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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.

DANIEL EVARISTO GARCIA, JR.,

Defendant and Appellant.

E061799

(Super.Ct.No. RIF1405337)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Bernard J. Schwartz,  
Judge. Affirmed.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, and Charles C. Ragland and  
Kimberley A. Donohue, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant Daniel Evaristo Garcia, Jr. appeals from his conviction of criminal threats. (Pen. Code, § 422.)<sup>1</sup> Defendant contends (1) he was deprived of effective assistance of counsel because his counsel failed to object to inadmissible hearsay and to information excluded by a pretrial ruling and (2) he was deprived of due process of law when the trial court failed to provide the jury with the option of convicting him of the lesser included offense of attempted criminal threats when such offense was supported by the evidence. We affirm.

## II. FACTS AND PROCEDURAL BACKGROUND

Defendant, age 44 at time of trial, lived with his 69-year-old mother, Angela Garcia.<sup>2</sup> Defendant received a monthly benefit of \$675, but the funds were put in Angela's care so she could control his expenditures and prevent him from spending the money on drugs. Angela testified that defendant asked her for money frequently, and she sometimes complied. On April 25, 2014, defendant asked her several times to lend him \$20, but she refused. On April 26, he asked her again, and she lent him the money. On April 27, defendant again asked for \$20 about eight times. She refused to give it to him because he said he was going to buy drugs.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> Because defendant and several witnesses share a last name, we will refer to them by their first names for convenience and clarity, and not intending any disrespect.

Defendant became angry; “[h]e was very weird.” Angela “got scared, the way he was.” Angela testified he was yelling, but she did not understand him. She left to go to the neighbor’s house for coffee. Before she left, defendant said he was going to make methamphetamine in the house. Defendant had been verbally abusive to her in the past, but not physically abusive. Angela testified defendant did not say anything on April 27 to make her feel her physical safety was at issue.

Angela testified she told a deputy on April 27 that defendant asked for money to buy drugs, and defendant had been upset and yelling and had called her names, and that she had been scared. She denied telling the deputy that defendant had gotten out pots and pans and had said he was going to make methamphetamine. She denied telling the deputy that defendant had said if she did not let him do what he wanted, he would have his friends come by and kill her. She testified defendant had not said that. She testified she had told defendant that if he did not stop using drugs, she would report where he went to buy them. Defendant told her “not to mess with that because they could do something” to her, but he did not threaten to kill her. She did not remember telling the deputy that defendant had previously been violent with her, and that was why she was afraid she would be assaulted. She denied telling the deputy that she had run out of the house. She denied telling the deputy that she feared for her safety because of defendant’s threats to have her killed. She denied that defendant had threatened her.

After she left the house, she called 911, but they did not answer in Spanish, so she called her son, Alfredo Garcia, and asked him to call the police so they would take

defendant to the hospital. She denied telling Alfredo that she was scared. She did not remember having previously testified that she had gotten really scared and had gone outside or that she had believed her physical safety was at risk. She testified that she had been scared of defendant assaulting her that day because “he looked really ugly.” She testified defendant had been yelling and upset and “looked like the devil” and was foaming at the mouth. She testified she had told the deputy the truth about what had happened. She was afraid of defendant, and she was also afraid of what he could do to himself. She was afraid because of how he was acting, not because of what he said.

She testified she had been scared that day, but for defendant, not for herself. She repeated that defendant had not threatened to kill her or have her killed, but she had feared for her physical safety. She testified she had told the deputy that she was afraid for defendant’s safety.

Deputy Edward Robles arrived in response to the 911 call. He observed that Angela was very agitated, scared, and nervous, and her hands were shaky. She said that defendant had gotten out pots and pans and had said he was going to manufacture methamphetamine. She told defendant he could not do so in her house, and he became angry and called her names. Defendant said something to the effect that if she did not allow him to do as he wanted, he would have his friends come and kill her. Angela repeatedly said that she was in fear and scared for her safety.

Deputy Jared Howe testified he had been dispatched to Angela’s house on April 27. He questioned Angela through Deputy Robles acting as an interpreter. Angela said

defendant had demanded money to buy drugs, and when she refused him, he became upset and started yelling. She told the deputy she was scared. She said defendant had gotten pots in the kitchen and had said he was going to make methamphetamine. When she told him to stop, he became very upset and called her names. Angela told Deputy Howe that defendant had said if she did not let him do what he wanted, he would have his friends kill her. She said there was a history of past violence, and she was in fear of being assaulted. She said because of her fear, she had run to her neighbor's trailer. She also said she wanted defendant to be taken for a psychological assessment; however, Deputy Howe did not believe defendant met the criteria for such an assessment. Defendant was speaking rapidly and was fidgety; he had white paste in the corners of his mouth and was clenching his jaw muscles and grinding his teeth. Based on his experience, Deputy Howe believed defendant was under the influence of a central nervous system stimulant.

Angela's son Javier Garcia testified that in 2011, Angela had told him that defendant had threatened to kill her, and as a result, he got an order to keep defendant away from her. He confirmed that Angela had signed the order. Javier helped Angela apply for a restraining order on April 28, 2014. Angela told him that defendant had threatened to kill her or have her killed and to cause her bodily harm. She had said she was scared because he was foaming at the mouth and that something might happen to him. On redirect, he clarified that Angela had changed her story two weeks after the incident.

The jury found defendant guilty of criminal threats. The trial court sentenced him to the middle term of two years, but found unusual circumstances and therefore suspended the sentence and imposed 60 months of formal probation.

Additional facts are set forth in the discussion of the issues to which they pertain.

### III. DISCUSSION

#### A. *Assistance of Counsel*

##### 1. Additional Background

The People made a pretrial motion to admit evidence under Evidence Code section 1101, subdivision (b) of defendant's conduct and statements in connection with a restraining order Angela applied for in 2011. Specifically, Angela had stated she was in fear for her life and that defendant had threatened to adulterate her coffee with methamphetamine. The trial court indicated that such evidence was admissible under Evidence Code sections 1101, subdivision (b) and 1109, and that the probative value of the evidence would outweigh its prejudicial effect, especially if defendant were to assert he did not make the alleged threatening statements or that he was intoxicated and lacked intent. The trial court further indicated that evidence of the 2011 application for a restraining order, obtaining that restraining order, or dismissing that prior restraining order would be excluded. The trial court therefore limited the evidence "to the actual threat made."

The prosecutor asked Angela on direct examination if defendant had lived with her in 2011, and she replied that she did not remember. The prosecutor asked whether she

had ever asked defendant to leave her house in 2011, and she stated she did not remember. The prosecutor attempted to refresh her recollection by showing her unidentified documents; she identified her signature on a document, but she testified it did not refresh her memory. Angela testified that defendant had been “verbally violent” with her in the past, but not physically violent. The prosecutor did not ask her if defendant had threatened to kill her in 2011.

The prosecutor asked Javier whether, in 2011, Angela had told him that defendant had threatened to kill her, and he responded, “Yes.” The prosecutor asked, “And as a result of that, you went and got a—an order to keep him away from your mother. Correct?” He responded, “Correct.” Javier confirmed that Angela had signed the order. Defense counsel did not object. The trial court instructed the jury with CALCRIM No. 375 that it could consider any “other behavior by the defendant that was not charged in this case,” if proved by a preponderance of the evidence, to determine whether defendant acted with the specific intent required to make a criminal threat and whether his acts were the result of a mistake or accident, but not for any other purpose.

## 2. Analysis

Every criminal defendant has a constitutional right to effective assistance of counsel. (*United States v. Cronin* (1984) 466 U.S. 648, 653-654; *People v. Pope* (1979) 23 Cal.3d 412, 423-424, overruled on another ground in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 822-823 & fn. 1.) To establish ineffective assistance of counsel, the

defendant must demonstrate both that counsel's performance was deficient, i.e., that counsel's performance fell "below an objective standard of reasonableness under prevailing professional norms," and that such deficiency was prejudicial, i.e., that it is reasonably probable the jury would have reached a more favorable verdict in the absence of the error. (*People v. Centeno* (2014) 60 Cal.4th 659, 674; *People v. Osband* (1996) 13 Cal.4th 622, 700; *People v. Wash* (1993) 6 Cal.4th 215, 271.)

In reviewing the defendant's claim of ineffective assistance, we "give great deference to counsel's tactical decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703.) If the record does not contain an explanation for the challenged act or omission, we must reject a claim of ineffective assistance unless counsel failed to provide an explanation when asked or there could be no satisfactory explanation for counsel's conduct. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

A trial counsel's decision whether or not to object is "inherently a matter of trial tactics not ordinarily reviewable on appeal." (*People v. Frierson* (1991) 53 Cal.3d 730, 749.) Thus, a "failure to object seldom establishes counsel's incompetence," even if the evidence is arguably inadmissible. (*People v. Maury* (2003) 30 Cal.4th 342, 415-416.)

Defendant contends there was no conceivable reason for failing to object to Javier's testimony. We disagree. The challenged evidence was brief. Defense counsel could reasonably have elected not to interpose an objection because doing so might have highlighted and unduly emphasized that challenged evidence to the jury. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 165.)

Moreover, defendant has not established that it is reasonably probable the jury would have reached the opposite verdict if counsel had objected to the challenged evidence. Deputies Robles and Howe testified that Angela had told them right after the incident that defendant had become upset, called her names, and said he would have his friends come over and kill her if she did not let him do what he wanted. Javier testified that the day after the incident, Angela told him defendant had threatened to kill her, cause her bodily harm, and have her killed. Thus, the evidence was overwhelming that defendant had in fact made the threats that formed the basis of the charge. We conclude that defendant has failed to establish ineffective assistance of counsel.

*B. Failure to Instruct on Lesser Included Offense*

Defendant contends he was deprived of due process of law when the trial court failed to provide the jury with the option of convicting him of the lesser included offense of attempted criminal threats when such offense was supported by the evidence.

1. Forfeiture

The People suggest that defendant failed to preserve the instructional issue by making a timely objection at trial. An objection is not required to preserve issues of instructional error that affect the defendant's substantial rights. (§ 1259.) We conclude the issue was not forfeited.

2. Invited Error

The People further contend that defendant invited the instructional error because defense counsel made a tactical choice to pursue an all-or-nothing strategy. Defense

counsel initially requested instructions on attempted criminal threats, but later withdrew the request.

““The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given.” [Citations.] [¶] Nevertheless, the claim may be waived under the doctrine of invited error if trial counsel both “intentionally caused the trial court to err” and clearly did so for tactical reasons. [Citation.] Invited error will be found, however, only if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction. [Citations.]” (*People v. Souza* (2012) 54 Cal.4th 90, 114.) On the record before us, we cannot determine that defense counsel’s withdrawal of the request for such instructions was based on tactical reasons and not on ignorance or mistake. We therefore find the doctrine of invited error inapplicable.

### 3. Duty to Instruct on Lesser Included Offense

The trial court must instruct on a lesser included offense when the jury could reasonably conclude, based on substantial evidence presented at trial, “that the defendant committed the lesser, uncharged offense but not the greater, charged offense.” (*People v. Thomas* (2012) 53 Cal.4th 771, 813.) However, “[i]t is error . . . to instruct on a lesser included offense when a defendant, if guilty at all, could only be guilty of the greater offense, i.e., when the evidence, even construed most favorably to the defendant, would not support a finding of guilt of the lesser included offense but would support a finding of guilt of the offense charged.” (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1367.)

A defendant is guilty of criminal threats when he or she “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 . . . 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 . . . .” (§ 422, subd. (a); *People v. Toledo* (2001) 26 Cal.4th 221, 227, fn. 3.) “Sustained” means ““a period of time that extends beyond what is momentary, fleeting, or transitory.”” (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349.)

The offense of attempted criminal threats is a lesser included offense of criminal threats. (*People v. Toledo, supra*, 26 Cal.4th at p. 230.) A defendant is guilty of attempted criminal threats if “acting with the requisite intent, [he] 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 . . . .” (*Id.* at p. 231.) The difference between criminal threats and attempted criminal threats is whether or not the defendant’s threats actually caused the victim to be in sustained fear. Defendant concedes that the evidence was sufficient to show that Angela was in sustained fear. He argues, however, that substantial evidence

showed that such fear was caused by his appearance and conduct, not by threats he made, and thus an instruction on the lesser included offense was required.

The facts of this case are sufficiently similar to those of *Toledo*, in which our Supreme Court affirmed the jury's verdict of attempted criminal threats. In both cases, the victim exhibited fear following threats by the defendant, and in both cases, other evidence showed that such fear could have been caused by the defendant's appearance and conduct rather than by the threats. (*People v. Toledo, supra*, 26 Cal.4th at p. 235.)

Thus, for purposes of argument, we will assume the jury should have been instructed on the lesser included offense of attempted criminal threats. Nonetheless, "evidence sufficient to warrant an instruction on a lesser included offense does not necessarily amount to evidence sufficient to create a reasonable probability of a different outcome had the instruction been given." (*People v. Banks* (2014) 59 Cal.4th 1113, 1161.) Reversal is required only if it was reasonably likely a jury would have rendered a more favorable verdict in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Banks, supra*, at p. 1161.) Here, Angela's statements and conduct contemporary to the incident indicated that she was placed in fear by defendant's threats, not merely that she feared for defendant's own safety. The evidence showed that she ran out of her home and called 911; she had her son call 911; and she filed a restraining order the next day. Her contrary evidence at trial was simply not plausible. (See *People v. Banks, supra*, at p. 1161 [stating that even when there was "some evidence" to the contrary, "the far more plausible inference" supported the jury's verdict, and the trial

court's failure to instruct on a lesser included offense was harmless].) We conclude the failure to give an instruction on the lesser included offense was harmless.

#### IV. DISPOSITION

The judgment is affirmed.

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KING  
J.

We concur:

McKINSTER  
Acting P. J.

MILLER  
J.