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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.

AARON TIMOTHY TOSSELL,

Defendant and Appellant.

E053056

(Super.Ct.No. RIF10000447)

OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Petersen, Judge.

Affirmed.

Gary V. Crooks, 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, Kelley Johnson, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Aaron Timothy Tossell appeals his conviction for residential burglary, attempted criminal threats and vandalism. He contends that the trial court violated his constitutional right to present a defense, that the prosecutor committed prejudicial acts of misconduct and that there was insufficient evidence to support the conviction for attempted criminal threats.

We will affirm the judgment.

### PROCEDURAL HISTORY

Defendant was convicted by a jury of attempted criminal threats (Pen. Code,<sup>1</sup> §§ 664/422; count 1); first degree burglary (§ 459; count 2); and vandalism (§ 594; count 3). The jury found that defendant personally used a bat during the commission of counts 1 and 2, within the meaning of sections 12022, subdivision (b)(1) and 1192.7, subdivision (c)(23), but the trial court struck the enhancement as to count 2.

The court placed defendant on summary probation for three years, subject to terms and conditions including 365 days in custody.

Defendant filed a timely notice of appeal.

### FACTS

Defendant and his wife, Jane Doe, had two children, a girl who was approximately a year old and a boy who was approximately two and a half. The family lived with defendant's parents in Corona. In December 2009, defendant "kicked" Doe out of the house. She took her daughter with her and left her son with defendant. She moved

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<sup>1</sup> All statutory citations refer to the Penal Code, unless another code is specified.

“between . . . a couple different places.” By December 29, 2009, Doe and the baby were staying at the home of Katherine McKinney in Corona.

On that date, defendant went to McKinney’s house looking for Doe. He testified that he was concerned about his daughter, whom he had not seen for three weeks. McKinney’s son, Jeff Groover, had been friends with defendant and Doe for many years, and defendant had been to the house many times. Defendant knocked on the back door of the house, which was Groover’s private entrance. Defendant had come to that door before. When Groover heard the knock on the door, he asked who it was. Defendant asked him to open the door. Groover thought he said, “Open the door or I’m going to come through the window,” or “something like that.” Defendant had a baseball bat.

Defendant asked where Jane Doe was. Groover pointed down the hall. He then closed his door because he did not want to be involved. Defendant was acting “normal.” About 15 seconds later, Groover heard Doe yell, “Get out of here.”

Doe was in a bedroom with the baby when she saw defendant walking down the hall toward her room, holding a baseball bat down at his side, by his leg. He was walking “like he was very upset or mad.” Doe asked him what he was doing there, and he replied, “Why are you doing this to [the baby]? Just let me have [her]. I’m going to take her home.” Doe asked why he had the baseball bat. Defendant replied, “Just give me [the baby] or I’m going to start smashing everyone’s head in and I’m going to kill you.” Defendant was speaking in an aggressive manner, in a tone “that means business.” He

was about two feet away from her, and he was speaking so rapidly and angrily that he was “like foaming at the mouth” and spit on her. Doe was scared.

The baby began to cry. Doe told him that he could not take her, and that they would have to handle it a different way. Defendant put the bat down and grabbed the baby. Doe asked him not to “play tug of war” with the baby. Defendant said he was taking the baby with him and told Doe to let go of her. The baby began to scream, and defendant let go of her. He grabbed Doe’s laptop computer and tore the keyboard off. Doe yelled, “Somebody needs to call the cops.” At that point, defendant started to walk away. As he was leaving, defendant “cussed” at Doe and said that he hated her and that he should just kill her.

Police arrived shortly after defendant left. Corona Police Officer Cortney Bell spoke to Doe shortly after the incident and said that Doe was “frightened,” “shaken up,” and “visibly upset.” Doe told Bell that defendant said he was going to kill her and that she believed that he would eventually either hurt her severely or kill her. Doe was adamant that the police obtain an emergency protective order against defendant.

About half an hour after the police arrived, a neighbor told them that defendant had just driven back by the house in a silver Chrysler. An officer went outside and saw a silver Chrysler driving away from the house. Shortly afterward, police located defendant’s car and stopped him.

Defendant testified that he went to the McKinney house just to check on the baby’s welfare because he had not seen her in three weeks. He denied that he had a

baseball bat and denied that he threatened to harm anyone. He admitted breaking the laptop, but said it was an accident. He said it was his intention to verify that his daughter was there and then ask a friend of his, who was a police officer, to do a welfare check. He drove back to the house solely to verify the address.

In May 2004, defendant pleaded guilty to misdemeanor vandalism after he broke a window. In August 2004, he pleaded guilty to misdemeanor spousal battery against Jane Doe and was placed on probation. In 2005, he pleaded guilty to violating a restraining order prohibiting negative contact with Jane Doe. In 2005, he was convicted of receiving stolen property.

Jane Doe testified that in 2005, she was convicted of felony possession of methamphetamine and that in 2004, she was convicted of misdemeanor petty theft.

### LEGAL ANALYSIS

1.

#### THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE PROFFERED IN SUPPORT OF DEFENDANT'S "DEFENSE OF ANOTHER" THEORY

Defendant contends that the trial court violated his constitutional right to present evidence in support of his defense. The issue arose as follows. The prosecutor filed a motion in limine to exclude evidence of Jane Doe's drug use in the weeks prior to the incident. In opposition, the defense argued that Doe's drug use could be substantiated by a Child Protective Services (CPS) worker, who could also testify that Doe's drug use affected her prospects for retaining or regaining custody of the children. Defense counsel

explained that this evidence was relevant with respect to Doe's motive to lie, as well as to show why defendant "would have concern for the well-being of his daughter and her safety." Defense counsel argued that Doe had "an extensive drug history" and that she had failed drug tests immediately after she had left the family home with the baby. This, she argued, was relevant to defendant's "belief that there [was] imminent harm or danger to the child, the defense of others."<sup>2</sup> The prosecutor argued that the CPS investigation was done after the incident in question, and that the subsequent drug testing was not relevant to establish that Doe was using drugs at the time of the incident. Defense counsel reiterated that this evidence would corroborate defendant's belief that the baby was in danger during the time in question. She argued that excluding the evidence would deprive defendant of the ability to explain the basis for his concern for the baby's safety.

The trial court ultimately excluded the evidence of Doe's drug use under Evidence Code section 352, finding it "collateral," minimally relevant, more prejudicial than probative, and likely to confuse the issues.<sup>3</sup>

The court denied defendant's subsequent motion for a mistrial, which was based on the contention that the exclusion of the evidence of Doe's drug use violated his

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<sup>2</sup> There was also discussion of evidence of Doe's character for violence in connection with a theory of self-defense, but defendant made no offer of proof on that point and does not raise any issue on appeal pertaining to the exclusion of such evidence.

<sup>3</sup> Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

constitutional right to present a defense. The court cited the same reasons it had relied upon to exclude that evidence pursuant to Evidence Code section 352, adding that there was “nothing to substantiate” defendant’s belief that the baby was in danger because of Doe’s drug use. The court noted that defendant had not made an offer of proof that he had any knowledge that Doe was using drugs on the day of the incident, and clarified that the proffered evidence of Doe’s *past* drug use was inappropriate under Evidence Code section 352.

On appeal, defendant again contends that the exclusion of the evidence of Doe’s drug use violated his constitutional right to present a defense, i.e., that he was legitimately concerned about his daughter’s welfare because Doe’s drug use placed the baby in danger.

Although the defenses of self-defense or defense of another arise most commonly in the context of a homicide prosecution, both defenses apply to other crimes as well, pursuant to sections 692, 693 and 694.<sup>4</sup> (See generally *People v. King* (1978) 22 Cal.3d

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<sup>4</sup> Section 692 provides: “Lawful resistance to the commission of a public offense may be made:

“1. By the party about to be injured;

“2. By other parties.”

Section 693 provides: “Resistance sufficient to prevent the offense may be made by the party about to be injured:

“1. To prevent an offense against his person, or his family, or some member thereof.

“2. To prevent an illegal attempt by force to take or injure property in his lawful possession.”

Section 694 provides: “Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense.”

12, 22-23; see also *People v. Kirk* (1986) 192 Cal.App.3d Supp. 15, 19 [defense of others defense is available to defendant who asserted that he brandished a weapon to prevent apparently imminent rape]; *People v. Clark* (2011) 201 Cal.App.4th 235, 247-248 [self-defense applies to felony child abuse charge, where father asserted that he struck 14-year-old-son, causing injury, in self-defense].) Those defenses apply, however, only in the face of an imminent threat of physical harm: “‘Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant’s fear must be of *imminent* danger to life or great bodily injury.’ [Citation.]” (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) “Imminent peril” means that the risk of physical harm “‘must have existed or appeared to the defendant to have existed at the very time [he or she acted to defend another person]. In other words, the peril must appear to the defendant as immediate and present and not prospective or even in the near future. An imminent peril is one that, from appearances, must be instantly dealt with.’” (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1187 [Fourth Dist., Div. Two], disapproved of on other grounds by *People v. Humphrey, supra*, 13 Cal.4th at pp. 1084-1089.) The defendant must actually believe that either the defendant or the other person is at imminent risk of physical harm, and that belief must have been objectively reasonable. (*People v. Humphrey, supra*, at pp. 1082-1083.)

In the context of dependency proceedings pursuant to Welfare and Institutions Code section 300, it is well established that evidence of a parent’s drug or alcohol abuse is not sufficient, by itself, to support a finding that the parent’s drug use placed the child

at risk of substantial physical harm. For example, in *In re David M.* (2005) 134 Cal.App.4th 822, the court held that a parent's use of marijuana, without more, was insufficient to warrant dependency jurisdiction. (*Id.* at pp. 829-830.) In contrast, in *J.M. v. Superior Court* (2012) 205 Cal.App.4th 483, the court found the evidence sufficient to warrant dependency jurisdiction where the mother lived in a "drug house" and "wantonly and recklessly exposed her children to illegal drugs and made them easily accessible" to the children, including one child who had died after ingesting some of the mother's drugs. (*Id.* at p. 488.) Similarly, in *People v. Little* (2004) 115 Cal.App.4th 766 (on which defendant mistakenly relies), the parent's use of controlled substances was not found to be sufficient, in itself, to support a conviction for child endangerment. (§ 273a, subd. (b).) On the contrary, the court found the verdict supported by the evidence that the baby, who was old enough to "crawl or at least roll over," was left unattended on a bed without railings or any restraint, at a height sufficient to cause injury if she fell off the bed, as well as the evidence of the appalling conditions in the residence, including "the stench from rotten food and feces, piles of garbage, loose animals, and widespread vermin." That the defendant possessed and used drugs in the residence "only strengthene[d] the finding that the circumstances in the residence posed a threat to the child's health and safety." (*People v. Little, supra*, at pp. 771-772.) The court did not hold, however, that it was sufficient in and of itself.

These authorities support the conclusion that the bare fact that a parent used controlled substances does not create such an imminent risk of physical harm to a child as

to either warrant an instruction on the theory of defense of another or entitle the defendant to present evidence in support of that theory. Rather, there must be some evidence of a specific, imminent threat to the child's physical safety which warranted an immediate use of force or threat of force to remove the child from the parent's care. Defendant made no offer of proof as to any such threat.<sup>5</sup>

We review a trial court's determination that evidence is not admissible under Evidence Code section 352 for abuse of discretion. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) Because defendant made no offer of proof that Doe's alleged drug use had placed the baby at imminent risk of physical harm at the time defendant went to the McKinney house, the evidence of Doe's drug use was not relevant to the theory that defendant acted in defense of another. Consequently, it was not an abuse of discretion to exclude it on that basis.

Moreover, even though defense counsel argued that the evidence was relevant to a defense of another theory, she never asserted that defendant would actually rely on the defense. She did not assert that defendant would testify that he went to the McKinney house with a baseball bat with the intent to use force or threats to retrieve his daughter because he feared she was at risk of imminent harm. On the contrary, she asserted that

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<sup>5</sup> Defendant claims that he "offered to present evidence that Jane Doe was a drug user, went to places where drugs were kept and ingested, and that her drug use was continuing before and after the day he entered the McKinney house," thus showing that "at the moment [he] entered the McKinney house he reasonably believed that injury to [his daughter] was imminent." The record does not support the claim that he proffered any such evidence. Even if he had done so, however, that would not have been sufficient to constitute a factual basis for a defense of another defense.

his intent was to discover Doe's and the baby's whereabouts and then ask his police officer friend to arrange a welfare check. Counsel pointed out to the court that the defense disputed the evidence that defendant was armed with a baseball bat when he went to the house. Although Doe's drug use had some relevance to this defense, in the sense that it provided an explanation for defendant's reasons for being concerned about his daughter, it was nevertheless not an abuse of discretion to exclude it. Any parent who did not know the whereabouts of his or her infant daughter for three weeks would be concerned about the baby's welfare, and under those circumstances, most parents would be searching for the baby. The additional information that he believed Doe was using drugs would not add significant weight to defendant's testimony as to his reasons for searching for his daughter. Given the minimal relevance of the evidence of Doe's drug use to the defense case, we cannot say it was an abuse of discretion to exclude it. Moreover, even if it were an abuse of discretion, the error would have been harmless for the same reasons: It is not reasonably probable that a more specific explanation for defendant's concern about his daughter would have resulted in an acquittal. (*People v. Cudjo, supra*, 6 Cal.4th at p. 611 [standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818 applies to Evid. Code § 352 error].)

Because there was no abuse of discretion, the trial court's ruling also did not violate defendant's due process right to present a defense. A trial court has a "traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.'" (*People v. Cudjo, supra*,

6 Cal.4th at p. 611.) Consequently, the application of the ordinary rules of evidence, such as the exclusion of evidence which has insufficient probative value to outweigh its prejudicial effect under Evidence Code section 352, generally does not deprive the defendant of the constitutional right to present a defense. (*Ibid.*)

2.

## THERE WAS NO PROSECUTORIAL MISCONDUCT

### *Introduction*

“The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Here, defendant contends that the prosecutor repeatedly misstated the evidence and argued facts not in evidence during his closing argument, improperly vouched for a witness's credibility, made objections in bad faith, appealed to the prejudice and passions of the jury, and disparaged defense counsel. He contends that the misconduct was cumulatively prejudicial because it was a close case and because the prosecution's case was weak. He also contends that objecting to each instance of misconduct would have been futile "because of the sheer number of instances of misconduct," and because the trial judge had indicated that defense counsel was making too many objections.

We disagree that objections would have been futile in any of the instances defendant relies upon. However, defendant also contends that if objections would not have been futile, trial counsel provided constitutionally deficient representation by failing to object. To address that contention, we will address defendant's arguments on their merits.

*It Is Not Reasonably Likely That the Jury Applied Any of the Prosecutor's Complained-of Remarks During Oral Argument in an Objectionable Fashion, and Any Misstatement of the Evidence Did Not Render the Trial Fundamentally Unfair or Involve the Use of Deceptive or Reprehensible Methods to Attempt to Persuade the Jury.*

Defendant contends first that the prosecutor misstated evidence and argued facts not in evidence during his argument to the jury. Specifically, he objects that the prosecutor misquoted Jane Doe's testimony, representing that Doe testified that defendant said, "Give me my daughter. I'm going to start smashing heads. I'm going to

kill you.” He points out that Doe actually testified that defendant said, “Just give me [my daughter] *or* I’m going to start smashing heads in and I’m going to kill you.” Later in his argument, the prosecutor stated the threat correctly. Based on this, defendant contends that by stating the threat once unconditionally (“I’m going to kill you”) and once conditionally (“Just give me [my daughter] *or* . . . I’m going to kill you”) the prosecutor “wanted the jury to believe” that defendant had made two threats.

We disagree. Nothing in the prosecutor’s minor paraphrasing of Doe’s testimony implied that defendant made more than one threat. In any event, however, Doe did testify that he threatened at least twice to kill her. She testified that defendant was holding the bat when he demanded that she give him the baby. He put the bat down, and they continued to argue and he broke the computer. Then, as he was leaving the room, he was “cussing at me and telling me that he, um, should just kill me and he hates me and just, you know . . . .”

Defendant further contends (under the same heading) that it was only because of the way the prosecutor questioned Doe that she appeared to state that defendant unequivocally threatened to kill Doe. We see nothing improper in the prosecutor’s questioning.

Defendant also objects that the prosecutor improperly elicited from Doe that she felt scared when defendant threatened to kill her. The question (“Did you feel scared?”) was leading, but defense counsel’s objection on that ground was overruled. However,

asking a single leading question does not, except perhaps under extraordinary circumstances not present in this case, amount to prosecutorial misconduct.

Defendant next complains that the prosecutor mischaracterized the evidence to argue that defendant wanted to retrieve his daughter because he had not seen her in three weeks and did not want to be separated from her. He contends that this was misconduct because the prosecutor knew that the “real” reason that defendant was concerned for the baby’s safety was Doe’s drug use. It is irrelevant that the prosecutor knew that defendant *wanted* to testify that he was concerned about Doe’s drug use. The court excluded that evidence, and the prosecutor had every right to argue the case based on the evidence which was actually admitted. Moreover, defendant did testify that he was “broken up” and “heartbroken” about not having seen his daughter for three weeks, and that is exactly what the defense argued to the jury. Accordingly, the prosecutor’s argument was fair comment on the evidence.

*The Prosecutor Did Not Improperly “Vouch” For His Case or For the Credibility of a Witness.*

A prosecutor may not offer his or her opinion based on personal experience or on facts outside the record to vouch for the credibility of the evidence or of a witness. (*People v. Farnam* (2002) 28 Cal.4th 107, 200.) Defendant contends that the prosecutor violated this principle when he argued, “I’m telling you that [defendant] entered [the house] with the intent to commit both assault and criminal threats.” The argument was not improper. The prosecutor followed that statement with a discussion of the elements

of assault. He then argued that defendant's act of demanding entry to the house with a baseball bat in his hand and confronting Jane Doe with the bat while saying that he was going to start smashing people's heads in if she did not give him the baby supports the inference that he intended to assault her if she did not comply. This is fair comment on the evidence, not improper vouching, and the trial court properly overruled the defense objection.

Next, defendant claims that the prosecutor improperly used the prestige of his office when he argued, "I am confident that [the laptop computer was] worth more than \$400."<sup>6</sup> He contends that this misstated the evidence. As defendant acknowledges, the trial court sustained defendant's objection and admonished the jury that counsel could not give a personal opinion. A defendant bears the burden of showing that an admonition to disregard improper argument was insufficient to cure the prejudice caused by the argument. (*People v. Samayoa, supra*, 15 Cal.4th at pp. 854-855.) Here, defendant does not contend that the admonition was not sufficient, and consequently, he has failed to meet his burden. And, in any event, Jane Doe testified that the laptop cost \$895, and defendant testified that he had paid about \$500 for it. Consequently, the prosecutor's argument was based on the evidence and did not constitute either improper vouching or relying on facts not in evidence.

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<sup>6</sup> Felony vandalism applies to property valued at \$400 or more. (§ 594, subd. (b)(1).)

Defendant next contends that the prosecutor improperly vouched for Jane Doe's credibility by saying, "So I think Jane Doe is very credible." Again, the court sustained defendant's objection and admonished the jury to disregard the prosecutor's argument. Defendant complains, however, that the admonition was insufficient because it did not tell the jury how much of the prosecutor's argument to disregard or why the jury should disregard it. The objection was made immediately after the prosecutor made the statement quoted above, the prosecutor stated that he would withdraw it, and the court immediately admonished the jury to disregard the argument. Although the court did not explicitly state that the jury was to disregard the prosecutor's opinion as to the value of the computer, in context, it was undoubtedly clear to the jurors what portion of the argument was being objected to and what they were to disregard. But even if the admonition was not sufficient, we agree with the Attorney General that the prosecutor's comment did not amount to improper vouching. A prosecutor is entitled to comment on the credibility of a witness based on the evidence (*People v. Thomas* (1992) 2 Cal.4th 489, 529), and may also give a fair response to the defendant's arguments (*People v. Lewis* (2004) 117 Cal.App.4th 246, 256-257). Here, the comment was part of the prosecutor's rebuttal to defendant's argument that Jane Doe was "making things up." The prosecutor explained, based on the evidence, *why* the jury should believe that Jane Doe was not making things up or exaggerating. This was not improper.

*The Record Does Not Support the Contention That the Prosecutor Made Objections in Bad Faith.*

Next, defendant contends that the prosecutor made objections in bad faith, misleading the court into erroneous rulings which excluded evidence beneficial to the defense. Specifically, he contends that in two instances, the prosecutor objected to testimony which he asserted violated, or would violate, the trial court's in limine rulings precluding certain categories of evidence. Defendant does not cite to anything in the record which suggests that the prosecutor did so in bad faith, however. The burden is on the appellant to demonstrate error. (*People v. Indiana Lumbermens Mutual Ins. Co.* (2011) 194 Cal.App.4th 45, 52 [Fourth Dist., Div. Two].) Defendant has not met this burden.

*The Prosecutor Did Not Improperly Appeal to the Prejudice and Passions of the Jury.*

Jane Doe testified that during the argument, defendant was standing about two feet away from her. He was "forceful and agitated," and "he was like foaming at the mouth like seriously . . . ." The prosecutor then asked, "When you say foaming, like do you mean like a rabid dog[?]" When the court overruled a defense objection, the prosecutor resumed, asking, "Was there like spit coming of his mouth? What do you mean by foaming at the mouth?" Jane Doe replied, "Exactly that. I told Officer Bell that he literally spit on me." She elaborated, "When he was speaking to me, it was like it was such a fast and angry way that he was literally spitting on me." Defendant now contends

that the prosecutor committed misconduct by “leading the witness to testify that [defendant] was two feet away and foaming like a rabid dog,” because “the larger impact was the implication that [defendant] was foaming at the mouth like an animal that normally has to be put to death because of rabies.” He contends that the prosecutor improperly compared him to a rabid dog.

Defendant is correct that a prosecutor may not make comments which are calculated to arouse the jury’s passions or prejudices. (*People v. Mayfield* (1997) 14 Cal.4th 668, 803.) We are not persuaded, however, that the prosecutor’s use of the phrase “rabid dog” was calculated to have that effect. Jane Doe’s testimony that defendant was “foaming at the mouth” was her own description; it was not elicited by any suggestion of the prosecutor. The prosecutor used the phrase “like a rabid dog” only in seeking to have Jane Doe clarify what she meant by “foaming at the mouth.” He did not argue that defendant was like a rabid dog, and he most certainly did not imply that defendant was someone who should be put to death, like a rabid dog. There is no reasonable likelihood that jurors were aroused to passion against defendant by the prosecutor’s use of that phrase.

Defendant also contends in connection with this argument that the prosecutor mischaracterized the evidence. He argues that it is improper for a prosecutor “to act as an unsworn witness by insinuating facts in questions which she cannot support with admissible evidence.” He points out that there was no foundation as to Jane Doe’s expertise in rabid dogs. The meaning of this argument is unclear. We hesitate to

conclude that he is attempting to argue that the prosecutor intended to insinuate that defendant was *actually* a rabid dog, because that argument would be absurd. However, we are unable to draw any other meaning from it.

*The Prosecutor Did Not Disparage Defense Counsel in Argument.*

Finally, defendant asserts that the prosecutor committed misconduct in making the following statement in his rebuttal:

“Good afternoon, ladies and gentlemen. I hope you guys [*sic*] all had a good lunch, had time to digest some arguments that [defense counsel] just gave to you. In case you didn’t know, she kind of threw the kitchen sink at you. She argued everything. And over lunch while eating my food, I was trying to think and I wanted to talk about a few of the things she said. I don’t want to dignify all the things she said.”

The trial court overruled defendant’s objection to this argument. The court later explained that it did not view the argument as a personal attack on defense counsel but merely vigorous argument.

Defendant now asserts that the comment was misconduct because it had a tendency to inflame the jury against defense counsel “for supposedly arguing points without any merit.” We disagree. The prosecutor did not engage in “such forbidden prosecutorial tactics as falsely accusing counsel of fabricating a defense or otherwise deceiving the jury.” (*People v. Stitely* (2005) 35 Cal.4th 514, 560.) Rather, the comment was explicitly directed at defense counsel’s closing argument and was not a comment on counsel’s integrity. It was not improper. (*Ibid.*)

*Conclusion*

Because we reject defendant's claims of prosecutorial misconduct on their merits, it follows that defense counsel did not render ineffective assistance in the instances in which she did not object. Accordingly, we reject defendant's claim of ineffective assistance of counsel as well.

3.

**SUBSTANTIAL EVIDENCE SUPPORTS THE CONVICTION FOR ATTEMPTED  
CRIMINAL THREATS**

As in effect on the date of the offense, section 422 provided:

“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 be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.”

Defendant contends that the verdict on count 1, on the lesser included offense of attempted criminal threats, cannot be sustained because defendant's statements were not

“so unequivocal, unconditional, immediate, and specific” as to convey a gravity of purpose and immediate prospect of execution of the threat, as required by section 422. Further, he contends, there was insufficient evidence that defendant’s statement actually placed Jane Doe in a state of sustained fear.

We address the second contention first. In order to sustain a conviction for attempted criminal threats, it is not necessary that the evidence shows that the victim was actually placed in a state of sustained fear. Rather, “[I]f a defendant, . . . acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat. [In this situation], only a fortuity, not intended by the defendant, has prevented the defendant from perpetrating the completed offense of criminal threat itself.” (*People v. Toledo* (2001) 26 Cal.4th 221, 231.)

Here, even if we assume that Jane Doe did not actually suffer sustained fear—either because defendant left before acting on his threat and was arrested almost immediately thereafter or because, as defendant asserts, she did not really believe him—defendant’s threat nevertheless constituted an attempted criminal threat if he acted with the requisite intent and under circumstances “sufficient to convey to the person threatened a gravity of purpose and an immediate prospect of execution so as to

reasonably cause the person to be in sustained fear for his or her own safety or for his or her family's safety.” (*People v. Toledo, supra*, 26 Cal.4th at pp. 230-231.) The real issue here is whether substantial evidence supported the jury's finding that the threat was “on its face and under the circumstances in which it [was] made . . . 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.” (§ 422.)

As defendant acknowledges, despite the express statutory language requiring that the threat be unconditional, the California Supreme Court has rejected a strict interpretation of that language. In *People v. Bolin* (1998) 18 Cal.4th 297, the court held that the statutory language, requiring that the threat be “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” (*id.* at p. 337, italics added) indicates that “unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim.’ [Citation.]” (*id.* at p. 340). That the threat is conditional does not place it outside the scope of section 422: “[T]he word “unconditional” was not meant to prohibit prosecution of all threats involving an “if” clause, but only to prohibit prosecution based on threats whose conditions precluded them from conveying a gravity of purpose and imminent prospect of execution.’ [Citations.] . . . ‘Most threats are conditional; they are

designed to accomplish something; the threatener hopes that they *will* accomplish it, so that he won't have to carry out the threats.'" (*People v. Bolin, supra*, at p. 339.)

Similarly, "[t]he use of the word 'so' indicates that unequivocal, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and [the] surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim. . . .' [Citation.]" (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1538.) "Immediate" means "that degree of seriousness and imminence which is understood by the victim to be attached to the *future prospect* of the threat being carried out" if the conditions are not met. (*Ibid.*, fn. omitted.) "The four qualities are simply the factors to be considered in determining whether a threat, considered together with its surrounding circumstances, conveys those impressions to the victim" (*ibid.*, quoting *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157-1158), or could convey them to a reasonable person under the circumstances.

Here, Jane Doe's testimony constitutes substantial evidence—i.e., credible evidence which a reasonable trier of fact could have believed was sufficient to prove defendant's guilt beyond a reasonable doubt (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11)—that the circumstances surrounding defendant's threat were sufficient to have put a reasonable person in sustained fear that the threat would be carried out if the condition was not complied with. Doe testified that when she saw defendant coming toward her with the baseball bat, he was walking like he was upset or mad, and he spoke to her in a tone which meant business. He was so angry he was spitting as he yelled at her.

Defendant had a history of violence toward Doe. Thus, even though defendant never raised the bat or gestured toward Doe with it, a person in her position could reasonably have feared that he would strike her with it. All of these circumstances are sufficient to cause a reasonable person to believe that when defendant demanded that Doe give him the baby, there was an immediate prospect of execution if the condition was not met. Moreover, even after defendant put the bat down and Doe suggested that they could work it out a different way, defendant continued to scream at her and said again that he was going to kill her. The fact that defendant did *not* actually strike Doe when she did not release the baby does not, as defendant contends, mean that his threat did not satisfy the requirements of section 422. Section 422 does not require that the threat be carried out in order for the defendant to be culpable. This evidence amply supports the guilty verdict on count 1.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER  
J.

We concur:

HOLLENHORST  
Acting P. J.  
KING  
J.