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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.

GAGANDEEP MARWAHA,

Defendant and Appellant.

E055979

(Super.Ct.No. SWF026791)

OPINION

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

Ferrentino & Associates, Inc. and Correen Ferrentino for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, and Lilia E. Garcia, Lynne G.
McGinnis, and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Gagandeep Marwaha was convicted of two counts of aggravated assault (Pen. Code,¹ § 245, subd. (a)(1); counts 1 & 8), one count of making a criminal threat (§ 422; count 4), two counts of felony false imprisonment (§ 236; counts 6 & 7), and two counts of attempted criminal threats (§ 422 lesser; counts 2 & 5). The jury found true the enhancement allegation that defendant personally used a deadly and dangerous weapon, to wit, a knife (§ 12022, subd. (b)(1); counts 4-7), and that he committed counts 4 through 8 while released on bail (§ 12022.1). Defendant was placed on three years' summary probation, with various terms and conditions.

I. FACTS

A. Counts 1 and 2

About 11:30 a.m. on August 5, 2008, Noah Churchill, an employee at Ace Hardware (Ace) in Wildomar, was sitting on a truck eating lunch with fellow employee, Rhon Walker. They heard an altercation between a couple near the Wireless Shop located next to Ace. A woman, Tara Gobie, was by a car, screaming at defendant to give back her cell phone. After defendant shoved Gobie against the car, Churchill walked toward the couple and asked Gobie if everything was all right. Defendant turned around and walked toward Churchill, asking, “[D]o you got a fuckin’ problem?” When defendant confronted Churchill, defendant’s left arm was behind his back, “holding something in his hand.” Churchill later learned that defendant was holding a stylus for a Palm Pilot. Defendant was saying, “I’m fucking crazy, I’ll fuckin’ kill you, . . .” When

¹ All further statutory references are to the Penal Code unless otherwise stated.

he got directly in Churchill's face, Churchill smelled alcohol. In defense, Churchill pushed defendant, who ended up "on his butt." Gobie drove off and Churchill returned to the truck to finish his lunch.

Defendant went back inside the Wireless Shop, drank a beer, and came out holding scissors. Defendant approached Churchill saying, "now like you're going to see or like I'm going to fuckin' kill you again." Defendant made jabbing motions towards Churchill, who was "a little nervous." As Churchill turned to walk away, defendant attempted to stab him in the back. Churchill stepped forward and felt a tug on his shirt. The scissors struck Churchill's shirt, tearing a hole in it. Defendant tumbled into Churchill, who pushed defendant away, causing him to fall.

Gobie testified that on August 5, 2008, she and defendant were at the Wireless Shop when they got into an argument and were yelling. Churchill approached, asking "what's the problem here?" Gobie told him it was none of his business and asked him to leave and to mind his own business. She denied that she had been pushed or touched by defendant. Gobie went to her car, got in, and circled the parking lot. She heard yelling and noticed a group of Ace employees surrounding defendant, until he was pushed down. Defendant got up, went into the Wireless Shop, and spoke with Gobie on the phone. She waited around and then went back to pick up defendant. As they were leaving, defendant displayed the finger and yelled profanities at the Ace employees.

B. Counts 4 Through 8

On January 6, 2009, defendant posted bail and was released in connection with the August 5, 2008, offenses. Later that month, defendant and Gobie went to the Home Comfort Furniture store in Murrieta to buy a bed. Kevin Nguyen, a salesman at the store, felt uncomfortable with defendant because defendant lost his temper with Gobie and kept haggling over the price of the bed. Defendant's manner caused fear.

During the morning of January 21, 2009, defendant returned to the furniture store and told Nguyen he was going to file a lawsuit. He said the bed he had purchased gave Gobie leg pain. Defendant spoke very loud. Nguyen asked defendant to calm down. Defendant said he was not calming down and demanded that Nguyen fix the problem. Defendant took a phone from the counter and slammed it on the floor. Broken pieces from the phone hit a vase, causing it to break. Nguyen was scared. He was going to call the police when defendant turned around, calmed down, and apologized. Nguyen told defendant to wait for the manager to take care of the problem. After asking defendant to leave, Nguyen called Thien Tran. Nguyen and Tran arranged a visit to defendant's apartment to determine what was wrong with the bed. Nguyen did not want to go because defendant frightened him.

When Nguyen and Tran arrived at the apartment, defendant was there alone, holding an infant. Defendant said the slat on the bed was broken and showed it to them. When Nguyen and Tran examined the bed, they realized that defendant had put it together incorrectly by placing a packed mattress on the bed frame without a box spring.

They told defendant he could not do that; and that his failure to use a box spring had caused the bed to collapse. Defendant laughed and insisted on getting the box spring for free. Tran explained that he could not do that but could sell it to defendant for a special price, almost at cost. Defendant kept insisting on a free box spring, and Nguyen tried to explain they had sold him the bed but not the mattress. Nguyen offered to help defendant find a box spring. Defendant said that if they did not give him a box spring, he would return everything he had purchased.

By this time, the argument had moved into defendant's living room. Defendant stood in front of the two men, blocking their way. Nguyen told defendant he (Nguyen) could not resolve this. Defendant dropped the baby on the floor, told them they were not going to leave the apartment, slammed the front door, locked it, and ran to the kitchen. Defendant grabbed a butter knife from the kitchen, returned, and lunged at Nguyen with the knife. Defendant said, "[y]ou don't give me that box spring, I am not letting you out of this place." Defendant kept launching the knife at Nguyen while demanding the box spring. Nguyen was very frightened. After Tran yelled at defendant to drop the knife, he threw it over Tran's head into the corner. When defendant calmed down, Tran and Nguyen left the apartment, returned to the store, and called the police.

Officer Chad Bennett and Sergeant Robert Anderson of the Murrieta Police Department responded to the call. Gobie answered the door. The officers told her why they were there and she said nothing had happened. Sergeant Anderson asked Gobie if anyone else was home, and she said no. The officers left the apartment. Sergeant

Anderson went to speak to the victims; however, Officer Bennett waited in his patrol vehicle that was parked at the apartment complex. Officer Bennett saw defendant walking from the direction of his apartment.

Gobie testified that on January 21, 2009, she was home when Nguyen and Tran came to the apartment. She claimed that after they made a nasty comment about something she and defendant were doing on the bed, she left the apartment and went to pick up her kids.

II. SUFFICIENCY OF EVIDENCE

Defendant contends the evidence is insufficient to support the jury's verdict on counts 4 and 5, criminal threats and attempted criminal threats against Nguyen and Tran, respectively, because he did not make an oral threat to kill or seriously injure either man. Defendant further challenges the sufficiency of the evidence to support his conviction for assault with a deadly weapon on the grounds the evidence fails to show that he used a butter knife in a manner capable of producing and likely to produce death or great bodily injury.

A. Standard of Review

Our review of any claim of insufficiency of the evidence is limited. “““When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.”””

(*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) We must presume in support of the judgment the existence of every fact the trier of fact could have reasonably deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Further, before we may set aside a judgment for insufficiency of the evidence, it must clearly appear that there is no hypothesis under which we could find sufficient evidence. (*People v. Rehmeier* (1993) 19 Cal.App.4th 1758, 1765.) “In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) “Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]” (*Ibid.*) This standard of review applies even “when the conviction rests primarily on circumstantial evidence.” (*People v. Kraft, supra*, 23 Cal.4th at p. 1053.)

B. Criminal Threats (§ 422)

To prove a violation of section 422, the prosecution must show beyond a reasonable doubt the following: (1) defendant willfully threatened to commit a crime that, if committed, would result in death or great bodily injury to another person; (2) he made the threat with the specific intent that it be taken as a threat (whether or not he actually intended to carry out the threat); (3) the threat, on its face and under the circumstances in which it was made, was 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; (4) the threatening statement actually caused the other person to be in sustained fear of his or her own safety or for the safety of his or her immediate family; and (5) the threatened person's fear was reasonable under the circumstances. (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228; *People v. Butler* (2000) 85 Cal.App.4th 745, 753.)

We look to the communication and all the surrounding circumstances to determine if there was substantial evidence to prove the elements of making a terrorist threat. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 860; *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340, superseded by statute on other grounds as stated in *People v. Franz* (2001) 88 Cal.App.4th 1426, 1442.) “The circumstances surrounding a communication include such things as the prior relationship of the parties and the manner in which the communication was made. [Citation.] Although an intent to carry out a threat is not required, the actions of the accused after making the communication may serve to give meaning to it. [Citation.] And, just as affirmative conduct and circumstances can show that a criminal threat was made, the absence of circumstances that would be expected to accompany a threat may serve to dispel the claim that a communication was a criminal threat. [Citation.]” (*In re Ryan D., supra*, at p. 860.)

Under section 664, “Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished[.]” An attempt to commit a criminal threat is a crime. (*People v. Toledo, supra*, 26 Cal.4th at pp. 230-231.)

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, “if 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.” (*Id.* at p. 231.) Thus, when the victim is not in sustained fear, the crime may be punishable as an attempt. (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 608-611.)

Defendant claims that “no reasonable juror could conclude that [he] made an oral threat to kill or seriously injure another.” He argues that the words, “you are not going to leave this place” and “I am not letting you out of this place” fail to include any indication that he intended to seriously injure or kill if he did not get his way. Instead, defendant argues that the words merely support a charge of false imprisonment. We disagree. According to the record, from the first time that Nguyen encountered defendant, Nguyen found defendant’s behavior frightening. Nguyen did not want to go to defendant’s apartment because Nguyen was frightened of him. At the apartment, when defendant was informed that he would have to pay for a box spring, he dropped the baby on the

floor, slammed the front door shut, locked it, and grabbed a butter knife. Defendant told Nguyen and Tran that if they did not give him the box spring, they were not going to leave the apartment. In addition to the verbal threat, defendant lunged at Nguyen with the knife, missing him only because Nguyen moved out of the way. Nguyen was very frightened and is still haunted by the incident. Clearly, this evidence was sufficient for the jury to conclude that defendant made an oral threat to kill or seriously injure Nguyen, even though defendant ultimately threw the butter knife over Tran's head into the corner.

Next, defendant contends the manner in which the communication was made shows he did not intend a real and genuine threat to cause death or great bodily injury. He argues that he was merely in a "highly agitated and emotional state," given the circumstances. Further, he asserts that his acts of throwing the butter knife down and allowing the victims to leave "belie a conclusion that he willfully threatened to unlawfully kill or cause great bodily injury and that his threat was so unconditional as to convey a serious intention that it be carried out." Again, we disagree. The manner of the communication more than supports defendant's intent. He slammed the door shut, locked it, and retrieved a butter knife. He threatened to not let either victim leave the apartment. Such threat was complete prior to the act of throwing the butter knife down and allowing them to leave.

Finally, defendant claims that his brandishing the butter knife was insufficient to support a violation or attempted violation of section 422. Defendant focused his attack on Nguyen. Even if we assume that Tran did not actually suffer sustained fear either

because defendant focused his attack on Nguyen or because, as defendant asserts, brandishing the butter knife was insufficient to support the charge, 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, subd. (a).)

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 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), 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 unequivocality, 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.*), or could convey them to a reasonable person under the circumstances.

Here, Nguyen’s and Tran’s testimonies constitute substantial evidence, i.e., credible evidence that 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.

C. Assault with a Deadly Weapon (§ 245, subd. (a))

“As used in section 245, subdivision (a)(1), a ‘deadly weapon’ is ‘any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.’ [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citations.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) In *In re Brandon T.* (2011) 191 Cal.App.4th 1491, 1496, the court accepted the parties’ agreement that a “butter knife” (described as three and a quarter inches long, with a rounded end and slight serrations on one side) was not a deadly weapon and limited its inquiry to whether the defendant “used it “in such a manner as to be capable of producing and likely to produce, death or great bodily injury.”” [Citation.]” (*Ibid.*)

Here, defendant argues the “butter knife as used was not capable of causing serious bodily injury,” and thus, he “was never in a position to seriously injure anyone.” We disagree. Nguyen testified that defendant lunged at him with the knife, jabbing it at

him, and that the only reason he avoided being struck was because he had “martial arts training” which helped him to “get to the side to avoid the direction of the knife.” Unlike the facts in *In re Brandon T.*, *supra*, 191 Cal.App.4th at page 1497, where the defendant tried to cut the victim’s cheek and only made welts, here defendant was jabbing the knife at Nguyen, attempting to stab him in the abdominal area. The fact that the butter knife was used differently in the case before this court distinguishes this case from *In re Brandon T.* While defendant downplays the type of knife used, describing it as rounded, the manner in which he used it made it capable of being inherently deadly or dangerous. Accordingly, there was sufficient evidence to support the jury’s finding that defendant committed an assault with a deadly weapon on Nguyen.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends his counsel provided ineffective assistance by “allowing the prosecution to bolster a weak, unpersuasive case with inadmissible . . . character evidence” and not requesting an instruction on voluntary intoxication as to the criminal threat charge in count 2 against Churchill.

A. Standard of Review

“Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel’s performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation prejudiced the defendant, i.e., there is a ‘reasonable probability’ that, but for counsel’s failings, defendant would have obtained a more favorable result.

[Citations.] A ‘reasonable probability’ is one that is enough to undermine confidence in the outcome. [Citations.] [¶] Our review is deferential; we make every effort to avoid the distorting effects of hindsight and to evaluate counsel’s conduct from counsel’s perspective at the time. [Citation.] A court must indulge a strong presumption that counsel’s acts were within the wide range of reasonable professional assistance. [Citation.] . . . Nevertheless, deference is not abdication; it cannot shield counsel’s performance from meaningful scrutiny or automatically validate challenged acts and omissions. [Citation.]” (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.)

“[I]f the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation’ [Citation.]” (*People v. Cudjo* (1993) 6 Cal.4th 585, 623.)

B. Character Evidence

Defendant faults his counsel for failing to object to (1) Gobie’s testimony regarding defendant’s uncharged acts of domestic violence, (2) Achint Singh’s testimony regarding defendant’s threat of violence and his vandalism of the Wireless Shop, and (3) Jillian Steiner’s testimony that defendant said he was “going to kill someone.” He contends that all of this testimony was inadmissible character evidence under Evidence Code section 1101, subdivision (a), and unduly prejudicial under Evidence Code section 352, in that it was offered “solely for the improper basis to establish that [defendant] had a violent and criminal predisposition”

Evidence Code section 1101, subdivision (a), states that: “Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.”

Evidence Code section 1102 provides: “In a criminal action, evidence of the defendant’s character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [¶] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).”

1. Gobie’s Testimony

During cross-examination by the prosecutor, Gobie claimed she did not feel threatened by defendant. However, upon further questioning, she admitted contacting the police on February 8, 2008, because she did feel threatened by defendant, but denied doing so on August 5, 2008. The police were called on August 5, but she denied telling the officer that defendant had pushed her to the ground and kicked her twice, hurting her hand as she tried to block his kicks. Instead, she claimed that on August 5, defendant was throwing laundry detergent at a door so that it would shatter and make a mess for her.

The admission of this evidence was discussed in motions in limine before trial. The prosecutor stated that “absent any sort of impeachment evidence by any potential

defense witnesses,” he would not seek to introduce this evidence. The court stated it would exclude the evidence, subject to revisiting the issue if necessary. According to the People, prior to cross-examining Gobie on the above issue, the prosecutor requested a sidebar conference, which was off the record. The People assert it is possible the prosecutor indicated his decision to question Gobie about the August 5, 2008, incident, and defense counsel objected to the questioning, but the objection was overruled. Thus, the People argue that “[s]ince [defendant’s] claim of error ‘depends upon matters outside the record, [it is] not properly before the court for review. [Citations.]’ [Citation.]” Nonetheless, the People argue that if counsel had objected, the objection would not have been sustained. We agree with the People.

Evidence Code section 1101, subdivision (c), provides that “[n]othing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.” In assessing the credibility of a witness, the witness’s prior consistent or inconsistent statements may be considered. (Evid. Code, § 780, subds. (f), (g).) Here, defendant was charged with false imprisonment by violence against Jillian Steiner on August 5, 2008.² Regarding the facts surrounding this charge, Steiner testified that on August 5, defendant, her boss, asked her for a ride to the Temecula store. Along the route, she stopped and defendant bought a six-pack of beer. While she was driving, he drank all, or nearly all, of the beer. While on the freeway, defendant made a lot of calls,

² The charge was later dismissed after the jury was unable to reach a verdict on this charge.

talking in his native language, and being loud, yelling over the phone. Defendant spoke English when he threatened to kill someone on the other end of the phone call. Steiner became frightened and told defendant she did not want to continue driving with him. He threatened to push her out of the car and take it if she did not continue. She was afraid and continued to drive, even though she did not want to. She tried to call Gobie, but defendant took the phone away from Steiner and put it in his pocket.

When Gobie testified for defendant, she denied that he had shoved her into a car door on August 5. She testified that they were merely having a verbal argument. Defense counsel asked Gobie if she felt threatened by defendant, and she replied, “No. I’m not threatened by him.” For impeachment purposes, the prosecutor was entitled to impeach Gobie with her prior statements that defendant had previously threatened her, that he had punched and kicked her, and that she was threatened by him. (*People v. Senior* (1992) 3 Cal.App.4th 765, 778-779 [prior threat of the defendant towards his children admissible for impeachment after he testified that he never threatened anyone].)

Moreover, regarding the prosecutor’s repeated questions as to whether Gobie felt threatened, the jury was instructed with CALCRIM No. 222 (Evidence) that the attorney’s questions were not evidence; rather, the evidence consisted of the testimony of the witnesses. We presume the jurors followed the court’s instructions. (*People v. Stanley* (1995) 10 Cal.4th 764, 836-837.) Given the fact the jury hung on one count of felony false imprisonment (count 3) and convicted defendant of the lesser included offense of attempted criminal threats (counts 2 & 5), the People assert that the jurors

based their decision on the evidence and not on extraneous factors, such as other alleged acts of violence by defendant. We agree.

Under the facts before this court, defense counsel was not ineffective for declining to object to the impeaching questions.

2. Achint Singh's Testimony

Regarding count 3 (felony false imprisonment) involving Steiner, the prosecutor introduced the testimonies of Steiner and Singh. Steiner testified as noted above. Additionally, she testified that when they (defendant and her) arrived at the Wireless Shop, defendant removed some items from the walls, broke other items, was cursing and punching things, and put some of the store's merchandise in her car. Singh testified that he and defendant were partners in the Wireless Shop located next to Ace. They ended their business relationship in July 2008. On August 5, 2008, defendant called Singh. Sounding "drunk or high on something," defendant said, "[W]atch out, I'm going to get you." Singh drove to the cell phone store and found items on the floor, display cases broken, and inventory gone.

Given the above, it is clear that the purpose of Singh's testimony was to corroborate Steiner's version of what happened. As the People argued at the trial level and on appeal, Singh's testimony supported the showing that Steiner had a legitimate reason to fear defendant and that she did not drive him or help him willingly. Moreover, as noted above, because the jury hung on the felony false imprisonment count involving

Steiner (count 3), defendant is unable to demonstrate any prejudice from counsel's failure to object to Singh's testimony.

C. Voluntary Intoxication

Defendant was charged with making a criminal threat against Churchill on August 5, 2008, in violation of section 422. While the jury convicted defendant of the lesser offense of attempted criminal threats, both offenses are specific intent crimes which require a showing that defendant must threaten death or great bodily injury to another and intend that his statement be understood as a threat. (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1347-1348.) Voluntary intoxication may negate the existence of a specific intent. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 635, 677.)

Defendant faults his counsel for not requesting CALCRIM No. 3426 (voluntary intoxication instruction) so that the jury could decide whether he possessed the requisite specific intent for the criminal threats charge involving Churchill. He contends the failure to instruct with CALCRIM No. 3426 deprived him "of a valid defense that [his] obvious intoxication at the time of the incident raised doubt about whether the prosecution proved the specific intent to threaten under section 422." He argues the criminal threat to Churchill "presented a compelling scenario that [he] was merely angry and drunk rather than a criminal intending to convey a serious threat, and an instruction on voluntary intoxication would have provided the platform for that argument."

"[A] defendant is entitled to an instruction on voluntary intoxication 'only when there is substantial evidence of the defendant's voluntary intoxication and the

intoxication affected the defendant's "actual formation of specific intent." [Citation.]” (*People v. Roldan* (2005) 35 Cal.4th 646, 715, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The mere fact that the defendant may have been drinking before committing a crime does not establish intoxication or require the giving of an instruction on intoxication. (*People v. Turville* (1959) 51 Cal.2d 620, 633-634, disapproved on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 637-638, fn. 2, 648-649.) Rather, to be entitled to an instruction on voluntary intoxication, the defendant must show not only that he consumed intoxicating substances, but also that “he became intoxicated to the point he failed to form the requisite intent” (*People v. Ivans* (1992) 2 Cal.App.4th 1654, 1661 [Fourth Dist., Div. Two].) For example, in *People v. Reyes* (1997) 52 Cal.App.4th 975, the court held it was reversible error for the trial court to exclude evidence of the defendant’s mental state and to refuse an instruction on voluntary intoxication in the defendant’s trial for receiving stolen property. (*Id.* at p. 986.) The defendant had testified he was intoxicated with drugs when he was found with the stolen property, and he could not remember where he had found the items. The trial court excluded his proffered expert evidence of numerous mental disorders, including schizophrenia, borderline personality disorder, and cognitive deficits “that might be identified as dementia” (*Id.* at pp. 980-981, 985-986.) We independently determine the sufficiency of the evidence to support a voluntary intoxication instruction. (See *People v. Parson* (2008) 44 Cal.4th 332, 350, fn. 8.)

Here, evidence of defendant's intoxication includes: Steiner testified that defendant drank beer on the way to the Wireless Shop and Singh testified that he sounded "either drunk or high on something." Churchill could smell alcohol on defendant, who had gone back into the store after Churchill had confronted him, and drank another beer. This evidence shows that defendant was drinking; however, it is insufficient to show he was intoxicated to the point where he could not form the intent to convey a criminal threat. According to Gobie, she did not smell alcohol on defendant and he was not drunk, "[j]ust angry."

As noted, to be entitled to an instruction on voluntary intoxication, the defendant must show not only that he was intoxicated, but also "that voluntary intoxication had [an] effect on [his] ability to formulate intent." (*People v. Williams, supra*, 16 Cal.4th at pp. 677-678.) In that case, the court found the evidence insufficient to require a voluntary intoxication instruction when a witness testified that the defendant was "probably spaced out" on the morning of the killings, and that the defendant had told the police he was "doped up" and "smokin' pretty tough" around the time of the killings. (*Id.* at p. 677.) Here, we conclude the evidence was insufficient to support an instruction on voluntary intoxication because there was simply no evidence that defendant was intoxicated to the point where he was unable to formulate specific intent. (*Id.* at pp. 677-678; *People v. Ivans, supra*, 2 Cal.App.4th at p. 1661.)

Moreover, the People assert that an instruction on intoxication would have been inconsistent with the defense theory that defendant acted in self-defense. Counsel

requested and received three self-defense instructions, namely, CALCRIM Nos. 3470 (Right to Self-Defense or Defense of Another), 3471 (Right to Self-Defense; Mutual Combat or Initial Aggressor), and 3472 (Right to Self-Defense; May Not be Contrived). Thus, as the People argue, “[p]ortraying [defendant] as the drunken aggressor would have contradicted [his] self-defense claim.” We agree.

For the above reasons, defense counsel was not ineffective for failing to request an instruction on voluntary intoxication.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MILLER

J.