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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ZEYAD AHMADIEH,

Defendant and Appellant.

G045352

(Super. Ct. No. 10NF0990)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Phillip I. Bronson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Zeyad Ahmadiieh of felony vandalism (Pen. Code, § 594, subds. (a) & (b)(1); all statutory citations are to the Penal Code unless noted).¹ Ahmadiieh contends trial counsel provided ineffective representation by failing to request a jury instruction concerning his alibi defense. (See CALCRIM No. 3400.) He also argues a probation condition directing him to “have no contact, direct or indirect, with” the victims is unconstitutionally vague. For the reasons expressed below, we affirm.

I

FACTUAL AND PROCEDURAL HISTORY

In March 2009, Ahmadiieh began renting a room behind Mohammad Mian’s Buena Park detached garage. According to Mian, the landlord-tenant relationship was acrimonious from the beginning. Ahmadiieh was evasive, failed to provide identification, changed locks without authorization, made loud disturbances late at night, entered Mian’s backyard and used Mian’s garden hose and water without permission.

Mian served eviction notices beginning in April 2009, but granted Ahmadiieh a couple of extensions when Ahmadiieh pleaded for more time to find another place. Tired of delays and Ahmadiieh’s excuses, Mian hired an attorney to handle the eviction process in September or October. When Ahmadiieh told Mian he was taking kickboxing classes, Mian felt threatened and worried if he “push[ed] [Ahmadiieh] too much . . . [Ahmadiieh] could hurt” him. Ahmadiieh also threatened to report Mian to the Internal Revenue Service. In November, Mian obtained a judgment evicting Ahmadiieh. The sheriff served the lockout notice and Mian changed the locks. Ahmadiieh arrived and

¹ Section 594 subdivision (a) provides that “Every person who maliciously [damages] . . . personal property not his or her own . . . is guilty of vandalism.” Where the amount of damage is \$400 or more, the offense is a felony/misdemeanor “wobbler” punishable by imprisonment or jail, and a fine. (§ 594, subd. (b)(1).)

demanded to speak to the sheriff. Mian told him to pack his belongings and leave. Ahmadieh locked himself in the room and took a shower before departing.

Around 12:30 a.m. on March 7, 2010, Mian's son Usman arrived home and spied a man circling his brother Jamil's Toyota Camry, spraying something on the car from a pump bottle. As Usman walked toward his brother's car, the man noticed Usman, stopped spraying, and began walking away. Usman saw the man's face and had no doubt it was Ahmadieh, who Usman saw frequently during the six months Ahmadieh rented the room. Usman briefly followed Ahmadieh but decided against confronting him. Usman watched Ahmadieh walk quickly toward and past his car, which was parked down the street. Usman informed his father and they called 911. When Usman and his father emerged a few minutes later, defendant and his car were gone. The substance sprayed on Jamil's car also had been applied to three other vehicles belonging to the Mians. Mohammad's Corolla suffered more damage than the others. The substance caused the paint to blister, resulting in well over \$10,000 in damage to the vehicles.

Ahmadieh denied committing the vandalism. He and a friend, Hisham Salman, testified they were at a Canoga Park strip club at the time of the vandalism. The men left the club around midnight, and Ahmadieh drove home to North Hollywood. Ahmadieh had previously complained to Salman his eviction was unfair, and that Mian falsely claimed he had not paid the rent, but Salman believed his friend was not a vengeful person. Ahmadieh admitted he and Mian had several disputes, and Mian did "not like a human being to be comfortable." But he was not angry about the eviction and harbored no grudge against Mian.

Following a trial in February 2011, a jury convicted Ahmadiieh as noted above. In May 2011, the trial court suspended imposition of judgment and placed Ahmadiieh on probation on various terms and conditions.

II

DISCUSSION

A. *Trial Counsel's Failure to Request an Alibi Instruction (CALCRIM No. 3400) Did Not Constitute Ineffective Assistance of Counsel*

Ahmadiieh contends trial counsel's failure to request an alibi instruction (CALCRIM No. 3400)² denied him his right to the effective assistance of counsel. (See *People v. Freeman* (1978) 22 Cal.3d 434, 437-439 (*Freeman*) [trial courts do not have a sua sponte duty to instruct the jury on an alibi defense even when it is the sole defense in the case].) He asserts the "jury was allowed to assume that the burden of proving alibi was [with him]." We disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate defense counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability the result would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218 (*Ledesma*).) If trial counsel's challenged act or omission resulted from an informed tactical choice within a range of reasonable competence, the appellate court must affirm the conviction. (*People v.*

² CALCRIM No. 3400 reads in part: "The defendant contends (he/she) did not commit (this/these) crime(s) and that (he/she) was somewhere else when the crime[s] (was/were) committed. The People must prove that the defendant was present and committed the crime[s] with which (he/she) is charged. The defendant does not need to prove (he/she) was elsewhere at the time of the crime. [¶] If you have a reasonable doubt about whether the defendant was present when the crime was committed, you must find (him/her) not guilty."

Walker (1993) 14 Cal.App.4th 1615, 1624.) In a direct appeal, the record must affirmatively disclose that counsel's omission lacked any tactical purpose. (*People v. Majors* (1998) 18 Cal.4th 385, 403.) The appellate court will reject an ineffective assistance claim if the appellate record sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless no satisfactory explanation could exist. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 (*Tello*); *Ledesma, supra*, 43 Cal.3d at p. 216.)³

As stated above, to show prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Ledesma, supra*, 43 Cal.3d at pp. 217-218.) A reasonable probability is one sufficient to undermine confidence in the outcome. (*Id.* at pp. 217-218.) If the defendant fails to show the challenged actions of counsel were prejudicial, the appellate court may reject the claim on that ground without determining whether counsel's performance at trial was deficient. (*People v. Sapp* (2003) 31 Cal.4th 240, 263.)

There is no reasonable probability Ahmadiieh would have realized a more favorable result had the defense requested, and the court provided, an alibi instruction. The defense of alibi tends only to negate the prosecution's evidence that the defendant was present at the scene of the crime. (*Freeman, supra*, 22 Cal.3d at p. 438.) The defense cannot "be considered by itself, but must be considered in connection with all other evidence in the case. [Citation.] For this reason, in the absence of a request [for an alibi instruction] . . . it is sufficient that the jury be instructed generally to consider *all* the

³ One reason given to explain why counsel may not wish an alibi instruction is where "the giving of such an instruction will so concentrate attention upon the subject of alibi as to divert attention from unrelated weaknesses in the State's case." (See *State v. Hunt* (1973) 283 N.J. 617, 624 [197 S.E.2d 513, 518].)

evidence in the case, and that defendant is entitled to an acquittal in case of a reasonable doubt whether his guilt is satisfactorily shown.” (Ibid.) Where the jury has been instructed to consider the evidence as a whole and acquit the defendant if reasonable doubt concerning his guilt has been shown, the failure to provide an alibi instruction is not prejudicial. (Ibid. [given reasonable doubt instruction, “[i]t would have been redundant to have required an additional instruction which directed the jury to acquit if a reasonable doubt existed regarding defendant’s presence during the crime”].)

Here, the trial court instructed the jury with CALCRIM No. 220 to acquit Ahmadiieh if it found the prosecution did not establish his guilt beyond a reasonable doubt. Specifically, the jury was instructed: “In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.” The jury was also instructed on how to evaluate witness credibility (CALCRIM No. 226), conflicting evidence (CALCRIM No. 302), and eyewitness testimony (CALCRIM No. 315). These instructions adequately informed the jury to consider all the evidence in the case and acquit if a reasonable doubt existed as to defendant’s guilt. (*Freeman, supra*, 22 Cal.3d at p. 438.)

As the prosecutor argued, “The only question is[,] who did it?” Defense counsel noted “the thing that is most clear is the People have to prove beyond a reasonable doubt that [defendant] was there in Buena Park at 12:30 and that he is the one who damaged these vehicles.” It is not reasonably probable that Ahmadiieh would have realized a more favorable result had CALCRIM No. 3400 been given. (See also *People v. Alcalá* (1992) 4 Cal.4th 742, 803-804 [rejecting claim of reversible error for failure to

instruct sua sponte on alibi because jury was instructed sufficiently with other instructions regarding the believability of witnesses, discrepancies in testimony, weighing conflicting testimony, sufficiency of testimony of one witness, and the presumption of innocence/reasonable doubt].)⁴

B. *The Probation Condition Prohibiting Direct and Indirect Contact with the Victims Is Not Unconstitutionally Vague*

One of defendant's probation conditions provided: "[Y]ou are to have no contact, direct or indirect, with Mohammad, Jamil or Diana M." Ahmadieh argues the prohibition on *indirect* contact is unconstitutionally vague because "it provides no notice of what the court meant by 'indirect contact.'" We disagree.

A probation condition must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena*); *People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.) Precision is necessary so that both the probationer and the person charged with enforcing the term, as people of common intelligence, can understand what is required. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115; *People v. Castenada* (2000) 23 Cal.4th 743, 751 [a vague law is one that either fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits, or that authorizes or encourages arbitrary and discriminatory enforcement].) The basis of a vagueness challenge is the due process concept of fair warning. (*People v. Castenada, supra*, 23 Cal.4th at p. 751.)

⁴ The older cases Ahmadieh cites for the proposition that failure to sua sponte instruct on alibi is reversible error contain little analysis and conflict with California law, as explained above. (See *Hogan v. State* (1965) 221 Ga.9 [142 S.E.2d 778].) In fact, *State v. Melton* (1924) 187 N.C. 481 [122 S.E. 17], cited by defendant, was overruled by *State v. Hunt, supra*, 283 N.C. at p. 618 [197 S.E.2d at p. 515], which adopted the rule applied in California and the vast majority of jurisdictions.

The probation condition Ahmadieh contorts is not vague. A reasonable person would understand the condition prohibits *any* contact with the victims. This would include personal contact, telephone, e-mail or other electronic contact, and contact via third parties. In *Sheena*, the probation condition that prohibited associating with “anyone ‘disapproved of by probation’” was vague because it did not provide the probationer advance knowledge of whom she must avoid. (*Sheena, supra*, 40 Cal.4th at p. 890.) Here, the condition defined precisely the three people Ahmadieh must not contact. None of the cases cited by defendant persuade us the prohibition on contact imposed here is unconstitutionally vague. (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 628-629 [condition of probation prohibiting any association with a gang modified to require knowledge by defendant]; *In re Vincent G.* (2008) 162 Cal.App.4th 238, 245, 247 [same]; *In re H.C.* (2009) 175 Cal.App.4th 1067, 1072 [condition minor not “frequent any areas of gang related activity” vague because “frequent” might refer to an occasional visit or no visit at all, and “areas” might refer to an entire district or town and should name the actual geographic area].)

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P.J.

BEDSWORTH, J.