

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

REBECCA RACHEL MODRALL,

Defendant and Appellant.

E054205

(Super.Ct.No. INF067411)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Ronald L. Johnson, Judge. (Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Dennis L. Cava, 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, and Barry Carlton, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant, Rebecca Rachel Modrall, was charged with one count of extortion. (Pen. Code, § 518.)¹ At trial, the prosecution argued that the jury could find defendant guilty based on any one of four possible acts of extortion. The court instructed the jury with CALCRIM No. 3500 as to the requirement of juror unanimity. The jury found defendant guilty. The court granted defendant probation on the condition, among others, that she serve 180 days in custody and pay \$28,200 in restitution.

On appeal, defendant contends the court prejudicially erred by giving the unanimity instruction. We reject this argument and affirm the judgment.

II. FACTUAL SUMMARY

On October 18 and 19, 2009, Elliott Ashford's wife was out of town. Around 11:30 p.m. on October 18, 2009, Ashford used the Craig's List Web site to find an advertisement for a woman who would come to his house to give him a massage. He was aware that these types of advertisements may refer to services other than a massage. Ashford called the telephone number in the advertisement, spoke with defendant, and agreed upon a price for her services.

Two or three hours later, defendant and another woman arrived at Ashford's home. Ashford gave defendant \$300 or \$500. Ashford offered the women a drink and suggested they get into his Jacuzzi. Defendant told him that would cost more money.

¹ All further statutory references are to the Penal Code unless otherwise indicated. Defendant was also charged with embezzlement or theft of property from an elder. (§ 368, subd. (d).) This count was dismissed prior to trial.

Ashford then drove to a bank ATM, withdrew \$700, and gave the money to defendant. He also wrote a check for \$300 and gave it to defendant's companion.

After they returned, the three of them got into the Jacuzzi. The women were topless and Ashford touched their breasts. When defendant mentioned her sister, Ashford asked if she could come over, too. Defendant then called her sister.

Ashford, who had been drinking, fell asleep in the Jacuzzi. When he awoke, defendant and her companion were gone and another woman was tapping his shoulder. The woman told Ashford she needed to be paid money if he wanted her to stay. Ashford said he did not have any more money and told her to leave.

Later that morning or the next day, defendant called Ashford and told him her sister had been in an accident, that it was Ashford's fault because he had requested she come to the house, and he needed to pay \$4,200 for the damage. Ashford, afraid defendant might cause problems with his family, agreed to pay.

He met defendant in a parking lot and gave her \$4,200 in cash. Defendant then asked Ashford for his Rolex watch. When he told her she could not have it, she suggested that he file an insurance claim for the watch and recover \$30,000. Ashford told her the watch was worth \$8,000, and he refused to give her the watch. Defendant told him: "You better think about it." She then produced one of Ashford's wife's purses and said: "Your wife might miss this, so you better reconsider on what you are going to do." She told him if he did not reconsider, she would "ruin [his] life."

Ashford understood defendant to mean that she would contact his wife and tell her what happened between them.

A few hours later, defendant sent a text message to Ashford, stating: ““You may want to reconsider, my dear. We aren’t going anywhere. I am going to visit with my attorney right now, and you could have till noon to decide, sweetie.””

Ashford agreed to pay defendant an additional \$8,000 because he was afraid defendant would contact his wife, and he wanted defendant to “keep quiet and go away.” Ashford withdrew the money from the bank. Defendant met him in a parking lot outside the bank. Ashford gave her \$8,000, and she gave him the purse. Ashford had defendant write out on the back of a bank deposit slip a promise that she would not contact him anymore.

Four or five days later when Ashford was at a golf tournament in Las Vegas, he received a text message from defendant. The message stated that defendant’s attorney wanted her to sue Ashford, and that she wanted more money.

When Ashford got back to town three or four days later, he agreed to meet defendant at a parking lot outside a restaurant. When they met, she patted him down to see if he was wearing a wire. She said she wanted \$25,000. The two negotiated and agreed on \$16,000. Ashford went to the bank and gave defendant a cashier’s check in the amount of \$9,346 and \$6,654 in cash. Defendant produced a written contract in which they each promised not to contact the other. They both signed the document.

Ashford's wife found some of the text messages from defendant on Ashford's cell phone and called defendant's telephone number. (There was no evidence as to whether Ashford's wife got through to defendant or left any message.)

Defendant then called or texted Ashford and told him he had broken their agreement. Ashford explained the situation to his wife and told her that he had been giving defendant money.

Upon the advice of their attorney, Ashford contacted the police. The police told Ashford to maintain contact with defendant.

Ashford and defendant arranged for another payment to defendant. They agreed on the amount of \$20,000. On November 9, 2009, Ashford got a cashier's check for \$20,000 and met defendant outside his bank. After he gave defendant the check, police arrested defendant.

At trial, the prosecution argued that defendant committed four possible acts of extortion: (1) Ashford's payment of \$4,200 in response to defendant's demand that Ashford compensate her sister for her alleged accident; (2) Ashford's payment of \$8,000 in response to defendant's threat to "ruin" Ashford's life; (3) Ashford's payment of \$16,000 in response to defendant's demand for more money; and (4) the final payment of \$20,000 after the alleged breach of the no-contact agreement.

The court gave the jury the following unanimity instruction based on CALCRIM No. 3500: "The defendant is charged with extortion 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 she committed.”²

III. ANALYSIS

Defendant was convicted of extortion. “Extortion is the obtaining of property from another, with his consent, . . . induced by a wrongful use of force or fear” (§ 518.) Such force or fear includes exposing, or imputing to, the victim any disgrace or crime, or exposing any secret affecting him. (§ 519.)

Here, defendant concedes that the evidence is sufficient to establish the crime of extortion based on the \$8,000 payment induced by the explicit threat to ruin Ashford’s life (and the implicit threat of exposing the secret of their tryst to Ashford’s wife). She contends the evidence was insufficient to convict defendant of extortion based on any of the other three payments relied upon by the prosecution. Therefore, she argues, the court should not have given the jury a unanimity instruction that indicates the possibility of finding defendant guilty based on any payment other than the \$8,000 payment. Without deciding whether the court erred in giving the unanimity instruction, we conclude that defendant could not have been prejudiced by its use.

² Defendant did not object to the instruction. Indeed, her counsel relied upon it in closing argument, stating: “Ladies and gentlemen, you have to be unanimous as to which, if any, of these four transactions constitutes extortion. If some of you believe that number one was extortion and others of you believe that number three was extortion, and still others believe that number four was extortion, then you have twelve agreeing that extortion took place, that is not enough. We must have all twelve of you believing beyond a reasonable doubt that one of the acts constituted extortion.”

To convict an accused of a crime, jurors must not only agree unanimously that the accused is guilty of the charged crime, but that “the defendant is guilty of a *specific* crime.” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Thus, “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.” (*Ibid.*) In the latter situation, the court imposes this requirement by giving an instruction requiring unanimous agreement of the particular criminal act. (See, e.g., CALCRIM No. 3500.)

“In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.” (*People v. Russo, supra*, 25 Cal.4th at p. 1135.) If the instruction has no application to the facts of the case, it should not be given even if it correctly states a correct legal principle. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 (*Guiton*).

In her opening brief, defendant explains how she was prejudiced by the unanimity instruction as follows: “Because the jury could only find [defendant] guilty of extortion beyond a reasonable doubt with respect to the \$8,000.00 Ashford gave her, if the jury did not find that payment was the result of extortion, but instead found that one of the other three payments to which the prosecutor alluded to in her argument to the jury constituted

extortion, [defendant's] conviction was not by proof beyond a reasonable doubt of every fact necessary to constitute extortion.”

If we assume, as defendant contends, that there was substantial evidence of only one extorted payment—the \$8,000 payment—defendant’s conditional assertion is correct: If the jury did not find defendant guilty of extortion based on the \$8,000 payment and the evidence was insufficient to support a verdict based on the other payments, the conviction would not be supported by substantial evidence and could not stand. This point, however, does not resolve the matter before us. The problem here is that the record does not indicate which factual basis the jury relied upon; there is no way of knowing that the jury found defendant guilty of extortion based on a payment or payments other than the \$8,000 payment. The question, therefore, is whether a conviction that is adequately supported under one factual scenario presented to the jury, but insufficiently supported by evidence of alternative factual scenarios presented to the jury, must be reversed when the record does not reveal which scenario the jury relied upon. This question was addressed in *Guiton*.

In *Guiton*, the defendant was found guilty of selling or transporting cocaine in violation of Health and Safety Code section 11352. (*Guiton, supra*, 4 Cal.4th at p. 1120.) Although there was some evidence that he sold cocaine, there was not enough evidence to support the conviction on that basis; however, there was sufficient evidence that he transported cocaine. (*Id.* at pp. 1120-1121, 1131.) The record did not reveal the basis for the jury’s verdict. The Supreme Court upheld the conviction, stating: “If the inadequacy

of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground.” (*Id.* at p. 1129.) The court further stated that “the appellate court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory.” (*Id.* at p. 1130.)

Here, the alleged inadequacy of proof—that the payments other than the \$8,000 payment were induced by a wrongful use of force or fear—is purely factual and the kind the jury is fully equipped to detect. Even if the evidence is insufficient to support a verdict based solely on one or more of the other three payments, defendant concedes that a “valid ground for the verdict remains.” (See *Guiron, supra*, 4 Cal.4th at p. 1129.) There is nothing in our record to suggest that the jury found defendant guilty based solely on payments other than the \$8,000 payment. Therefore, even if evidence of the other payments is factually inadequate to support the verdict, the conviction will not be reversed. (See *id.* at p. 1130.)

In her reply brief, defendant states her prejudice argument this way: “Because the unanimity instruction was given, the jury was afforded the opportunity to convict [defendant] of extortion on the basis of any of the . . . four payments, if it unanimously agreed as to what payment constituted extortion or if it unanimously agreed that

[defendant] committed four separate acts of extortion.” This argument, too, is without merit.

To the extent the jury was afforded the opportunity to convict defendant based on payments other than the \$8,000 payment, that opportunity had nothing to do with the unanimity instruction. The facts surrounding the other acts were admitted into evidence and the prosecutor argued (without objection) that the jury could find that any of the four payments were extorted. The possibility defendant is concerned about is not, as she argues, a possibility that existed *because of* the unanimity instruction.

For example, with or without the unanimity instruction, the jury might have concluded that the \$4,200 payment was the act that completed the extortion. The unanimity instruction did not, as defendant contends, “afford[the jurors] the opportunity to convict” defendant of extortion based on the \$4,200 payment; they had that opportunity even without the instruction. The only effect the unanimity instruction could have had on the verdict was that it ensured that all jurors agreed upon at least one act that constituted extortion. This could not, under any harmless error standard, have prejudiced defendant.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.