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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SHELLEY MATHEW MALIL,

Defendant and Appellant.

D059130

(Super. Ct. No. SCN249433)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias, Judge. Affirmed.

A jury found Shelley Mathew Malil guilty of attempted deliberate and premeditated murder of Kendra Beebe (count 1: Pen. Code,¹ §§ 187, subd. (a), 189, 664); and assault with a deadly weapon on David Maldonado (count 2: § 245, subd. (a)(1)). As to count 1, the jury found true allegations that Malil personally used a deadly weapon (a knife) within the meaning of section 12022, subdivision (b)(1), and personally

¹ Undesignated statutory references will be to the Penal Code.

inflicted great bodily injury on Beebe under circumstances involving domestic violence the meaning of section 12022.7, subdivision (e). As to count 2, the jury found true allegations that Malil personally used a deadly weapon (a knife) within the meaning of section 1192.7, subdivision (c)(23). The jury found Malil not guilty of residential burglary (§§ 459, 460) as charged in count 3. The court sentenced Malil to a determinate prison term of five years plus an indeterminate term of life with the possibility of parole.

Malil asserts three principal claims on appeal. First, he claims the court violated his constitutional rights to a jury trial and due process when it dismissed juror No. 12 during deliberations over a defense objection. Second, he claims (as discussed more fully, *post*) that he was deprived of his constitutional rights to due process and a fair trial as a result of three alleged errors related to the issue of unanimity. Last, Malil claims the evidence is insufficient to support his count 2 conviction of assaulting Maldonado with a deadly weapon because there is no evidence he intended to harm Maldonado, who (he claims) was only injured because he grabbed the knife from Malil.

For reasons we shall explain, we reject these claims. Accordingly, we affirm the judgment.

FACTUAL BACKGROUND

A. The People's Case

Beebe testified that she and Malil began dating after they met online in August 2007. Trouble in the relationship began around Thanksgiving of that year when Beebe learned that Malil was an alcoholic.²

Malil and Beebe went to the beach on Saturday, August 9, 2008, the day before Malil stabbed her. Malil became angry and drove off in Beebe's car, leaving her stranded. After a stranger drove Beebe home, she found she was locked out of her house and had to enter through a garage window. She found her keys inside the house. Malil drove back to his home in Los Angeles, started drinking, and became intoxicated. That evening, Malil e-mailed to Beebe's coworkers several explicit photographs showing Malil and Beebe in the nude having sexual relations.

At around 8:45 p.m. the next night, Sunday, August 10, Beebe and her friend Maldonado were sitting at a table and sipping wine on her back patio when Malil suddenly walked out onto the patio. Malil, who was shoeless and shirtless, had one hand behind his back as he walked up to Beebe saying her name three times. When asked at trial what Malil's face looked like, Beebe answered, "Crazy." Beebe thought he was

² As most of the details of the many troubles in Malil and Beebe's tumultuous relationship, like the details of Beebe's troubled relationship with her former husband are only marginally pertinent to the issues raised on appeal, we do not summarize them here. We note that during his testimony at trial, Malil admitted that he repeatedly stabbed Beebe, and thus his identity as the person who stabbed her was and is not at issue. Also, he does not challenge on appeal the sufficiency of the evidence supporting his conviction of the attempted deliberate and premeditated murder of Beebe charged in count 1. Accordingly, our summary of the facts is brief.

going to either hug her or punch her. Beebe testified she then saw a "flash of silver" and Malil stabbed her three times in her chest.

Maldonado got up to help Beebe and saw the knife in Malil's right hand. Maldonado testified that he pulled Malil's arm away from Beebe's body and "grabbed the knife from the blade to take it out of [Malil's] hand." As a result, Maldonado suffered cuts to the fingers and palm of his left hand. Maldonado threw the knife³ over the fence, and Beebe screamed at him to call 911. Maldonado ran to his car to get his phone and called 911. He reported that a man named "Shelley" (Malil) was trying to kill Beebe and that Malil "took a knife and was trying to cut her—her neck." Maldonado also reported that he "took the knife away and [threw] it in the bushes."

Beebe testified that after Maldonado left, Malil grabbed the wine bottle on the table and smashed it on her back. Malil went inside the house and Beebe tried to get away through the side gate, but the gate was stuck and did not open. When Beebe started running to the other side of the yard to escape, Malil confronted her and came after her with a big knife. Beebe grabbed a garden hoe and unsuccessfully tried to defend herself with it. Beebe testified she thought the violent ordeal was a "like a bad game of pickle." Malil stabbed Beebe about 20 more times.

Alerted by the screaming, Charlton Lee, a neighbor, jumped over the fence in the dark and saw someone chasing Beebe, who was screaming, "Help me. Help me. He's

³ Police later determined that the knife Maldonado took from Malil matched the set of knives Malil kept in his home in Los Angeles.

trying to kill me." Lee ran back to his garage to get something with which to defend himself, returned, and saw Malil kneeling on top of Beebe, who was lying on a wicker couch on the porch. Lee testified that "it looked like [Malil] was holding her down with a knife in his hand." Lee elaborated, stating:

"[Malil] was holding her down by her stomach, so it looked like the knife and everything and his hands were kind of on the lower part of her body, then I saw him move it up. And it kind of looked like he was cutting her at that point, but I don't know exactly what he was doing, but it looked like he was almost kind of like a motion not lifting up his hands, but kind of, you know, kind of sliding his hands up against her torso, top of her neck."

Lee yelled at Malil to get off Beebe and put down the knife, which he did. Lee testified that when he looked at Beebe, "[i]t was gruesome. It was terrible." Beebe's chin was "nearly severed, and she was bleeding profusely." When he tried to shift her body, he felt blood coming out of her back and a big open wound. Lee and Beebe both asked Malil to get some towels with which to stop the bleeding, and Malil complied.

According to Beebe, Malil disappeared when they heard sirens.

Paramedics took Beebe, who was shaking and in shock, to the hospital where she underwent surgery and remained nine days. Beebe had suffered multiple wounds on her face, neck, both sides of her chest, and both arms and legs. She suffered a large back wound that measured about a foot in length and penetrated underneath her shoulder blade. One of the three chest wounds extended down between the ribs into the chest cavity such that one of the treating physicians could see the lung moving with her respirations. A deep penetrating wound to the right side of Beebe's neck was less than an eighth of an inch from the jugular vein. Her chin had been nearly amputated.

A fugitive task force eventually seized Malil from an Amtrak train headed for San Diego.

B. The Defense Case

Malil testified on his own behalf. He stated he was stunned when he first learned the extent of the injuries he had inflicted on Beebe. Defense counsel asked him, "[D]id you plan [Beebe's] murder?" Malil answered, "Absolutely not." He replied, "Never," when asked, "Did it ever cross your mind to kill her like when you were fighting or anything?"

Malil indicated that when he went to Beebe's home on the day of the stabbings, he stepped on one of Beebe's feet as he walked up to her, she screamed, and he heard Maldonado's chair backing up behind him, so he grabbed a knife that was in the umbrella pole hole in the patio table. Malil testified that Maldonado then pulled Malil's arm with one hand, and, as they were "fighting over" the knife, Maldonado pried the knife out of Malil's hand with his other hand.

According to Malil, the second time he wielded a knife during the incident was after he retrieved the largest chef's knife from the set of knives he found in Beebe's kitchen. Malil stated he followed Maldonado and saw him go to his car, thought Maldonado had grabbed a gun and was going to kill him, so he (Malil) armed himself with the knife. Malil testified he went back outside to escape from Maldonado, but it was dark and someone suddenly started hitting him with something hard, so he "just went like—like bananas" and used the knife he grabbed from the knife block. Malil estimated he swung the knife 50 to 100 times. Eventually he realized he was fighting with Beebe.

On cross-examination, the prosecutor asked Malil, "[O]n that night what was your intention when you grabbed that knife?" Malil replied that he grabbed it to arm and defend himself in case he "ran into any kind of conflict with the dude with the gun." He denied he had any intention to kill anyone with that knife.

The defense presented witnesses who testified as to the reputations of both Malil and Beebe. The defense also presented the expert testimony of a clinical and forensic psychologist who testified regarding fight or flight.

DISCUSSION

I. *DISCHARGE OF JUROR NO. 12 DURING DELIBERATIONS*

Malil first contends the court violated his constitutional rights to a jury trial and due process when it discharged juror No. 12 during deliberations over a defense objection. We reject this contention.

A. *Background*

During deliberations, juror No. 12 sent the court a note that stated:

"I have concerns about whether I can be fair and impartial in this case. I am not able to separate myself from my personal beliefs as I thought I would. *I believe in karma and believe that the victim deserved this because of her immoral lifestyle.* I know that this is not fair to her but *I cannot be objective because of this.* I am hoping to talk to the judge privately about this." (Italics added.)

The court conducted a hearing in chambers with juror No. 12, the prosecutor, and defense counsel present. Malil waived his right to be present. Addressing juror No. 12, the court stated:

"First, I appreciate your writing because that's one of the things I want to make sure jurors felt comfortable in doing to let us know if

something comes up. So let me read it, so that it's in the record, then I'm going to ask some questions about it. Okay. I'm doing this privately per the request to be done in private."

After reading the note for the record, the court explained how it intended to proceed:

"So I want to go to the first sentence. First, where you have concerns about being fair and impartial. And then I want to go to the part where you say you can't separate it and you don't think you can be objective."

The court and juror No. 12 then engaged in the following exchange:

"[The Court:] . . . The first sentence leads me to believe that you understand you're having a struggle, personal struggle with what's going on. The first sentence I believe though you recognize there's a struggle. Do you think now that you addressed it and you know about it, you can compartmentalize it; and if not, why not?"

"Juror No. 12: I don't think so because it's a big part of my life. It's the way I live my whole life and the way my thinking works, I guess. And I can't just really turn that off just because I have to. And logically I know it's not right. I know it's not fair. I'm aware of it, but even then it still creeps back into my mind.

"The Court: So you have, if I understand correctly, the logical understanding about the need to separate?"

"Juror No. 12: Yes.

"The Court: Is it, what you're telling me, you feel that the emotional or philosophical part of you, even though you can logically tell yourself you have to separate, you don't think you're able to do that. The emotional part is carrying more of the weight, if you will, than the logical part?"

"Juror No. 12: I guess, you could say I'm trying to be logical and to consider the evidence the way it is, but at the same time I find myself discounting things. And I don't know. I just—*I don't feel like I can judge fairly.*

"The Court: All right. So my understanding then of what you just said is in your analysis of what you're trying to accomplish as a juror[,] in *knowing what the instructions ask you to do[,] you do not believe you could be fair and impartial to both sides here*; is that a fair statement?

"Juror No. 12: *Not after hearing the whole story.*" (Italics added.)

Seeking confirmation, the prosecutor asked juror No. 12, "You're saying that you cannot be fair and impartial to both sides in this case[?]" Juror No. 12 replied, "Yes."

Malil's counsel asked juror No. 12, "[A]re you willing to continue to deliberate and are you willing to follow the law?" Juror No. 12 replied, "I'm willing to continue to deliberate and *try to follow the law, but I'm not being impartial.*" (Italics added.)

Probing further, defense counsel asked juror No. 12, "That's because you heard all of the evidence and when you began you said, yeah, I can be fair and impartial, then you heard all of the evidence and have some biases . . . after hearing everything, right?" Juror No. 12 replied, "Yes, but *not based on the evidence per se, based on the way I interpret her lifestyle.*" (Italics added.) The juror added, "I feel like *I'm making excuses in favor of the defendant just because I—I just—I don't know, like she deserved it*, which I know this is horrible. Like I feel really bad saying that but that's—*I just can't get that out of my mind.*" (Italics added.)

Shortly thereafter, the prosecutor asked juror No. 12, "[D]o you believe that you cannot be fair and impartial, that's the reason you believe you need to be removed?" Juror No. 12 replied, "Yes."

The court then directed juror No. 12 to continue to deliberate and not discuss this matter with the other jurors. After juror No. 12 left to return to the deliberation room, the court conferred with both counsel and the prosecutor moved to excuse the juror, arguing:

"She said she cannot be fair and impartial. She said it several times in different ways. I think I get the impression from her both based on her words, which are on the record, as well as her demeanor. Just the impression from watching her as we sit here in the courtroom that she's unable to separate her emotions from the issues of weighing and analyzing the evidence in this case."

Defense counsel disagreed, asserting that all of the jurors had said they could be fair and impartial and that "[e]vidence is supposed to bias them one way or the other." Malil's counsel stressed that juror No. 12 represented she would continue to deliberate and follow the law.

The court granted the prosecutor's motion to excuse juror No. 12, finding that "based on her written note and her response to both the court's questions and counsel's questions . . . there is good cause to excuse her and replace her with an alternate." The court explained:

"A couple of things. What [juror No. 12] stated . . . concerns me. One is [her] talk about karma and her analysis, if you will, of . . . Ms. Beebe's lifestyle that plays a role in how she's assessing this whole case. It's one thing to say, I think her lifestyle sucks and, therefore, I don't believe a word she has to say. That's okay. She can do that. That's not what [juror No. 12] said. [She] said as a result she feels she can't be fair and impartial because it's overloading everything else."

After hearing additional arguments, the court further explained:

"I draw a distinction between a person saying because of what they have done they have in fact legally provoked someone such that it rises to the level of either a complete defense or a defense that

reduces it. *It's a whole different thing to say they deserved what they got. That is a philosophical deep seeded choice that I think [juror No. 12] is struggling with. As she herself said, she feels guilty about saying that it's more than at least from the perspective of taking the facts and then applying them creating a bias, if you wish to use that term, and doing an analysis of what transpired. What she said is greater and beyond your assessment from my perspective.*" (Italics added.)

B. Legal Principles Governing the Discharge of a Sitting Juror (§ 1089)

Section 1089 sets forth the procedure for removing a sitting juror and provides in pertinent part: "If at any time . . . a juror . . . upon . . . good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate" (§ 1089; see *People v. Boyette* (2002) 29 Cal.4th 381, 462.)

"Removal of a juror under section 1089 is committed to the discretion of the trial court." (*People v. Thompson* (2010) 49 Cal.4th 79, 137.) "Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty "to make whatever inquiry is reasonably necessary" to determine whether the juror should be discharged.'" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1029.) A juror's inability to perform as a juror must appear in the record as a ""demonstrable reality."" (*People v. Williams* (2001) 25 Cal.4th 441, 448.)

"The court's decision whether to discharge a juror under section 1089 is reviewed for abuse of discretion." (*People v. Lucas* (1995) 12 Cal.4th 415, 489.) A reviewing court requires that substantial evidence support any factual finding upon which the decision was based. (*People v. Boyette, supra*, 29 Cal.4th at p. 462.) The reviewing

court also requires that "the grounds for . . . removal appear in the record as a demonstrable reality." (*People v. Thompson, supra*, 49 Cal.4th at p. 137; *People v. Boyette*, p. 462.)

C. Analysis

We conclude the court did not abuse its discretion in granting juror No. 12's request to be discharged because substantial evidence supports the court's factual findings and good cause for removal of that juror appears in the record as a demonstrable reality. (*People v. Thompson, supra*, 49 Cal.4th at p. 137; *People v. Boyette*, p. 462.) Juror No. 12 self-reported to the court her inability to serve as a fair and impartial juror, indicating she harbored a deeply felt antipathy toward one of the victims, Beebe, because of what juror No. 12 called Beebe's "immoral lifestyle." The juror indicated that her enmity toward Beebe was based "not . . . on the evidence per se," but on "the way I interpret her lifestyle." Juror No. 12 admitted she was "making excuses in favor of the defendant just because [Beebe] deserved it." That the court concluded juror No. 12's self-reported belief that Beebe deserved what Malil did to her was genuine is shown by the court's finding that the juror "feels guilty about saying that." This finding is supported by juror No. 12's statement, "I know this is horrible. Like I feel really bad saying that but that's—I just can't get that out of my mind." In essence, juror No. 12 demonstrated that her dislike of Beebe because of Beebe's "immoral lifestyle" would prevent her from holding Malil responsible, she felt guilty about her belief that Beebe deserved what Malil did to her, and she was unable to fairly and impartially apply the law to the facts established by the

evidence. In sum, the court properly discharged juror No. 12 for good cause, as authorized by section 1089.

II. *UNANIMITY*

Malil also contends he was deprived of his constitutional rights to due process and a fair trial as a result of the following three claimed errors related to the issue of unanimity: (1) the court erroneously denied his motion to require the prosecutor to elect which act constituted the crime of attempted deliberate and premeditated murder of Beebe as charged in count 1, and the court's unanimity instruction did not remedy the error; (2) as shown by four post-deliberation juror declarations submitted with his new trial motion, the jury did not reach a unanimous agreement as to which act constituted the crime of attempted deliberate and premeditated murder charged in count 1; and (3) the court erroneously failed to conduct an evidentiary hearing concerning the claim in his new trial motion that the jury did not following the unanimity instruction. We conclude Malil's acts during the stabbing incident constituted a continuous course of conduct; the prosecution was not required to elect which act constituted the crime of attempted deliberate and premeditated murder of Beebe as charged in count 1; and, although the court did give a unanimity instruction to the jury, it was not required to do so. Accordingly, we reject Malil's claims of error.

A. *Background*

Before the trial commenced, the prosecution filed a trial brief in which it argued a unanimity instruction was not required because "[t]he People's theory is that the entire course of conduct, from the first stab to the last, is one attempted murder"; and, under

People v. Maury (2003) 30 Cal.4th 342, "[t]he court has no sua sponte duty to instruct on unanimity if the offense constitutes a 'continuous course of conduct.'"

At an in limine hearing on the issue, defense counsel indicated he wanted the prosecution to make an election as to what theory it was relying on to prove the attempted murder charge and the related premeditation and deliberation allegation. Defense counsel complained that although the People appeared to be arguing that Malil formed the intent to kill Beebe before he drove down from Los Angeles, they "may try to shift their theory [and argue] he formed the intent once he got there." Stating that the People were "entitled to their theory and you're entitled to disprove it," the court concluded that whether "[u]nanimity will come into play" would be determined "at the end of all of the evidence."

At the conclusion of the evidentiary phase of the trial, following oral arguments on the matter, the court gave the jury a unanimity instruction using the following version of CALCRIM No. 3500:

"The defendant is charged with attempted murder in Count 1. [¶] 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."

The jury found Malil guilty of attempted murder of Beebe as charged in count 1 and found true the related allegation that the offense was willful, deliberate, and premeditated.

Malil thereafter brought a motion for new trial in which he claimed the verdict was invalid because "various Jurors found different acts to justify their individual verdict."

Specifically, Malil asserted:

"Juror [No.] 1 believed that Ms. Beebe was stabbed with the first knife and based his verdict on this act. He strongly expressed this view to the entire panel. Juror [No.] 5 based his verdict on the initial confrontation in the patio, but expressed that Ms. Beebe was not stabbed or suffocated on the front porch. Juror [No.] 8 indicated that Ms. Beebe was not stabbed with the first knife and was acting in self-defense on the side of the house, but based her verdict on the incident on the front porch. Juror [No.] 9 also stated that Ms. Beebe was not stabbed with the first knife and was initially acting in self-defense on the side yard, but the act she relied on was Mr. Malil[']s preventing Mr. LEE from rendering aid. [¶] The jurors all indicate that there was never an agreement or vote on which act on which they unanimously agreed upon."

Following oral arguments, the court denied Malil's new trial motion. The court found the declarations submitted in support of the motion were inadmissible under *In re Stankewitz* (1985) 40 Cal.3d 391 because they described the jurors' "thought processes." Finding that the jurors were not obligated to agree as to what act they felt demonstrated willfulness, deliberation, and premeditation, the court added that although it gave the CALCRIM No. 3500 unanimity instruction, it probably did so *erroneously*. The court then found the burglary acquittal was not significant as it related to the attempted deliberate and premeditated murder conviction and concluded the verdicts were "consistent with the conduct and the evidence" because the jury could properly find Malil had sufficient time to deliberate and premeditate after he entered Beebe's backyard.

B. *Applicable Legal Principles*

The right to a unanimous jury in criminal cases is guaranteed by the California Constitution. (See *People v. Russo* (2001) 25 Cal.4th 1124, 1132, citing Cal. Const., art. I, § 16 [expressly stating "in a civil cause three-fourths of the jury may render a verdict," implying only a unanimous jury may render a verdict in a criminal cause]; see also *People v. Jones* (1990) 51 Cal.3d 294, 321 ["the requirement of unanimity in criminal cases is of constitutional origin"], also citing Cal. Const., art. I, § 16).)

"It is established that some assurance of unanimity is required where the evidence shows that the defendant has committed two or more similar acts, each of which is a separately chargeable offense, but the information charges fewer offenses than the evidence shows. [Citation.] [A unanimity] instruction is intended to eliminate the danger that the defendant will be convicted of even though there is no single offense which all the jurors agree the defendant committed. . . . [I]t is generally agreed that under such circumstances, a unanimity instruction of some kind is required to ensure the defendant's constitutional right to a unanimous verdict." (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 611-612.)

In *People v. Russo, supra*, 25 Cal.4th at page 1132, the California Supreme Court explained that the jury "must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." Thus, "[i]n a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed,

[a] standard unanimity instruction should be given." (*People v. Jones, supra*, 51 Cal.3d at pp. 321-322.) In such a case, a trial court must sua sponte give an appropriate unanimity instruction (e.g., CALCRIM No. 3500 or 3501) when the evidence shows more than one act could constitute an element of a charged offense. (See *People v. Russo, supra*, 25 Cal.4th at p. 1132; *People v. Jones, supra*, 51 Cal.3d at pp. 321-322.)

However, under an exception for continuous courses of conduct, unanimity instructions are not required "where a series of acts is so closely connected in time that it forms part of one transaction." (*People v. Robbins* (1989) 209 Cal.App.3d 261, 266; *People v. Maury, supra*, 30 Cal.4th at p. 423; *People v. Napoles* (2002) 104 Cal.App.4th 108, 115-116; *People v. Muniz* (1989) 213 Cal.App.3d 1508, 1518.)

C. Analysis

The circumstances of Malil's case are similar to those in *People v. Jefferson* (1954) 123 Cal.App.2d 219 (*Jefferson*), in which the Court of Appeal concluded the trial court did not err in denying the defendant's demand for an election. In *Jefferson*, police officers responded to a domestic violence call and found the defendant holding a butcher knife outside her home. As the officers stood around her trying to convince her to give them the knife, she told them they would have to use a gun to get it. (*Id.* at pp. 219-220.) The defendant then started swinging the knife at the officers, and one officer was so close to her that the knife cut his sleeve. (*Id.* at p. 220.) When a sergeant distracted her by accusing her of not being married, she went inside the house, followed by some of the officers, to show him her marriage certificate, and then laid the knife down. (*Ibid.*) When one of the officers grabbed the butcher knife, the defendant pulled a second

knife—a pocket knife—out of her purse and began slashing at the officers. (*Ibid.*) During the ensuing struggle, one of the officers was cut in the hand. (*Ibid.*) The whole episode lasted 10 to 15 minutes. (*Id.* at p. 221.) A jury convicted the defendant of one count of assault with a deadly weapon. (*Id.* at p. 219.)

On appeal, the defendant claimed the court prejudicially erred by denying her demand for an election. (*Jefferson, supra*, 123 Cal.App.2d at p. 220.) Specifically, she claimed the evidence showed that there was one offense with the butcher knife and another and different offense with the pocket knife; that her evidence tended to show, as to the assault outside the house, that if she struck the officer with the butcher knife at all, she did it in self-defense; that with respect to the second assault inside the house, she testified she did not open the pocket knife; and that some of the jurors may have believed she was guilty of an assault with the butcher knife, while others may have believed she was guilty of an assault with the pocket knife. (*Id.* at pp. 220-221.)

The *Jefferson* court rejected the defendant's contentions that she committed two offenses and that the prosecutor was required to elect which act formed the basis of the offense of which she was convicted, holding there was but one transaction that, as a whole, constituted one offense. (*Jefferson, supra*, 123 Cal.App.2d at p. 221.)

Similarly, here, although the prosecution presented evidence that Malil stabbed Beebe many times in different places at her home, and with two knives, the evidence establishes Malil committed one continuous attempted with premeditation and deliberation during a short period of time. We conclude Malil's acts constituted one continuous course of conduct, the prosecution was not required to elect which act

constituted the crime of attempted deliberate and premeditated murder, and the court was not required to give the jury the unanimity instruction. Accordingly, we also conclude Malil's claims of error are unavailing.

III. SUFFICIENCY OF THE EVIDENCE (COUNT 2)

Last, Malil contends the evidence is insufficient to support his count 2 conviction of assaulting Maldonado with a deadly weapon because there is no evidence he intended to harm Maldonado, who he claims was only injured because he grabbed the knife from Malil. We reject this contention.

A. Standard of review

When assessing a challenge to the sufficiency of the evidence, we apply the substantial evidence standard of review, under which we view the evidence "in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Maury, supra*, 30 Cal.4th at p. 396.)

The uncorroborated testimony of a single witness is sufficient to sustain a conviction or true finding on an enhancement allegation, "unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v.*

Jones, supra, 51 Cal.3d at p. 314.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

B. *Analysis*

Assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Assault is a general intent crime that does not require a specific intent to injure the victim. (*People v. Wyatt* (2010) 48 Cal.4th 776, 780.) "[T]he criminal intent required for assault is 'the general intent to wilfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another.'" (*Ibid.*, quoting *People v. Rocha* (1971) 3 Cal.3d 893, 899.) "Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm." (*People v. Colantuono* (1994) 7 Cal.4th 206, 214.) To be guilty of assault, the defendant must have had knowledge of facts that would lead a reasonable person to realize that the act "by its nature will probably and directly result in physical force being applied to another, i.e., a battery." (*People v. Williams* (2001) 26 Cal.4th 779, 788.) In *Colantuono*, our high state court explained:

"[T]he question of intent for assault is determined by the character of the defendant's willful conduct considered in conjunction with its direct and probable consequences. If one commits an act that by its nature will likely result in physical force on another, the particular intention of committing a battery is thereby subsumed. Since the law seeks to prevent such harm irrespective of any actual purpose to cause it, a general criminal intent or willingness to commit the act satisfies the mens rea requirement for assault." (*People v. Colantuono, supra*, 7 Cal.4th at p. 217.)

Applying these principles, the courts have concluded that a defendant is liable for assault against a reasonably foreseeable victim regardless of whether the defendant was subjectively targeting that particular person. (See *People v. Felix* (2009) 172 Cal.App.4th 1618, 1628-1629 ["[A] defendant's intended acts are evaluated objectively to determine whether harm to a charged victim was foreseeable."]; *People v. Tran* (1996) 47 Cal.App.4th 253, 261-262 [jury could reasonably find knife-wielding defendant, who chased a man holding a baby, guilty of assault with a deadly weapon against both the man and baby even if defendant did not intend to harm the baby; knife attack on man "could foreseeably have wounded the baby."].)

Here, the jury credited the testimony of Beebe and Maldonado showing that when Malil suddenly approached Beebe with one hand behind his back and then stabbed her, Maldonado jumped up from his chair, pulled Malil's arm away from Beebe's body, grabbed the knife by the blade, and pulled it out of Malil's hand, resulting in lacerations to Maldonado's hand. A reasonable jury could find beyond a reasonable doubt both that Malil's acts of brandishing the knife and stabbing Beebe were willful, and a reasonable person in Malil's position would have realized that Maldonado was Beebe 's friend, Maldonado would physically intervene to try to protect her, and there was a reasonable likelihood that Maldonado would suffer lacerations as he pulled Malil away from Beebe and grabbed the knife to prevent Malil from stabbing Beebe again. Even if Malil did not subjectively intend that Maldonado suffer such lacerations, the jury could reasonably conclude Maldonado was a victim of the knife assault because it was reasonably

foreseeable he could be harmed by the knife. We conclude substantial evidence supports the jury's finding that Malil is guilty of the offense of assault with a deadly weapon against Maldonado.

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.