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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LINITONE PULEALI TAEOTUI,

Defendant and Appellant.

D061057

(Super. Ct. No. SCN290035)

APPEAL from a judgment of the Superior Court of San Diego County, Richard E. Mills, Judge. Affirmed.

Linitone Puleali Taeotui brandished a knife at Vaalele Faatiliga and threatened to kill him. A jury found Taeotui guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); subsequent section references are to this code) and making a criminal threat (§ 422, subd. (a)). In a bifurcated proceeding, the trial court found true certain allegations regarding Taeotui's prior convictions and prison terms. The court sentenced Taeotui to prison for an aggregate term of nine years.

On appeal, Taeotui contends the judgment must be reversed because (1) there was insufficient evidence he ever had a present ability to injure Faatiliga with the knife, as required to support the conviction of assault with a deadly weapon; and (2) his trial counsel provided ineffective assistance by failing to request a jury instruction on voluntary intoxication with respect to the charge of making a criminal threat. We reject these contentions and affirm the judgment.

## I.

### FACTUAL BACKGROUND

Taeotui and Faatiliga are first cousins. Faatiliga, a recovering alcoholic, allowed Taeotui and Taeotui's girlfriend to move in with him in March 2011, provided they did not drink in the house.

On the night of April 2, 2011, Faatiliga awoke when he heard Taeotui and his girlfriend arguing in their bedroom. Faatiliga told them, "Stop all that noise because I have to work tomorrow"; returned to his own bedroom; and locked the door.

Moments later, Taeotui began pounding on Faatiliga's bedroom door and ordered him to come out so that he could "kick [Faatiliga's] ass." Taeotui said, "Come on out. . . . Today I'm going to kill you . . . ."

Faatiliga telephoned 911. The call was interrupted when Taeotui kicked in Faatiliga's bedroom door and Faatiliga climbed out the window to the front yard. Taeotui then threw a stool at Faatiliga and again said he was going to kill him. Faatiliga thought Taeotui was "basically drunk," or "[r]eally, really drunk," or "[s]tupid drunk," but not "drunk out of his mind."

Faatiliga then went to the front door of the house and briefly held it closed to try to prevent Taeotui from coming outside, but then ran down the street. As Faatiliga fled, he again telephoned 911 because he feared that if police did not come either he or Taeotui was going to end up dead. When Faatiliga looked back at his house, he saw Taeotui "waving a knife" and heard him say, "I'm gonna kill you, Airplane." (Faatiliga's first name, Vaalele, is Samoan for airplane.) Taeotui also pursued Faatiliga with the knife for a short distance and repeated his threat to kill him.

When Officer David Weissenfluh arrived in response to the 911 call, Faatiliga gave him a recorded statement describing the incident. Faatiliga also took Weissenfluh inside the house and identified the knife Taeotui waved at him. It was a kitchen knife that had an eight-inch serrated blade with a forked tip.

When Weissenfluh entered the house, he noticed "it smelled very strongly of alcohol." Weissenfluh also noticed Taeotui appeared to be intoxicated: "His speech was slurred. His eyes were red and bloodshot. He smelled very strongly of an alcoholic beverage. . . . [H]e had a staggered ga[it.]" Weissenfluh rated Taeotui a nine "[o]n a scale from one to 10, 10 being heavily intoxicated . . . ." Weissenfluh arrested Taeotui.

## II.

### DISCUSSION

Taeotui argues his conviction of assault with a deadly weapon must be reversed for insufficient evidence, and his conviction of making a criminal threat must be reversed for ineffective assistance of counsel. As we shall explain, neither argument has merit.

#### A. *Sufficient Evidence Supports the Conviction of Assault with a Deadly Weapon*

Taeotui contends his conviction of assault with a deadly weapon violates his federal constitutional right to due process of law (U.S. Const., 14th Amend., § 1) because "there was no substantial evidence that, with the present ability, [he] committed an act with the bread knife that by its nature would probably and directly result in injury to [Faatiliga]." Specifically, Taeotui argues he could not be found guilty because there was "no substantial evidence that [he] ever got close enough to Faatiliga to attempt to strike him with the knife." We disagree.

On a due process challenge to the sufficiency of the evidence, the "critical inquiry" is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318.) "[T]his inquiry does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Id.* at pp. 318-319.) "Evidence meeting this standard satisfies constitutional due process and reliability concerns." (*People v. Boyer* (2006) 38 Cal.4th 412, 480.)

To establish Taeotui violated section 245, subdivision (a)(1), the People had to prove "an unlawful attempt, *coupled with a present ability*," by him "to commit a violent injury on the person of [Faatiliga]" (§ 240, italics added) "with a deadly weapon" (§ 245, subd. (a)(1)). With regard to the "present ability" element challenged by Taeotui, our Supreme Court recently held the defendant need not have the ability to inflict injury

instantaneously; he need only "have the ability to inflict injury on the present occasion."

(*People v. Chance* (2008) 44 Cal.4th 1164, 1168 (*Chance*)).) The court explained:

"[I]t is a defendant's action enabling him to inflict a present injury that constitutes the actus reus of assault. There is no requirement that the injury would necessarily occur as the very next step in the sequence of events, or without any delay. . . . [Citation.] 'There need not be even a direct attempt at violence; but any indirect preparation towards it, under the circumstances mentioned, such as drawing a sword or bayonet, or even laying one's hand upon his sword, would be sufficient.' [Citation.] [¶] Subsequent California cases establish that when a defendant equips and positions himself to carry out a battery, he has the 'present ability' required by section 240 if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart infliction of injury." (*Id.* at p. 1172.)

In a much earlier case, the Supreme Court held: "It is not indispensable to the commission of an assault that the assailant should be at any time within striking distance. If he is advancing with intent to strike his adversary and comes sufficiently near to induce a man of ordinary firmness to believe, in view of all the circumstances, that he will instantly receive a blow unless he strike in self-defense or retreat, the assault is complete." (*People v. Yslas* (1865) 27 Cal. 630, 634 (*Yslas*)).) Thus, "[o]nce a defendant has attained the means and location to strike immediately he has the 'present ability to injure.' The fact an intended victim takes effective steps to avoid injury has never been held to negate this 'present ability.'" (*People v. Valdez* (1985) 175 Cal.App.3d 103, 113 (*Valdez*); accord, *Chance*, at p. 1174.)

Here, the evidence introduced at trial established Taotui had a present ability to injure Faatiliga with a knife. Faatiliga's testimony and the recorded statement he gave Weissenfluh showed that Taotui threatened to kill Faatiliga, kicked in Faatiliga's

bedroom door, and threw a stool at him. When Faatiliga retreated by climbing out his bedroom window, Taeotui followed him outside, waved a knife at him, and again threatened to kill him. This evidence of Taeotui's "chasing [Faatiliga] and threatening [him] with a long knife demonstrate[d] a willful attempt to use physical force against [him]," and was sufficient to establish the offense of assault with a deadly weapon. (*People v. Tran* (1996) 47 Cal.App.4th 253, 261-262.) The People did not also have to prove that Taeotui was "at any time within striking distance" (*Yslas, supra*, 27 Cal. at p. 634); that an injurious knife blow "would necessarily occur as the very next step in the sequence of events, or without any delay" (*Chance, supra*, 44 Cal.4th at p. 1172); or "that [Taeotui] actually made an attempt to strike or use the knife upon the person of [Faatiliga]" (*People v. McCoy* (1944) 25 Cal.2d 177, 189, italics omitted). Rather, to establish the present ability element of the charge of assault with a deadly weapon, it was sufficient for the People to prove, as they did, that Taeotui had taken steps that enabled him "to commit a present, and not a future injury, upon a different occasion." (*People v. McMakin* (1857) 8 Cal. 547, 548 (*McMakin*); accord, *Chance*, at p. 1771.)

Indeed, courts have upheld convictions for assault with a deadly weapon on facts closely analogous to those of this case. Our Supreme Court summarized two such cases in *Chance, supra*, 44 Cal.4th at page 1174:

"In *Yslas*, the defendant approached within seven or eight feet of the victim with a raised hatchet, but the victim escaped injury by running to the next room and locking the door. Yslas committed assault, even though he never closed the distance between himself and the victim, or swung the hatchet. (*Yslas, supra*, 27 Cal. at pp. 631, 633-634.) Similarly, in *People v. Hunter* (1925) 71 Cal.App. 315, 318-319, the victim jumped out a window as the

defendant tried to pull a gun from his sock. Hunter committed assault, even though the victim was gone before he could deploy his weapon."

Similar to *Yslas*, here Taeotui approached Faatiliga with a knife, but never closed the distance between himself and Faatiliga or swung the knife at him. Similar to *Hunter*, here Taeotui pursued Faatiliga and brandished the knife at him, but Faatiliga fled before Taeotui could actually strike him with it. The fact that Faatiliga, like the victims in *Yslas* and *Hunter*, had "take[n] effective steps to avoid injury" by running away from Taeotui did not negate Taeotui's present ability to inflict injury. (*Valdez, supra*, 175 Cal.App.3d at p. 113; accord, *Chance*, at p. 1174.)

We are not persuaded to reach a different conclusion by Taeotui's reference to the following sentence from *McMakin, supra*, 8 Cal. at page 548: "Holding up a fist in a menacing manner, drawing a sword, or bayonet, presenting a gun at a person *who is within its range*, have been held to constitute an assault." (Italics added.) This statement merely lists examples of conduct that is sufficient to constitute an assault; it is not a holding that proof the defendant approached within striking distance of the victim is necessary for an assault conviction. In fact, as we noted earlier, our Supreme Court has held the opposite: "It is not indispensable to the commission of an assault that the assailant should be at any time within striking distance." (*Yslas, supra*, 27 Cal. at p. 634.) Moreover, the Supreme Court has subsequently held that "[a]lthough temporal and spatial considerations are relevant to a defendant's 'present ability' under section 240, it is the ability to inflict injury on the present occasion that is determinative, not whether injury will necessarily be the instantaneous result of the defendant's conduct." (*Chance, supra*,

44 Cal.4th at p. 1171.) Therefore, where, as here, the evidence establishes the defendant could have injured the victim because he "held the knife in a threatening manner" and actually threatened to kill the victim in the victim's presence, but did not reach the point of making "an affirmative attempt to commit a battery (i.e., a lunge)," the defendant may be convicted of assault with a deadly weapon. (*People v. Vorbach* (1984) 151 Cal.App.3d 425, 429.)

For the foregoing reasons, we reject Taeotui's contention there was no substantial evidence he had the present ability to injure Faatiliga with the knife. We hold the evidence was sufficient to support the conviction of assault with a deadly weapon.

B. *Taeotui's Trial Counsel Did Not Provide Ineffective Assistance by Not Requesting a Jury Instruction on Voluntary Intoxication*

Taeotui complains his trial counsel provided constitutionally inadequate representation by failing to request a jury instruction on voluntary intoxication (CALCRIM No. 3426) with regard to the charge of making a criminal threat. (See U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15.) He argues his intoxication prevented him from forming the specific intent required to prove that charge, and asserts "it is inconceivable any reasonably competent criminal lawyer could have a legitimate strategic reason not to request" such an instruction in this case. We disagree.

A jury instruction on voluntary intoxication was theoretically applicable to the criminal threat charge. To convict Taeotui of that charge, the People had to prove, among other elements, that he made a statement with "the specific intent that the statement . . . is to be taken as a threat." (§ 422, subd. (a).) Evidence of Taeotui's

voluntary intoxication would have been admissible on the issue of whether he actually formed the required specific intent (§ 29.4, subd. (b)), and with an appropriate evidentiary basis he would have been entitled to a jury instruction on that issue. But, as Taeotui acknowledges, "[i]t is well settled that '[a]n instruction on the significance of voluntary intoxication is a "pinpoint" instruction that the trial court is not required to give unless requested by the defendant.' " (*People v. Verdugo* (2010) 50 Cal.4th 263, 295 (*Verdugo*)).) Not having requested a voluntary intoxication instruction at trial, Taeotui cannot claim on appeal that the trial court erred by not giving it. (See, e.g., *People v. Campos* (2007) 156 Cal.App.4th 1228, 1236 [defendant who did not request pinpoint instruction forfeited claim that trial court erred by not giving it].) Taeotui thus tries to avoid the forfeiture by claiming his trial counsel provided ineffective assistance by not requesting a voluntary intoxication instruction; but, as we shall explain, this claim fails.

The evidence did not warrant a voluntary intoxication instruction. Our Supreme Court repeatedly has held "[a] defendant is entitled to such an instruction only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' " (*People v. Williams* (1997) 16 Cal.4th 635, 677; accord, *Verdugo, supra*, 50 Cal.4th at p. 295; *People v. Horton* (1995) 11 Cal.4th 1068, 1119; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1181.) Here, the record contains some evidence that Taeotui was under the influence of alcohol and somewhat impaired when he threatened Faatiliga. Faatiliga testified Taeotui was "basically drunk," or "[r]eally, really drunk," or "[s]tupid drunk," but not "drunk out of his mind." Weissenfluh testified (1) he smelled alcohol on Taeotui; (2) Taeotui showed

several signs commonly associated with drunkenness, including bloodshot eyes, slurred speech, and staggering gait; and (3) Taeotui rated a nine on a drunkenness scale of one to 10.<sup>1</sup> Other evidence, however, indicated Taeotui was not seriously impaired, for he was able to kick down Faatiliga's bedroom door, chase him with a knife, and repeatedly threaten to kill him. Moreover, there was no evidence of what alcoholic beverage Taeotui drank, how much he drank, over what period of time he drank it, or what his blood-alcohol level was. And, most importantly, "evidence of the *effect* of [Taeotui's] alcohol consumption on his state of mind [was] lacking." (*Marshall, supra*, 13 Cal.4th at p. 848.)

In short, there was "no evidence whatever going to the issue whether as a result of his alleged consumption of an undetermined amount of [alcohol,] [Taeotui] failed to form the requisite criminal intent." (*People v. Williams, supra*, 45 Cal.3d at p. 1312.)

Therefore, "even if [his trial counsel] had requested a voluntary intoxication instruction,

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<sup>1</sup> Courts have held such generalized testimony does not by itself warrant a voluntary intoxication instruction. (See, e.g., *People v. Williams, supra*, 16 Cal.4th at p. 677 [defendant was " 'doped up,' " " 'smokin' pretty tough then,' " and " 'probably spaced out' "]; *People v. Marshall* (1996) 13 Cal.4th 799, 847-848 (*Marshall*) [defendant was " 'under the influence of alcohol,' " appeared " 'dazed' " and " 'in a state of shock,' " and had a blood-alcohol level that would have impaired driving]; *People v. Williams* (1988) 45 Cal.3d 1268, 1311 [defendant "was 'acting crazy,' i.e., 'making facial expressions, being kind of jumpy[,] . . . [changing] the tone of his voice' "].) "In other cases, courts found insufficient evidence to support a [voluntary] intoxication instruction when (1) the defendant had drunk some beer and whiskey and was " 'pretty well plastered' " [citation]; (2) the defendant had been drinking for several hours, but was 'only woozy and not completely "blacked out" ' [citation]; (3) the defendant had been drinking before the crime; he appeared to be " 'a little high' " at the time of the crime, and he testified he was " 'pretty drunk' " [citation]; and (4) the defendant had drunk a dozen beers and some wine and thought he was drunk, but knew what he was doing." (*People v. Ivans* (1992) 2 Cal.App.4th 1654, 1662.)

the trial court would properly have refused it" (*Verdugo, supra*, 50 Cal.4th at p. 295), and counsel did not provide constitutionally ineffective assistance by failing to make the request (*People v. Gray* (2005) 37 Cal.4th 168, 220).

DISPOSITION

The judgment is affirmed.

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IRION, J.

WE CONCUR:

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McCONNELL, P. J.

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O'ROURKE, J.