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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.

THOMAS JAMES HEWITT,

Defendant and Appellant.

G046851

(Super. Ct. No. 11WF2576)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
Frank F. Fasel, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief  
Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Catherine White, 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, Barry Carlton and  
Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Thomas James Hewitt appeals from the judgment entered after a jury found him guilty of one count each of domestic battery with corporal injury, criminal threats, and assault. The trial court found Hewitt had suffered a prior serious felony conviction and served a prior prison term. As to the criminal threats offense, Hewitt contends the trial court erred by failing to give the jury a unanimity instruction, sua sponte, in light of evidence at trial that he twice threatened to kill his girlfriend. Hewitt also argues the trial court erred in finding that his prior felony conviction, which he suffered in Michigan for assault with a dangerous weapon, constituted a serious felony within the meaning of Penal Code sections 667, subdivisions (a)(1), (d), and (e)(1), and 1170.12, subdivisions (b) and (c)(1). Hewitt contends insufficient evidence showed he personally used a weapon in the commission of that offense. (All further statutory references are to the Penal Code unless otherwise specified.)

We affirm. For the reasons we will explain, the trial court did not err regarding a unanimity instruction because Hewitt's threats were made in one continuous course of conduct. In California, all convictions for assault with a deadly weapon constitute serious felonies, regardless whether the perpetrator personally used the weapon. Because Hewitt's prior conviction in Michigan for assault with a dangerous weapon shares all of the elements as the offense of assault with a deadly weapon in California, the trial court did not err by finding the prior assault with a dangerous weapon conviction to be a serious felony.

## FACTS

Hewitt and his girlfriend, Ana R., met in 2011 on an Internet Web site. Within three weeks of meeting, Hewitt began living with Ana R. and her two minor children. Before Ana R. met Hewitt, she spent a lot of time with her sister, Francina A.

After Ana R. and Hewitt began dating, Ana R.'s relationship with Francina A. changed as Ana R. spent more time with Hewitt. Ana R. did not speak with Francina A. on the cell phone as often. Hewitt would take Ana R.'s cell phone from out of her purse or off the desk and put it under the couch.

During the early evening of October 27, 2011, Ana R. dropped her daughter off at Francina A.'s home to spend the night. An hour or two later, Francina A. called Hewitt's cell phone; Hewitt allowed Francina A. to speak with Ana R. After Ana R. spoke with Francina A. in Spanish, Hewitt became upset, and got on the phone with Francina A. (Ana R. testified that Hewitt "would always cut the calls" and "would get the phone and want[] to talk to [Francina A.]" himself.) When Hewitt got off the phone with Francina A., "[h]e was angry."

Around 1:00 or 2:00 a.m. on October 28, 2011, Ana R. told Hewitt she wanted to end their relationship. Hewitt retrieved a knife from his desk and began angrily pacing the room. He called her "stupid" and told her that her children would be put in foster care because he was going to "call immigration." Hewitt then sat down on the floor next to Ana R., grabbed her neck, placed the tip of the knife against her neck, and told her, "I'm going to kill you." The knife did not cut Ana R.'s neck, but she was scared and began to cry; she believed he was going to kill her.

Hewitt got up and resumed pacing the room, while calling Ana R. "retard," "stupid," and "whore." Next, Hewitt turned off the light, grabbed Ana R. by her neck, and slammed his head into her head, knocking her unconscious. After Ana R. regained consciousness, Hewitt "had [her] by [her] shoulders and he was shaking [her] like wanting to pick [her] up," while saying, "[g]et up because otherwise I'm going to kill you for real."

At some point, Hewitt showed Ana R. the tattoo on his right arm that says "Vengeance," and told her, "you know what this is." Hewitt directed Ana R. to "go with [him] to the bathroom" where "[h]e made [her] touch his penis." Hewitt and Ana R. later

went to another room because Ana R. was dizzy and did not feel well. Hewitt suggested Ana R. orally copulate him; she complied. Hewitt also “came to [Ana R.] to have sex,” and she again complied. Ana R. thereafter got up and tried to conceal her injuries before taking her son to school. She suffered a large bump on her forehead and bruises on her face, collarbone, and left arm.

Initially, Ana R. did not want to contact the police about the incident because Hewitt “always promised that he would change, and [she] loved him” and she did not want him to go to jail. She was also concerned she would be deported if the police were contacted. When Francina A. saw Ana R.’s bruised face and the bump on her forehead, however, Francina A. told Ana R., “she needed to call the police” or Francina A. was “going to call social services because [she] was not going to let the kids” return home with Ana R. Ultimately, Francina A. called 911.

On October 30, 2011, deputy sheriffs from the Orange County Sheriff’s Department spoke with Ana R. At trial, Deputy Nathan Wilson testified that he saw “[s]evere bruising and swelling on [Ana R.’s] face around her eyes and forehead area.” He testified that Ana R. said she and Hewitt had argued because he “did not like her speaking too much Spanish.” She told the deputy sheriffs that during the argument, Hewitt “head-butted” her, causing her to lose consciousness and sustain the injuries to her face and forehead. She explained that she had awakened to Hewitt shaking her and choking her with his hand on her neck, “telling her to shut up” and “calling her other bad names like . . . bitch.” Ana R. also told the deputy sheriffs that Hewitt had held an orange-handled knife to her neck.

Based on Ana R.’s injuries and statements, the deputy sheriffs then contacted Hewitt and arrested him. Wilson testified that during questioning, Hewitt had told the deputy sheriffs that he has diabetic attacks, which cause him to “jump[] around and he doesn’t have memory of what happens.” At trial, Ana R. testified she had helped Hewitt many times during his diabetic attacks because he would become weak.

## PROCEDURAL BACKGROUND

Hewitt was charged in an information with domestic battery with corporal injury, in violation of section 273.5, subdivision (a) (count 1); making criminal threats, in violation of section 422 (count 2); and aggravated assault, in violation of section 245, subdivision (a)(1) (count 3). As to counts 1 and 2, the information alleged that, pursuant to section 12022, subdivision (b)(1), and within the meaning of section 1192.7, Hewitt personally used a knife, a dangerous and deadly weapon, in the commission of those offenses.

The information further alleged that, pursuant to section 667, subdivision (a)(1), “prior to the commission of the felony offenses charged herein, [Hewitt] was convicted of a felony that includes all of the elements of a serious felony as defined in California Penal Code section 1192.7, on charges brought and tried separately on or about November 21, 2005 in the DISTRICT Court of the State of Michigan” and has therefore suffered a prior serious felony pursuant to sections 667, subdivisions (d) and (e)(1), and 1170.12, subdivisions (b) and (c)(1). The information also alleged Hewitt served a prior prison term within the meaning of section 667.5, subdivision (b), as a result of the Michigan prior conviction.

The jury found Hewitt guilty on counts 1 and 2, and also found him guilty of assault as a lesser included offense of count 3. The jury found the enhancement allegation that Hewitt personally used a knife in the commission of counts 1 and 2 not true.

The trial court found the prior conviction and prior prison term enhancement allegations true, and sentenced Hewitt to a total prison term of 11 years. Hewitt timely appealed.

## DISCUSSION

### I.

#### THE TRIAL COURT DID NOT ERR BY FAILING TO INSTRUCT THE JURY ON UNANIMITY AS TO THE CRIMINAL THREATS OFFENSE.

Under the California Constitution, a criminal defendant has a right to a unanimous jury verdict. (Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) “Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime.” (*People v. Russo, supra*, at p. 1132.) “[C]ases 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.*; *People v. Riel* (2000) 22 Cal.4th 1153, 1199 [the trial court has a sua sponte obligation to give a unanimity instruction “‘where the circumstances of the case so dictate’”].) “This requirement of unanimity as to the criminal act ‘is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.’” (*People v. Russo, supra*, at p. 1132.) A unanimity instruction “‘is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.’ [Citation.]” (*Ibid.*)

The trial court’s duty to instruct on unanimity is not triggered, however, “if the case falls within the continuous-course-of-conduct exception, which arises ‘when the acts are so closely connected in time as to form part of one transaction’ [citation], or ‘when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time’ [citation]. There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime. [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 679; see *People v. Maury*

(2003) 30 Cal.4th 342, 423 [a unanimity instruction is not required where the evidence shows multiple acts in a continuous course of conduct]; see also *People v. Beardslee* (1991) 53 Cal.3d 68, 93 [“[W]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury’s understanding of the case”].)

Here, Hewitt’s two threats were both made in a continuous course of conduct—namely, in the domestic violence incident that occurred during the early morning of October 28, 2011. The two threats were closely connected in time and substantially identical in nature. In the first threat, Hewitt stated, “I’m going to kill you.” After pacing the room and calling Ana R. names, Hewitt turned off the light and then head-butted Ana R., causing her to lose consciousness. Hewitt shook Ana R. back into consciousness, while making his second threat, which was a reiteration of the first, stating, “[g]et up because otherwise I’m going to kill you for real.” Under those circumstances, Hewitt’s threats were not “discrete” acts, but part of a single transaction—Hewitt’s violent response to Ana R. informing Hewitt that she wanted to break up with him. (*People v. Russo, supra*, 25 Cal.4th at pp. 1134-1135.)

Hewitt’s defense, as explained by his trial counsel in closing argument, was that Ana R. was a liar and the domestic violence incident, including any threat, simply did not happen. The prosecutor in his closing argument pointed out that the criminal threats count came up “in two separate cases” but collectively referred to both of Hewitt’s threatening statements as the “threat.” The prosecutor’s argument “wove the two [threats] together.” (*People v. Sapp* (2003) 31 Cal.4th 240, 284.) Therefore, there was no basis for the jury to differentiate between the threats and come to the conclusion Hewitt made one of the two threats, but not the other.

This case is therefore factually distinguishable from *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539, in which the appellate court held that the trial court committed reversible error when it failed to give a unanimity instruction. In that case, the

defendant had made two criminal threats about two hours apart to the employees of an auto repair shop. (*Id.* at pp. 1532-1533.) The first threat involved a face-to-face confrontation with the manager at the repair shop, in which the defendant threatened to go home and return with a grenade. (*Id.* at pp. 1533, 1538.) After the defendant left, the manager called the police who took a report. (*Id.* at p. 1533.) About two hours after the first threat, the defendant returned to the repair shop with a fake grenade and threatened to blow up the shop. (*Ibid.*) The appellate court held, “the evidence presented . . . established that appellant committed two acts of making terrorist threats, each of which could have been charged as a separate offense, yet the matter went to the jury on only one such offense.” (*Id.* at p. 1539.) Therefore, a unanimity instruction was required. (*Ibid.*)

In *People v. Melhado*, *supra*, 60 Cal.App.4th at page 1533, the threats were separated by a period of time in which the confrontation ended, the defendant left the premises, and the victim contacted the police. In contrast, here, the threats occurred during an ongoing argument separated only by conduct (the name calling and the head-butting) that was part of a single transaction—the domestic violence incident.

This case is also factually, as well as legally, distinguishable from *People v. Salvato* (1991) 234 Cal.App.3d 872, in which the appellate court concluded the trial court erred by failing to give a unanimity instruction. In *People v. Salvato*, trial evidence showed the defendant engaged in multiple threatening acts over a time period exceeding one month, which included telephone calls and a “mimed shooting,” in addition to the defendant sending his former wife and her attorney firearm receipts and threatening letters. (*Id.* at pp. 876-877, 884.) *People v. Salvato* is also legally distinguishable from the instant case because the appellate court did not apply the first category of the continuous course of conduct exception, applied *ante* (e.g., whether the acts are so closely connected in time that they form part of the same transaction). Instead, the appellate court found error after analyzing the second category of the continuous course of conduct exception, and determined that the applicable statute, section 422, did not

“come within the continuous course of conduct exception.” (*People v. Salvato, supra*, at p. 883.)

Because we conclude a unanimity instruction was not required here because the first category of the continuous course of conduct exception applied, we find no error.

## II.

### SUFFICIENT EVIDENCE SUPPORTED THE TRIAL COURT’S FINDING HEWITT HAD SUFFERED A PRIOR SERIOUS FELONY CONVICTION.

The trial court found Hewitt had been previously convicted in Michigan of committing an assault with a dangerous weapon in violation of Michigan Compiled Laws section 750.82. Based on that prior conviction, the trial court also found Hewitt had committed a prior serious felony conviction within the meaning of California’s “Three Strikes” law (§§ 667, 1170.12).

Hewitt contends the trial court’s finding he had suffered a prior serious felony conviction is not supported by substantial evidence because insufficient evidence showed he *personally* used a dangerous weapon in the commission of the assault with a dangerous weapon offense in Michigan. In his opening brief, Hewitt acknowledges that the evidence before the trial court showed he hit his victim in the shoulder with a baseball bat, but contends the evidence showing his personal use of the bat constitutes inadmissible hearsay the trial court should not have considered. For the reasons we will explain, the Michigan offense of assault with a dangerous weapon, like its California counterpart, qualifies as a serious felony regardless whether Hewitt personally used the dangerous weapon in the commission of the Michigan offense.

### A.

*The Offense of Assault with a Dangerous Weapon in Violation of Michigan Law Shares All of the Same Elements as California’s Offense of Assault with a Deadly Weapon.*

In his opening brief, Hewitt acknowledges, “the state’s documentary proof showed beyond dispute [he] suffered a prior conviction for violating Michigan criminal

code section 750.82,” and thus committed assault with a dangerous weapon. Certified documents from the circuit court in Ann Arbor, Michigan, were admitted in evidence, including an order of conviction stating Hewitt pleaded guilty to the charge of assault with a dangerous weapon.

Under section 667, subdivision (a)(1), a prior conviction for an offense committed in another jurisdiction only qualifies as a strike if it includes all of the elements of a serious felony in California. In determining whether the prior conviction “involved conduct which satisfies all of the elements of the comparable California serious felony offense,” the trier of fact may consider the “entire record of the proceedings leading to imposition of judgment.” (*People v. Myers* (1993) 5 Cal.4th 1193, 1195.) “A common means of proving the fact and nature of a prior conviction is to introduce certified documents from the record of the prior court proceeding and commitment to prison, including the abstract of judgment describing the prior offense.” (*People v. Delgado* (2008) 43 Cal.4th 1059, 1066 (*Delgado*).

Hewitt’s prior conviction in Michigan for assault with a dangerous weapon includes all of the elements of the comparable California serious felony offense of assault with a deadly weapon. Pursuant to Michigan Compiled Laws section 750.82(1), “a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$2,000.00, or both.” Thus, “[t]he elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” (*People v. Avant* (1999) 235 Mich.App. 499, 505 [597 N.W.2d 864, 869].) The third element is coupled with “the element of present ability or apparent present ability to commit [the] battery.” (*People v. Grant* (1995) 211 Mich.App. 200, 202 [535 N.W.2d 581, 582].)

California's equivalent to Michigan's offense of assault with a dangerous weapon, the offense of assault with a deadly weapon in violation of section 245, subdivision (a)(1), also requires proof of (1) an assault (2) with a deadly weapon or instrument other than a firearm. (See *Delgado, supra*, 43 Cal.4th at p. 1068.)<sup>1</sup> Both the Michigan and California crimes require an assault or attempted assault with the use of an instrument in a manner likely to cause death or great bodily injury. (See *Delgado, supra*, at p. 1068; *People v. Avant, supra*, 597 N.W.2d 864, 869.) Therefore, Hewitt's prior conviction for assault with a dangerous weapon in Michigan satisfied all of the elements of the comparable assault with a deadly weapon felony offense in California.

B.

*The California Offense of Assault with a Deadly Weapon Constitutes a Serious Felony Regardless Whether the Defendant Personally Used the Deadly Weapon.*

Hewitt argues that his prior conviction of assault with a dangerous weapon in Michigan does not qualify as a serious felony in California, without evidence that he personally used the weapon in the commission of the Michigan offense. Hewitt's argument is without merit.

Under California's Three Strikes law, a prior conviction qualifies as a strike if it is a "serious felony" as defined by section 1192.7, subdivision (c). (§ 667, subd. (d)(1).) In March 2000, "Proposition 21 amended section 1192.7, subdivision (c), by adding 14 felonies to the statutory 'serious felony' list." (*People v. Winters* (2001) 93 Cal.App.4th 273, 276.) As amended, section 1192.7, subdivision (c)(31) defines "serious

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<sup>1</sup> "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.'" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) In California, a bat is a deadly weapon for purposes of a conviction under section 245, subdivision (a)(1). (See, e.g., *People v. Loeun* (1997) 17 Cal.4th 1, 5-7.) Hewitt does not argue that the weapon used in the commission of the assault with a dangerous weapon offense in Michigan fails to qualify as a "deadly weapon or instrument other than a firearm" within the meaning of section 245, subdivision (a)(1).

felony” to include “assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm . . . , in violation of Section 245.” As discussed *ante*, section 245, subdivision (a)(1) states, in pertinent part, “[a]ny person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment . . . , or by a fine . . . , or by both.” Neither section 1192.7, subdivision (c), as amended in 2000, nor section 245, subdivision (a)(1) requires a finding that the defendant *personally* used the weapon involved in the offense. Consequently, Proposition 21 “made all assaults with deadly weapons serious felonies, regardless of personal use.” (*Delgado, supra*, 43 Cal.4th at p. 1068.)

The amended serious felony list set forth in section 1192.7, subdivision (c) applies to offenses committed on or after March 8, 2000, the effective date of Proposition 21. (*People v. James* (2001) 91 Cal.App.4th 1147, 1149-1150.) Substantial evidence showed Hewitt committed the assault with a dangerous weapon offense in Michigan in 2005, and, thus, section 1192.7, subdivision (c), as amended by Proposition 21, applies. As Hewitt’s prior conviction for assault with a dangerous weapon in Michigan includes all of the elements of California’s serious felony of assault with a deadly weapon, the trial court properly found Hewitt suffered a prior serious felony conviction.

### C.

#### *Any Error Regarding the Admission of Prior Conviction Evidence Was Harmless.*

In support of his argument that insufficient evidence showed he personally used a weapon in committing the assault with a dangerous weapon offense, Hewitt argues the trial court improperly relied on inadmissible hearsay describing his personal use of a baseball bat in committing that offense. Hewitt did not raise this evidentiary objection in the trial court and has therefore forfeited the issue on appeal. (See *People v. Jennings* (2010) 50 Cal.4th 616, 654.)

Even if the argument were not forfeited, any evidentiary error was harmless because, as discussed *ante*, Hewitt's personal use of the dangerous weapon was not relevant to the determination whether he suffered a prior serious felony conviction. Furthermore, even were we to disregard the two documents, which Hewitt contends contain such inadmissible hearsay, sufficient evidence (e.g., the order of conviction in August 2005, stating Hewitt pleaded guilty to assault with a dangerous weapon in violation of Michigan Compiled Laws section 750.82) supported the finding Hewitt committed assault with a dangerous weapon in Michigan in 2005, and thus suffered a prior serious felony conviction within the meaning of the Three Strikes law.

#### DISPOSITION

The judgment is affirmed.

FYBEL, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.