

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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.

ROBERT RAYMOND NIRA,

Defendant and Appellant.

E057935

(Super.Ct.No. RIF1202178)

OPINION

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger and Charles J. Koosed, Judges. Affirmed.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

I

INTRODUCTION

On September 14, 2012, an information charged defendant and appellant Robert Raymond Nira with damaging and destroying property in an amount of \$400 or more. (Pen. Code, § 594, subd. (b)(1), count 1.) The information also alleged that defendant served three prior prison terms (§ 667.5, subd. (b)), and that he had been convicted of a prior serious and violent felony (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)).

On November 29, 2012, a jury found defendant guilty of count 1. Thereafter, the trial court found that the three prior prison term allegations and prior serious and violent conviction were true.

On January 11, 2013, the trial court sentenced defendant to a total term of six years in state prison, and ordered defendant to pay various fines and fees. Defendant was awarded 545 days of credit for time served, consisting of 273 actual days and 272 days pursuant to Penal Code section 4019.

On January 16, 2013, defendant filed a timely notice of appeal.

II

FACTUAL AND PROCEDURAL BACKGROUND¹

On April 14, 2012, about 7:15 p.m., as the victim, her children, and other family members were getting into the victim's truck, defendant approached them, and began hitting the vehicle with a "big crowbar." He "dented" the "tailgate and took the paint"

¹ The facts are taken from the reporters' transcripts of the preliminary hearing and jury trial, as well as the probation officer's report.

off of the truck. He “beat the window until the whole window shattered and broke.” He hit the vehicle at least three times. The victim testified that defendant appeared “really spaced out” and looked “scary.” The victim ran into the street and called 911. Defendant stopped hitting the vehicle, stood by the vehicle for about four minutes, and then ran inside his home. The victim did not know defendant, and did not give him permission to hit her vehicle.

Officer Lun testified that when he arrived at the scene, the victim was “hysterical” and was “screaming and yelling.” Officers contacted defendant in his brother’s apartment. Defendant appeared “excited and paranoid.” Defendant was eventually arrested.

The victim further testified that she had not repaired her vehicle because she could not afford the necessary repairs. The estimated cost of the repairs was approximately \$2,275.

III

ANALYSIS

After defendant appealed, and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case, a summary of the facts and potential arguable issues, and requesting this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, and he has filed two supplemental briefs. On June 13, 2013, defendant filed a 14-page handwritten brief (first brief). On June 28, 2013, he filed a five-page handwritten brief (second brief). In his first brief, it appears that defendant is arguing that there is insubstantial evidence to support the verdict, ineffective assistance of counsel (IAC), and that the trial court erred in failing to instruct the jury on a lesser charge of misdemeanor vandalism. In his second brief, defendant adds to his argument that the court erred in failing to instruct the jury on a lesser charge of misdemeanor vandalism. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error.

We first address defendant's insubstantial evidence argument. When determining whether the evidence was sufficient to sustain a conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We must examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which the jury could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Substantial evidence—meaning, evidence that is reasonable, credible, and of solid value—must support each essential element of an offense. (*Id.* at pp. 577-578.) If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, 326.)

In determining whether substantial evidence exists, “we do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses.” (*People v. Cortes* (1999) 71 Cal.App.4th 62, 71.) “Although it is the duty of the [trier of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the [trier of fact], not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.” [Citations.]” (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) The standard of review applies even “when the conviction rests primarily on circumstantial evidence.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

In this case, defendant contends that there is insubstantial evidence because he did not commit the crime as presented. Instead, in summary, defendant asserts the following: He was working in his brother’s garage when he heard a noise, which sounded like a child crying. He looked outside and noticed “a large Black male exiting a truck while yelling and slapping out at a young child who was crying.” Defendant believed that the child was being hurt. He then “got the abuser’s attention by breaking his back window.” In essence, defendant asserts that he broke the back window to assist the child who was being abused; and, in order to cover up the abuse, the victim is setting defendant up by calling the police and accusing him of damaging her vehicle.

Notwithstanding the statement presented in defendant's first brief, there is nothing in the trial record to support defendant's assertion. The evidence presented at trial was summarized *ante*. Moreover, defendant, in his personal brief, admits that he broke the window of a vehicle. According to the evidence presented during trial and in defendant's personal brief, the verdict is supported by substantial evidence.

Second, we address defendant's IAC claim. Defendant argues that his trial counsel rendered IAC. In order to establish a claim of IAC, defendant must 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.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541, citing, among other cases, *Strickland v. Washington* (1984) 466 U.S. 668; accord, *People v. Boyette* (2002) 29 Cal.4th 381, 430.) Hence, an IAC claim has two components: deficient performance and prejudice. (*Strickland v. Washington*, at pp. 687-688, 693-694; *People v. Williams* (1997) 16 Cal.4th 153, 214-215; *People v. Davis* (1995) 10 Cal.4th 463, 503; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) If defendant fails to establish either component, his claim fails.

When a claim of IAC is made on direct appeal, and the record does not show the reason for counsel’s challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

Here, defendant claims that his counsel was ineffective because he failed to spend the time needed on his defense before and during trial. An almost identical argument was made by defendant immediately prior to trial during a *Marsden*² hearing. In response to defendant’s claim, counsel stated: “I have done things for the case, including sending out my independent investigator to confirm—this is a vandalism case, so we’re trying to confirm how much was actually damaged. If we keep in under the felony limit, that’s going to be a key part of the case, so my investigator has gone to talk to another body shop to see what their value was.” Counsel went on to state that he had attempted to subpoena records for the case. Moreover, counsel confirmed that he had not visited defendant in jail but had discussed the case “at length” at the different hearings. Additionally, defense counsel indicated that “based on the notes from the previous attorney” and discussions with defendant, counsel “didn’t know what else could be added to that.” Counsel further pointed out that he had requested that defendant give counsel additional time to look into things further but that defendant had “declined to waive time.”

² *People v. Marsden* (1970) 2 Cal.3d 118.

Then the court questioned defense counsel on other matters. Counsel answered each question and explained his actions. For example, counsel indicated that he did not want to interview the victim in this case but wanted to cross-examine her during trial—this was a tactical decision. The court reiterated, “I think he told me he’s making a tactical decision that it’s better to surprise this complaining witness with this subject, ask if she can supply proof at trial and try to catch her by surprise on this subject rather than let her know weeks in advance that this is going to come up.” At the conclusion of the hearing, the court denied defendant’s request for new counsel. The court, however, told defendant that his decision was not final and that defendant could file another motion for a *Marsden* hearing if he believed he needed “a better attorney or a different attorney.”

We have reviewed the reporter’s transcript of the trial. During trial, defense counsel was attentive, cross-examined all the witnesses, and was a strong advocate for defendant. Based on the above, we find that defendant has failed to demonstrate that his “counsel’s performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms.” (*People v. Dennis, supra*, 17 Cal.4th at pp. 540-541.)

Third, we address defendant’s claim that the trial court erred in failing to instruct the jury on a lesser charge of misdemeanor vandalism. Again, this argument was addressed by the trial court at the close of trial. The court stated: “And then lastly, as to the lesser, I recognize that misdemeanor vandalism is a lesser-included offense of felony vandalism. However, there needs to be evidence that the action which defendant took was, in fact, just a misdemeanor or could be a misdemeanor, I should say, versus the

felony. From what the testimony and the evidence shows, this was [a] continuous course of conduct that happens in a fairly small span of time where the defendant apparently beats up this woman's car with some sort of pole or stick, and in the process, smashes out the back window and dents the tailgate. And taken all together, it . . . totaled somewhere in the neighborhood of \$2,200 in damages.

“The threshold for a misdemeanor is \$400. There is no evidence that he, I should say, didn't do the other damage. The evidence as it stands is all the damage to the back of that car was done by the defendant. I don't think it would be appropriate to sort of parse out the window from the dent from the fresh paint that was needed. It just doesn't make any sense to me.

“And, you know, if there was some evidence somehow that those dents existed prior, I think you'd have a good argument. If there was some evidence that somebody else did that damage, I think you'd have a good argument. But it's just the defendant with his pole beating up the car.

“And, you know, kind of take victims as you find them. He happened to beat up a car with a custom paint job on it. And I have no doubt that that's increasing the cost to fix the car. So for all of those reasons, I find there is insufficient evidence—there's virtually no evidence to warrant giving the instruction of a misdemeanor because the damages don't come close to \$400. There's no evidence that any of these damages were caused in any other fashion other than by the defendant.”

We agree with the trial court and find that the it did not err in failing to instruct the jury on the lesser charge of misdemeanor vandalism.

We have now concluded our independent review of the record and found no arguable issues.

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
Acting P.J.

We concur:

RICHLI
J.

KING
J.