake a private examination of employment records. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.)

We see no abuse of discretion in the denial of defendant’s posttrial *Pitchess* motion. As the trial court accurately noted in its ruling, the declaration supporting the motion did not even explicitly deny that defendant had made the statement to

Deputy McCormick. Furthermore, McCormick testified as to why he wrote the report: His chain of command directed him to do so, and he believed his disclosure of the statement to Agent Carrell prompted this directive.

VIII. Section 654 and Counts 3 and 4

Defendant asserts the trial court erred under section 654 by imposing unstayed sentences on count 3 (criminal threats, enhanced with knife use) and count 4 (assault with a knife). Admittedly, couched in such spare terms, a section 654 issue is piqued. But as we explain, the facts show something else and the trial court properly imposed unstayed sentences on counts 3 and 4.

Section 654 proscribes multiple punishment not only for a single act, but for multiple acts that are committed in a single transaction encompassing a single intent and objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Whether a defendant entertained multiple criminal objectives is a factual decision for the trial court, a decision we uphold if supported by substantial evidence. (*People v. Nubla* (1999) 74 Cal.App.4th 719, 730 (*Nubla*).) For section 654 purposes, separately punishable acts may occur when none of the acts was committed as a means of committing any other, none facilitated commission of any other, and none was incidental to any other. (*Nubla*, at pp. 730-731.)

As we noted above in discussing the unanimity instructional issue (see Discussion, pt. V., *ante*, at pp. 11-12), the evidence

showed that defendant, during a single episode while armed with a knife, made multiple violent threats to Ebert. This evidence comprised the count 3 charge of criminal threats enhanced by knife use (§§ 422, 12022, subd. (b)). We also noted in that discussion that, at one point during this episode, defendant stabbed Ebert in the elbow with the knife. This evidence comprised the count 4 charge of assault with a deadly weapon (a knife; § 245, subd. (a)(1)), as the prosecutor argued to the jury and defendant concedes.

Viewing counts 3 and 4 in this way, and there is substantial evidence supporting this view, these two counts constituted separate acts separately punishable under section 654. Moreover, as the trial court noted in its ruling in citing *Nubla*, the stabbing did not facilitate the criminal threats. (See *Nubla, supra*, 74 Cal.App.4th at p. 731 [the defendant's "act of pushing his wife onto the bed and placing the gun against her head was not done as a means of pushing the gun into her mouth, did not facilitate that offense and was not incidental to that offense. The trial court was entitled to conclude that each act was separate for purposes of Penal Code section 654."].)

We conclude the trial court properly imposed unstayed sentences on counts 3 and 4.

IX. Cumulative Error

Finding no significant individual error, we find no cumulative error.

DISPOSITION

The judgment is affirmed.³

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

MURRAY, J.

³ Recent statutory amendments do not provide defendant with any additional presentence custody credit, as he was committed for a felony in which he personally inflicted great bodily injury, a serious felony. (§§ 1192.7, subd. (c)(8), 245, subd. (a)(1), 12022.7, subd. (a), 4019, 2933.)