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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW GRANT RICE,

Defendant and Appellant.

E052693

(Super.Ct.Nos. INF064200 &
INF10001280)

OPINION

APPEAL from the Superior Court of Riverside County. H. Morgan Dougherty, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions as to case No. INF064200. Affirmed in part and reversed in part as to case No. INF10001280.

Laurel M. Nelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lynne G. McGinnis, Quisteen S. Shum, and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Matthew Grant Rice appeals his conviction in Riverside County case No. INF10001280, for criminal threats, misdemeanor vandalism and two counts of misdemeanor violation of a restraining order. He contends that his convictions on three counts must be reversed because the trial court failed to give necessary unanimity instructions, and because the trial court failed to give proper consideration to his motion for a new trial. He also appeals in Riverside County case No. INF064200, in which his probation was revoked, contending that the court erred with respect to the imposition of a restitution fine.

We conclude that the omission of a unanimity instruction requires reversal on counts 2 and 7 in Riverside County case No. INF10001280. We will also order modification of the abstract of judgment in Riverside County case No. INF064200.

PROCEDURAL HISTORY

In case No. INF10001280, defendant was charged with two counts of making criminal threats (Pen. Code, § 422, subd. (a); counts 1 & 2);¹ assault with a deadly weapon (§ 245, subd. (a)(1); count 3); sexual battery (§ 243.4, subd. (a); count 4); felony vandalism (§ 594, subd. (b); count 5); and two misdemeanor counts of violating a

¹ All statutory citations refer to the Penal Code unless otherwise indicated.

restraining order (§ 273.6, subd. (a); counts 6 & 7). The information also alleged one strike prior within the meaning of sections 667, subdivisions (c) and (e)(1) and 1170.12, subdivision (c)(1). Before trial, the court reduced count 5 to a misdemeanor on motion of the prosecution.

A jury found defendant guilty on counts 2, 5, 6 and 7, and not guilty on all remaining counts, including lesser offenses. The court struck the prior conviction allegation because the out-of-state juvenile adjudication did not qualify as a strike prior under California law.

After hearing and denying the defense motion for a new trial and denying a defense motion to reduce the felony conviction on count 2 to a misdemeanor pursuant to section 17, subdivision (b),² the court imposed the middle term of two years on count 2 and imposed misdemeanor terms of 365 days on the three remaining counts, to run concurrently with the term on count 2.

In case No. INF064200, defendant pleaded guilty to one count of false imprisonment. (§ 236.) (The victim in both cases is the same person, referred to herein

² Section 17 provides, in pertinent part:

“(b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

“(1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170.”

Section 422, subdivision (a) provides that a criminal threat may be punished by a term of up to 365 days in county jail or by imprisonment in state prison.

as Jane Doe or Doe.) On January 21, 2009, he was sentenced to probation, and a restraining order was issued prohibiting him from any negative contact with the victim. His probation was revoked on March 18, 2010. Following the trial in case No. INF10001280, the court imposed an eight-month term in case No. INF064200, to run consecutive to the sentence in case No. INF10001280.

Defendant filed a timely notice of appeal.

SUMMARY OF THE EVIDENCE³

Defendant and Jane Doe met at a bar in Desert Hot Springs in March or April 2008 and began dating. On December 13, 2008, while they were at a sports bar in Cathedral City, defendant became angry when Doe received several text messages from a male friend, Steven Logan. They left the bar, and as Doe was driving them back to Desert Hot Springs, defendant called Logan on Doe's cell phone. Defendant told Logan to leave Doe alone and demanded that Logan meet defendant at defendant's house. Defendant wanted to fight Logan. After completing the call, defendant began hitting Doe. He hit her on her temple, nose and jaw with his fists. He hit the windshield of the

³ Because the only issue in case No. INF064200 is the restitution fine, we omit any factual background in that case.

In case No. INF10001280, the charged offenses arose out of several encounters between defendant and his former girlfriend, Jane Doe, in which he allegedly made credible threats to kill her, physically abused her and vandalized her car. The jury's acquittal on three of the most serious charges indicates that it found some of the following evidence untrue. However, the evidence which the jury apparently rejected is relevant to the issues on appeal, and we will therefore recite the evidence which was offered on all of the charges without regard to whether it was found true. Accordingly, although this section of the opinion is normally designated the "statement of facts," in this case we will call it the "summary of the evidence."

car and screamed at her that she was a “whore” and a “slut” and said he was going to kill her. He choked her and pushed her out of the car. As a result of this incident, the car windshield was cracked. Doe sustained black eyes and cuts to her lip, and her throat was so swollen she “could not swallow.”

Doe reported the incident to the police, and in January 2009, she obtained a restraining order which prohibited any “negative contact” by defendant, i.e., prohibiting him from annoying, harassing or threatening her.⁴ Despite having obtained that order, Doe continued to be in contact with defendant because he was trying to apologize to her and she wanted to “understand where that behavior came from.”

On February 21 or 22, 2009,⁵ Doe went to the Valero gas station in Desert Hot Springs to see her friend, Teresa Martinez. Doe brought her four-year-old daughter. After she and Martinez had visited for a few minutes, defendant arrived in a black car. The car parked immediately behind Doe’s car, and defendant jumped out of the passenger side. Defendant demanded to know why she had stopped talking to him and had changed her phone number. Doe had changed her number because defendant had been harassing her with repeated calls, but she told him merely that she was “done.”

⁴ Although it does not appear that the jury was so informed, the December 13 incident is the basis of defendant’s conviction in case No. INF064200.

⁵ The information alleges that counts 2, 3, 4 and 7 occurred on or about February 21, 2009. Those counts involve the incident at the Valero gas station and an incident which occurred later the same day, which we discuss below. Doe testified initially that these events occurred on February 21, 2009, but later testified that these events occurred on February 22, 2009.

Defendant grabbed Doe's phone and used it to call his cell phone, apparently in order to have a record of Doe's phone number. He was very angry, and eventually put his hands around her neck and said he was going to kill her. With his right hand around Doe's neck, defendant put his left hand down her pants and inserted a finger into her vagina. He said he wanted to know if she had been with anyone else. After he removed his finger, defendant smelled it. At that point, Doe's friend Heather Bush arrived. Heather told Doe to get into her (Doe's) car and told her to leave. At that point, defendant asked Doe if she would give him a ride, since the person driving the car he had arrived in had left the gas station. Doe declined.

Doe went from the gas station to the Desert Hot Springs Police Department to report the incident. She arrived there 10 or 15 minutes after the incident. The office was closed. Doe rang the buzzer, which should have caused an officer to be dispatched to the office, but after waiting about five minutes, she left. Defendant had a family member who lived near the police station, and Doe did not want to remain in the area. She left to go to her brother's house in Morongo. As she left, she called 911.

As Doe was driving away from the police station, after she had turned off the street where the police station is located, defendant jumped out of some bushes on the right side of the road, and jumped into her car. He said he was going to kill her and held a purple box cutter to her throat. She believed that he would kill her, but a truck pulled up and several men got out. Defendant got out of Doe's car and began fighting with the men. Doe drove off.

Doe went to her brother's house in Morongo. Later that evening, Officer Hempel returned her call and she was able to make a police report. She told Hempel about the incident at the Valero gas station but omitted the sexual assault. She attempted to tell Hempel about the incident which had occurred after she left the Desert Hot Springs police station, but Hempel, who was a Riverside County deputy sheriff at the time, said it was not in his jurisdiction. He told her she would have to report it to the Desert Hot Springs police.

On February 23, 2009, Doe went to the home of her other brother, in Desert Hot Springs. Her sister-in-law, Tammy Rymer, was there, along with her newborn daughter, her teenage daughter Amber Simpson, and Doe's four-year-old daughter. Doe parked her car in an alley adjoining the house so that defendant would not be able to see her car. She heard the family dog barking and went outside with her niece and saw that one of her tires was flat. She then saw defendant stabbing another of her tires with a large knife. When defendant saw her, he said he was going to kill her. He held the knife against his own throat and made a slashing motion. Doe understood that to mean that he was going to kill her. Doe ran from the house into the desert. Defendant chased her, but she outran him and returned to the house. She then called the police.

LEGAL ANALYSIS

1.

THE OMISSION OF AN INSTRUCTION ON UNANIMITY REQUIRES REVERSAL
OF COUNTS 2 AND 7

Defendant contends that although he was charged with two counts of criminal threats (counts 1 & 2), the evidence showed four threats on four different occasions, any one of which could have supported a conviction for criminal threats under section 422. In a separate argument, he contends that any of the same four incidents could have constituted the violation of the restraining order as charged in counts 6 and 7. Because neither the prosecutor nor the court informed the jury that it was required to determine unanimously which act or acts constituted each of the charged offenses, defendant contends, his convictions on counts 2, 6 and 7 must be reversed. (He was acquitted on count 1.) The Attorney General counters that the prosecutor did inform the jury of the conduct she was relying on to prove each of the counts and that a unanimity instruction was therefore not necessary.

We agree with defendant that an instruction on unanimity was required, and that reversal is required as to counts 2 and 7, but that the omission was not prejudicial as to count 6.

A criminal defendant is constitutionally entitled to a verdict “‘in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged.’ [Citation.]” (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) “From this constitutional origin, the principle has emerged that if the prosecution shows several acts, each of which could constitute a separate offense, a unanimity instruction is required. [Citation.] [¶] ‘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.’ [Citations.] By giving the unanimity instruction the trial court can ensure that a defendant will not be convicted when there is no agreement among the jurors as to which single offense was committed. [Citation.]” (*Ibid.*) “The duty to instruct on unanimity when no election has been made rests upon the court sua sponte. [Citation.]” (*Ibid.*)

The four incidents defendant refers to which could have constituted both the criminal threats and the violation of the restraining order are (1) the incident at the Valero gas station, in which defendant choked Doe and threatened to kill her; (2) the incident on that same day, in which defendant jumped into Doe’s car as she left the Desert Hot Springs police station, held a box cutter to her throat and threatened to kill her; (3) the incident at Doe’s brother’s home in Desert Hot Springs in which defendant slashed Doe’s tires, held a knife to his own throat, made a slashing motion and said he was going to kill her; and (4) a threatening phone call on February 25, 2009, which Doe reported to defendant’s probation officer, in which defendant said he had an unregistered gun and was willing to use it. All four incidents included evidence which, if found true by the jury, would constitute a violation of section 422, subdivision (a),⁶ as well as a violation of

⁶ “Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family’s safety, shall

[footnote continued on next page]

the restraining order, which forbade harassing, striking, threatening, and assaulting Doe, among other things.

As far as the record shows, the prosecutor did not make a formal election as to either counts 1 and 2 or counts 6 and 7. During her closing argument, however, the prosecutor informed the jury that the tire slashing incident on February 23 was the basis for count 1 and that the box cutter incident near the police station on February 22 was the basis for count 2, as well as for count 3, assault with a deadly weapon. She informed the jury that the December 13 incident was evidence of defendant's disposition to commit acts of domestic violence, within the meaning of Evidence Code section 1109.^{7, 8} She discussed the incident at the Valero gas station but did not specifically relate it to any count of the information. She referred generally to the "February 22nd" incident as the

[footnote continued from previous page]

be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison." (§ 422, subd. (a).)

⁷ "Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a)(1).)

⁸ It is perhaps arguable that the jury could have chosen to rely on the December 13 incident as the basis for count 1 or count 2. The court's instructions did not identify that incident as the evidence admitted pursuant to Evidence Code section 1109 or in any way directly exclude it as the basis for either count 1 or count 2. However, the information alleged that counts 1 and 2 took place on or about February 23 and February 21, 2009, respectively, and it is unlikely that jurors would conclude that an incident which occurred more than two months earlier qualified as having been committed "on or about" those dates. In any event, defendant does not assert that the jury could have relied on the December 13 incident as the basis of either count 1 or count 2.

basis of count 7, for violation of the restraining order, but did not elaborate as to whether she was referring to the Valero gas station incident, the box cutter incident, or both. She referred to defendant threatening, harassing, and annoying Doe on February 23 as the basis for count 6 but did not otherwise elaborate. She did not inform the jury of the requirement that they unanimously decide which acts constituted each of the offenses. The court's instructions also did not associate any particular act with any of the four counts (i.e., 1 and 2 and 6 and 7), and did not inform the jury that it was required to agree unanimously which acts constituted each count.

Although it is arguable that a prosecutor's explicit election of acts upon which he or she intends to rely as proof of each charged offense can relieve the trial court of the obligation to instruct on the unanimity requirement, it is clear that if the court does not so instruct, the prosecutor's argument can substitute for an instruction only if the prosecutor not only directly informs the jurors of the election but also informs the jurors of their "concomitant duties," i.e., the duty to reach a unanimous agreement on the acts underlying each charged offense. (*People v. Melhado, supra*, 60 Cal.App.4th at p. 1536.) Here, although the prosecutor explained that she was electing to rely on certain incidents for the various counts, she did not inform the jury that it could not rely on other evidence or that it had to agree unanimously as to the facts underlying each count. Accordingly,

the prosecutor's argument was not sufficient to remedy the absence of a unanimity instruction.⁹

We review error in omitting a unanimity instruction under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24, i.e., whether the error was harmless beyond a reasonable doubt. (*People v. Smith* (2005) 132 Cal.App.4th 1537, 1545-1546; *People v. Melhado, supra*, 60 Cal.App.4th at p. 1536.)

With respect to count 2, the omission of an instruction on unanimity was not harmless beyond a reasonable doubt. Even if we assume that the jury accepted that the criminal threat charged in count 2 necessarily occurred on February 22 (while the criminal threat charged in count 1 occurred on February 23), there were two incidents on February 22, both of which included conduct which could support a conviction for criminal threats: the incident at the Valero gas station, in which defendant choked Doe and threatened to kill her, and the box cutter incident which occurred after Doe left the Desert Hot Springs police station. It is clear that the jury at least in part rejected Doe's testimony concerning the box cutter incident, in that it acquitted defendant on count 3, assault with a deadly weapon, which the prosecutor also based on the box cutter incident. Because the jury did not believe that defendant threatened Doe with a box cutter in that incident, it is obvious that we cannot say beyond a reasonable doubt that all jurors *did*

⁹ It is irrelevant that defendant did not request an explicit election by the prosecutor and/or a unanimity instruction by the court. Where a unanimity instruction is required, the court has a sua sponte duty to give it. (*People v. Melhado, supra*, 60 Cal.App.4th at p. 1534.)

believe that defendant verbally threatened to kill Doe in that incident. Some jurors may have believed that he threatened her but without a box cutter in his hand, while others may have disbelieved her testimony as to that incident all together, and convicted defendant on the basis of the threat he made at the gas station. Certainly, there is nothing in the record which persuades us beyond a reasonable doubt that all jurors necessarily found that defendant threatened to kill Doe after jumping into her car as she drove away from the police station. Because the record provides no basis upon which we can conclude that all jurors selected the same incident as the basis for count 2, the instructional error was not harmless beyond a reasonable doubt.

As to count 7, the omission of a unanimity instruction was also not harmless beyond a reasonable doubt. The prosecutor argued that count 6 occurred on February 23 and count 7 on February 22. As we discussed above with respect to count 2, there was evidence of two incidents on February 22, each of which, if believed by the jury, constituted a violation of the restraining order. For the same reasons that we are not convinced that all jurors necessarily agreed on the same incident as the basis for count 2, we are not convinced that all jurors necessarily agreed on the same incident as the basis for count 7.

As to count 6, however, we are convinced beyond a reasonable doubt that the jury unanimously found that defendant violated the restraining order in the incident on February 23, as argued by the prosecutor. That incident, according to Doe, involved the vandalism of her car and a threat to kill her (counts 5 & 1, respectively). The jury

acquitted defendant of making criminal threats on that date, but it convicted him of vandalism. The restraining order forbids damaging or destroying personal property. Consequently, there is no reason to believe that some jurors may have based the conviction in count 6 on the February 25 threatening phone call Doe reported to the probation officer.

For these reasons, we will reverse the judgment as to counts 2 and 7 and affirm the judgment as to count 6.

2.

THE NEW TRIAL MOTION WAS PROPERLY DENIED

Defendant filed a motion for new trial, asserting that he was denied a fair trial by the prosecutor's misconduct during closing arguments, in which she repeatedly asserted that law enforcement had "failed" Doe and urged the jury not to fail Doe as well. The trial court held that any prejudicial effect of the argument, which it agreed was improper, was cured by the court's admonitions to the jury not to decide the case on the basis of any concern that the system had "failed" Doe or on the basis of any emotion.

A trial court may grant a motion for new trial if the court finds that the prosecutor engaged in prejudicial misconduct. (§ 1181, subd. 5.) Defendant contends, however, that the trial court "did not properly consider" the motion because the court failed to independently weigh the evidence and assess the credibility of the witnesses. The trial court has a duty to reweigh the evidence and determine the credibility of witnesses—in effect, to act as a 13th juror—but this applies only when the basis of the new trial motion

is that the verdict is contrary to the evidence, as provided in section 1181, subdivision 6. (See, e.g., *Porter v. Superior Court* (2009) 47 Cal.4th 125, 133.) When the new trial motion is based on prosecutorial misconduct, as provided in section 1181, subdivision 5, the trial court does not reweigh the evidence but instead determines whether misconduct occurred and if so, whether it was sufficiently prejudicial to require a new trial.¹⁰ (See *People v. Uribe* (2011) 199 Cal.App.4th 836, 870-871.)

Here, the new trial motion was based solely on section 1181, subdivision 5. Defendant asserts that it was based on section 1181, subdivision 6 as well, apparently because the motion argued that the jury “returned verdicts contrary to the law and truth of evidence, by returning contradicting verdicts based on passion.” This is incorrect. The motion does not cite section 1181, subdivision 6 as a basis for granting a new trial. And, read in context, the contention that the jury “returned verdicts contrary to the law and truth of the evidence” is merely an expression of the prejudice which allegedly resulted from the prosecutor’s misconduct.

We reverse the denial of a new trial motion based on prosecutorial misconduct only if the decision is “plainly wrong.” (*People v. Hardy* (1992) 2 Cal.4th 86, 213.)

¹⁰ Section 1181, subdivision 5 provides that a new trial may be granted “[w]hen the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury[.]” Section 1181, subdivision 6 provides that a new trial may be granted “[w]hen the verdict or finding is contrary to law or evidence . . . [.]”

We agree with defendant that the prosecutor's remarks, in which she repeatedly urged the jury not to "fail" Doe and exhorted them to remedy the failures of law enforcement, were an improper appeal to the emotions of the jurors. However, we also agree with the trial court that the court's prompt admonitions to the jury in each instance in which the defense objected cured any prejudice which might otherwise have ensued. Rather than convicting defendant on all counts, as might be expected if the jury's passions were swayed by the improper argument, the jury acquitted defendant on three counts, including multiple lesser included offenses. This clearly demonstrates that the jury rejected the prosecutor's appeal to emotion rather than dispassionate factfinding and that defendant suffered no prejudice. Accordingly, the trial court was not "plainly wrong" in denying the new trial motion. (*People v. Hardy, supra*, 2 Cal.4th at p. 213.)

3.

THE ABSTRACT OF JUDGMENT AND SENTENCING MINUTES IN CASE NO.

INF064200 MUST BE MODIFIED

When defendant was sentenced following his guilty plea in case No. INF064200, the court imposed a restitution fine and a probation revocation fine, as required by law (§§ 1202.4, subd. (b), 1202.44), each in the amount of \$200. After his probation was revoked and he was sentenced to state prison in that case, the court again imposed a restitution fine in the amount of \$200. He contends that it was improper to impose a second restitution fine. The Attorney General agrees, but points out that imposition of a restitution fine is mandatory, and in the absence of any evidence that defendant paid the

restitution fine as originally ordered, the abstract of judgment must reflect that the fine was imposed. She suggests modifying the abstract of judgment to reflect imposition of a \$200 restitution fine “as ordered by the trial court on January 21, 2009.” We agree with this solution. Defendant does not oppose this solution.

The Attorney General also points out that the abstract of judgment in case No. INF064200 should be corrected to state that the probation revocation fine is now due because probation was revoked. Again, we agree.

DISPOSITION

In case No. INF064200, the superior court is directed to modify the abstract of judgment and the sentencing minutes to reflect that the restitution fine is imposed pursuant to Penal Code section 1202.4, subdivision (b), as originally ordered on January 21, 2009. The superior court is also directed to modify the abstract of judgment and sentencing minutes to reflect that the probation revocation fine imposed on January 21, 2009, is now due, probation having been revoked. The superior court is further directed to forward the corrected minutes and abstract of judgment to the Department of Corrections and Rehabilitation within 30 days after the finality of this opinion. The judgment is otherwise affirmed.

In case No. INF10001280, the judgment is reversed as to counts 2 and 7, and the cause remanded for a new trial on those counts. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.