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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAHINE ARSEN SAHAGIAN,

Defendant and Appellant.

F064872

(Super. Ct. No. F11904505)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, Judge.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General for Plaintiff and Respondent.

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Defendant Shahine Arsen Sahagian killed his dog with an ax, threatened to bring a mob to kill two neighbors and burn their trailer, and hit another acquaintance in the

forehead with a piece of lumber. He was convicted of animal cruelty, making a criminal threat, and assault with a deadly weapon.

Sahagian now argues that the trial court erred in instructing the jury that it could find him guilty of making a criminal threat if he threatened either of the two neighbors. The jury was not instructed that it must make a unanimous decision about which.

Sahagian also argues that the court erred in instructing the jury with CALCRIM No. 362, which stated that if the jury found he made a false statement denying he had committed the offenses, it could view this as evidence of his awareness of his guilt. The statements on which this instruction was based were made in a telephone call Sahagian made to his brother from jail, in which Sahagian partially denied he committed the crimes. Sahagian maintains that the instruction was improper because the statements were not of the kind that implied consciousness of guilt.

We perceive no reversible error. We will affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Tim Herzog, a Fresno County Deputy Sheriff, responded to a call from Emily and Joe Mello about threats in Friant on the afternoon of August 2, 2011. The Mellos told Herzog that Sahagian had come to their trailer and asked to buy a computer that Emily had previously bought from Alyssa Lockwood, who had been living in Sahagian's trailer. When Emily declined, Sahagian became angry. He threatened to bring 40 Armenians to the Mellos' trailer, tie them up, steal all their property, and burn the trailer, killing them and their dogs.

The Mellos also told Herzog that, the previous day, Sahagian had come to them with a gash on his hand. He said his dog had bitten him and he was going to kill the dog. Afterward, Emily saw Sahagian swinging an ax outside his trailer and heard a dog yelping. The Mellos went to Sahagian's trailer later that day. Emily saw a bloody ax and Joe saw something wrapped in a tarp.

In the course of investigating the case, Douglas Stokes, an investigator for the district attorney, met Howard Holmes. Holmes told Stokes that, sometime in July, Sahagian had assaulted Holmes with a two-by-four, leaving a scar on his forehead.

The district attorney filed an information charging three counts: (1) making a criminal threat against the Mellos (Pen. Code, § 422¹); (2) cruelty to an animal (§ 597, subd. (a)); and (3) assault against Holmes with a deadly weapon (§ 245, subd. (a)(1)). For purposes of sentence enhancement under section 667.5, subdivision (b), the information also alleged that Sahagian had served three prior prison terms.

At trial, Emily Mello testified that on August 1, 2011, Sahagian came to the Mellos' trailer and asked her to bandage his hand, as his dog had bitten it. Emily had seen the dog before and described it as a "Spud McKenzie type dog." As she bandaged the hand, Sahagian became angrier and angrier and said he was going to go home and kill the dog. The Mellos urged him not to hurt the dog and suggested he call the SPCA, but Sahagian said he was the kind of person who handled his own problems. Later that day, when she was in her yard, Emily heard a commotion at Sahagian's home, which was across a road and about 100 yards away. She saw Sahagian and heard him yelling and heard the dog yelping. Sahagian was standing in the area where he kept his dog and repeatedly swinging a yellow-handled ax. Then he stopped swinging the ax and Emily heard a chainsaw start. The dog's yelping became worse and Emily went inside.

That evening, Emily went to Sahagian's trailer to check on his hand. While there, she looked at the area where Sahagian had kept the dog. She saw a bloody blanket with a knife protruding from it. She also saw the ax, which had blood on its handle.

About half an hour later, Sahagian returned to the Mellos' home and said he did not want to be alone. They allowed him to spend the night.

¹Subsequent statutory references are to the Penal Code unless otherwise noted.

The following day, August 2, Emily was at home with her husband and her friends Perry and Marie Ellis. She testified that Sahagian came over and wanted to talk about a computer Emily had bought from a friend. He wanted to buy it and offered the price Emily had paid for it, and he would also give her an iPad. Emily had spent money to repair the computer and was not interested in selling. Sahagian got angry and said, “[W]e’re going to do this the easy way or the hard way.” Emily still refused to sell, so Sahagian said “he would bring 40 Armenians to my home, tie me and my husband up, take everything in my home and burn it to the ground and kill my dogs, and myself and my husband.”

Emily testified that Sahagian’s threats made her feel angry. Asked whether she also felt scared, she said, “Yes. But I was more angry at that point that I couldn’t believe that, you know, everything that we’ve done for him that, you know, he could be like that.” She believed he was actually capable of harming her and took seriously the notion that he would bring a group of people to attack her and her husband. She said, “[A]fter seeing what he did to the dog I figured he would—it would be nothing for him to do it to me and my husband as well.” She was still afraid of Sahagian at the time of trial.

Emily ordered Sahagian to leave, but he stayed for another 10 to 15 minutes, during which he told Joe Mello to make Emily sell the computer. He also said he would be back, and would kill the Ellises also, “since they were involved.” Sahagian left, and Emily called the police within half an hour, at the urging of Joe and the Ellises. A recording of her 911 call was played for the jury.

Joe Mello testified and described Sahagian’s threats. Joe said Sahagian said he would bring his family to carry out the threats and would be back in about 40 minutes. Joe was concerned for his and his wife’s safety and said he believed Sahagian was capable of carrying out the threats “[a]fter the dog incident” When asked to choose a word to describe his state of mind, Joe said he was “worried.” He also said he took the threats seriously and knew Emily was afraid.

Howard Holmes testified that he lived in Friant in July 2011. He had known Sahagian about three or four months at that time. One day at Holmes's house, Sahagian asked to borrow money from Holmes. Holmes said he had none. Sahagian became angry and stomped out. On a subsequent day, Holmes was on his knees repairing a chest of drawers in his bedroom when Sahagian appeared. He had a two-by-four and hit Holmes with it. The board hit Holmes over his right eye, causing a two-and-a-half-inch laceration from the eyebrow toward the hairline, and leaving a scar that was still visible at the time of trial. After the assault, Sahagian told Holmes he wanted money. Then he left.

John Roberts, who operated a boat rental business next door to Holmes's house, saw Sahagian coming out of Holmes's doorway screaming profanities and yelling about not calling the police. He was holding a "large stick," about two-and-a-half-by-two-and-a-half inches thick and five-to-six feet long. Roberts described the wound on Holmes's head as a gash and said it bled a lot. Holmes told Roberts not to call the police.

Emily testified that Holmes came to her trailer with a gash on his head a few weeks before Sahagian threatened her. Holmes told her Sahagian had caused the injury. Emily taped the wound closed.

Alyssa Lockwood testified that she was living with Sahagian in July and August 2011. She identified a picture of the dog that had been killed and said that it had bitten her, Sahagian, and another person. She was present when Sahagian killed the dog. She washed off the ax and chainsaw and put them away afterward. She saw some friends of Sahagian's wrap the dog's dead body in a blanket and take it away in a milk crate.

Stokes, the district attorney's investigator, testified that he found the yellow-handled ax in a tool shed by Sahagian's trailer. The head of the ax had blood on it. A doghouse near the shed was spattered with blood. Stokes also found a bloody hammer.

A deputy sheriff testified that, responding to a call from park employees, he found a dead dog that had been in the water at Lost Lake Park. It had been wrapped in a blanket and placed in a milk crate.

An investigator and a forensic pathologist with the coroner's office testified about their examination of the dog's body. A fracture in the skull was caused by a heavy implement with a sharp edge, such as an ax, and could have caused death. The right front leg was broken in two places. The decomposition of the dog's soft tissue had progressed so far that it was impossible to determine whether it had been cut with a chainsaw.

A recording of a telephone call Sahagian placed to his brother from jail was played for the jury. The recording begins with an automated voice stating that the call is being recorded and is subject to monitoring. Sahagian told his brother he was in jail because a couple across the street said "I was going to kill their dog and blow up their trailer and everything." He also said he had a neighbor kill a dog with a two by four. His brother told him not to discuss the matter on the phone, but he continued, saying "that tweaker down the street said I hit him with a 2x4," but "I didn't hit him with no 2x4." Sahagian asked his brother to deposit money in his jail account and asked him to seek the services of a certain lawyer.

In count 1, the information charged that Sahagian threatened "Joseph Lee Mello and Emily Joy Mello." It also charged that the threat conveyed a gravity of purpose and an immediate prospect of execution to both Joe and Emily, and that both Joe and Emily reasonably were in sustained fear. The prosecutor, however, argued over defense counsel's objection that the jury instructions should say that Sahagian threatened Joe *or* Emily, that the threat conveyed a gravity of purpose and an immediate prospect of execution to Joe or Emily, and that Joe or Emily was in sustained fear. The prosecutor argued that the jury should be able to convict even if it found the elements of the crime were fulfilled for only one victim. He said the evidence of sustained fear was stronger for Emily than for Joe. The court agreed with the prosecution and used "or" throughout the instruction on the elements of the criminal-threat offense. The court said that if the jury found the elements true as to only one of the victims, a unanimity instruction could address the question of which one it was.

The unanimity instruction actually given, however—which was read immediately after the instruction on the elements of a criminal threat—did not mention unanimous findings about whether the victim of the crime was Joe, Emily, or both. It referred only to an agreement about which *act* Sahagian committed:

“Now, the defendant is charged in Count One with making a criminal threat on or about August 2nd, 2001—2011 in Count One. 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 the defendant committed at least one of these acts and you all agree on which act he committed.”

During the conference on jury instructions, defense counsel did not object or request any modification when this instruction was discussed.

Regarding the jail call, the court instructed the jury in accordance with CALCRIM No. 362:

“Now, if you conclude that the defendant made a false or misleading statement before this trial relating to the charged crime knowing that the statement was false or intending to mislead, that conduct may show that he was aware of his guilt of the crime and you may consider it in determining his guilt. If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself.”

Defense counsel objected to this instruction during the jury-instruction conference, saying there was no evidence Sahagian intended to mislead.

The jury found Sahagian guilty as charged. Sahagian admitted he served three prior prison terms. The court sentenced him to an aggregate prison term of seven years four months, calculated as follows: three years for assault with a deadly weapon, three years for the prior-prison-term enhancements, and eight months each for animal cruelty and making a criminal threat.

DISCUSSION

I. Unanimity instructions

Under the California Constitution, a conviction by jury verdict is valid only if the jurors unanimously find the defendant committed a specific offense. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) “Therefore, cases have long held that 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.*)

This doctrine requires the jury to agree on a discrete crime, but not on a single theory of the case:

“The crime of burglary provides a good illustration of the difference between discrete crimes, which require a unanimity instruction, and theories of the case, which do not. Burglary requires an entry with a specified intent. [Citation.] If the evidence showed two different entries with burglarious intent, for example, one of a house on Elm Street on Tuesday and another of a house on Maple Street on Wednesday, the jury would have to unanimously find the defendant guilty of at least one of those acts. If, however, the evidence showed a single entry, but possible uncertainty as to the exact burglarious intent, that uncertainty would involve only the theory of the case and not require the unanimity instruction.” (*People v. Russo, supra*, 25 Cal.4th at pp. 1132-1133.)

Similarly, a jury convicting on a charge of first degree murder need not unanimously choose between theories of premeditation and felony murder. (*People v. Russo, supra*, 25 Cal.4th at p. 1133.)

The United States Supreme Court has reached similar conclusions applying federal due process principles. (See *Schad v. Arizona* (1991) 501 U.S. 624, 644-645 [lack of instruction requiring jury to make unanimous choice between felony murder and premeditated murder did not violate federal due process principles]; *id.* at p. 651 (conc. opn. of Scalia, J.) [allowing jury to convict based on finding that defendant “assaulted either X on Tuesday or Y on Wednesday” would be unconstitutional].)

Sahagian contends that the court’s failure to give an instruction requiring the jury to make a unanimous decision about which of the two *victims* the threat offense was

committed against violated the state and federal Constitutions. Acknowledging that there is no such constitutional violation when an *assault* is committed against a group (e.g., firing a gun into a crowd) and the jury is not required to select a victim (see, e.g., *People v. Griggs* (1989) 216 Cal.App.3d 734, 742), Sahagian says this case is different: The elements of a section 422 violation include facts about the victim—whether the threat conveyed to the victim an immediate prospect of execution and whether the victim reasonably was in sustained fear—that the jury must specifically find. The People argue that Sahagian has failed to preserve the issue for appeal because he did not object to the unanimity instruction. They also argue that the unanimity instruction discussing agreement on an act (but not a victim) was adequate, and that any error was harmless.

Trial counsel's failure to object to the unanimity instruction as given could have been a tactical choice. Counsel might have intended to avoid prompting the prosecution to seek an amendment of the information to conform to the proof that Sahagian was guilty of two separate counts of violating section 422 and possible future sentencing for two separate strikes. Having raised the problem by requesting that Emily and Joe be referred to in the conjunctive in the instruction on the elements of the offense, counsel might then have thought better of it and dropped the issue when the unanimity instruction was being considered. Nevertheless, we will assume for the sake of argument that the discussion that did take place was sufficient to preserve the issue. We also will assume, without deciding, that an instruction directing the jury to make a unanimous finding about the identity of the victim or victims was required. As we will explain, any error in not giving that instruction was harmless beyond a reasonable doubt.

To prove a violation of section 422, the prosecution must show that (1) a defendant willfully threatened to commit a crime that would result in death or great bodily injury; (2) the defendant had a specific intent that his or her statement be taken as a threat; (3) the threat was of such a nature as to convey to the person threatened a gravity of purpose and an immediate prospect of execution; and (4) the threat caused the person

threatened reasonably to be in sustained fear for his or his immediate family's safety.
(§ 422.)

Here, the evidence that Sahagian threatened to kill both Mellos and did so with the intent that his statement be taken as a threat—the first and second elements—was overwhelming and is not disputed in this appeal. The testimony of Emily and Joe was uncontradicted. Further, this evidence was the same for both victims. There are no grounds on which any juror could have found that Sahagian's statement contained a threat (intended to be taken as a threat) against Emily but not against Joe or vice versa.

We also see no grounds on which any juror could have found the third element—that Sahagian's threat conveyed gravity of purpose and an immediate prospect of execution—for one of the Mellos but not the other. The content of the threat was the same for both hearers. Whatever it conveyed, it conveyed to both. Further, both gave testimony that they took the threat seriously and believed Sahagian capable of returning and carrying it out.

Sahagian's argument focuses on the fourth element: whether Emily and Joe were in sustained fear. Both in the trial court and on appeal, Sahagian has argued that the evidence on this element was weaker as to Joe. This may be so, but, contrary to Sahagian's contention, it does not reveal any possibility that properly instructed jurors would have failed to reach a unanimous guilty verdict. Since the jury found Sahagian guilty, each juror must have found the fourth element fulfilled for Emily or Joe or both. If all found it was fulfilled for Emily, or all found it for Joe, or all found it for both, then Sahagian's rights were not infringed. Suppose, however, that some jurors made the finding only for Emily and some only for Joe. By Sahagian's admission, the evidence supporting the finding was stronger for Emily than for Joe. It follows that any rational juror who made the necessary finding for Joe would, if properly instructed, also have made it for Emily. We know that all jurors made the finding at least for one or the other. This means that all jurors, if properly instructed and if acting rationally, would have made

the finding at least for Emily. Consequently, the error was harmless beyond a reasonable doubt.

II. CALCRIM No. 362

CALCRIM No. 362 gives effect to the rule that “false and contradictory statements of defendant in relation to the offense charged constitute in themselves corroborative evidence by showing a consciousness of guilt.” (*People v. Atwood* (1963) 223 Cal.App.2d 316, 327, overruled on other grounds by *People v. Carter* (2003) 30 Cal.4th 1166, 1197.)

Sahagian argues that the instruction was inapplicable because he was only trying to mislead his family about his guilt, not the authorities. We disagree. The instruction applies when the evidence supports a finding that a defendant lied about the offense in a way that implies guilt. (*People v. Kimble* (1988) 44 Cal.3d 480, 496 & fn. 11; *People v. Fritz* (2007) 153 Cal.App.4th 949, 957-958; *People v. Albertson* (1944) 23 Cal.2d 550, 582 (conc. opn. of Traynor, J.)) Justice Traynor explained that an inference of guilt can be made from defendants’ false statements when they are “fabrications which, like devious alibis, are apparently motivated by fear of detection, or which, like devious explanations of the possession of stolen goods, suggest that there is no honest explanation for incriminating circumstances” (*People v. Albertson, supra*, at p. 582.)

Sahagian asked his brother for help in the form of money and assistance in obtaining a lawyer. If he gave a false and exculpatory account of the facts to his brother, the jury could reasonably infer that this was because he knew he did wrong. It could find that he did not want his family to learn of his guilt because he wanted their help or simply because he did not want to appear guilty in their eyes. It is not only to the authorities that a person might wish to avoid revealing his guilt. As a result, a lie to the authorities is not the only kind of lie that can evidence consciousness of guilt.

Some of the authorities cited by the parties and by us above do refer to false statements made to investigating authorities. (*People v. Kimble, supra*, 44 Cal.3d at

p. 496; *People v. Albertson, supra*, 23 Cal.2d at p. 581; *People v. White* (1995) 35 Cal.App.4th 758, 772.) This is merely the situation in which the issue happened to arise in those cases, and we do not believe the courts intended to limit the rule to that situation. In *People v. White*, for instance, on which Sahagian relies, the court stated that “[t]he inference of guilt comes from the fact that a falsehood was told in order to mislead the authorities and avoid suspicion” (*White, supra*, at p. 772.) The court made this statement as part of its analysis rejecting the defendant’s contention that a false statement evidences consciousness of guilt only if made upon arrest. The court’s point was that if the false statement was made to mislead, it did not matter when it was made. There is no reason to think the court intended to limit the rule, that a defendant’s false statement can show consciousness of guilt, to situations in which the defendant lies to law enforcement.

DISPOSITION

The judgment is affirmed.

LaPorte, J.*

WE CONCUR:

Levy, Acting P.J.

Detjen, J.

*Judge of the Superior Court of Kings County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.