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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.

HUGO BARRUETA,

Defendant and Appellant.

G050121

(Super. Ct. No. 13NF2304)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed in part, reversed in part and remanded for resentencing.

Cynthia M. Jones, 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, Peter Quon, Jr., Randy Einhorn and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Hugo Barrueta was charged with assaulting, battering and making criminal threats against his girlfriend Esperanza Diego. At trial, appellant denied the charges and testified Diego was the violent one in their relationship. Nonetheless, the jury convicted him as charged, and he was sentenced to six years in prison. On appeal, he contends his trial was tainted by evidentiary error, instructional error and prosecutorial misconduct. He also argues his sentence is flawed and he should have been convicted of only two, not three counts of making a criminal threat. As respondent concedes, appellant's last contention has merit, and so does one of his sentencing claims. Therefore, we will reverse one of his convictions, vacate his sentence and remand the matter for resentencing.

FACTS

At the time this case arose, appellant and Diego were living together in Anaheim. They were known to have a tumultuous relationship, and at trial each claimed to be the victim of the other's hostility. According to Diego, the morning of June 30, 2013 is when things really took a turn for the worse. While she was in the bathroom getting ready for work, appellant read a text message on her phone that led him to believe she was seeing another man. Appellant got so worked up that when Diego came out of the bathroom he lunged at her and wrapped his hands around her neck. Then he began berating Diego and choked her to the point she had trouble breathing. Diego lost her balance and fell, but appellant kept one hand on her neck. While squeezing her throat "real hard," he grabbed a pocket knife from next to the bed, opened it, and put it up against her cheek. Then he made a series of threatening statements to Diego. First he told her he was going to "split" her face so no one would want to look at her. Then, referring to Diego's four-year-old daughter, he asked, "How many filets can you get out of a little girl?"¹ And lastly, he threatened to chop up Diego and her daughter into "little

¹ At that time, Diego's daughter was living with her father at another location.

pieces.” Frightened by these remarkably vivid threats, Diego wrested herself free of appellant’s grasp and ran out of the house.

But she did not call the police. Instead, she went to her job as a cashier at the La Rena Market. A short time later, appellant showed up there and told Diego she was going to be sorry she had ever been born. Then he left. Thirty minutes later, a security guard informed Diego someone had scratched her car. Sure enough, when she went out into the parking lot she discovered that someone had keyed the side of her car.

After returning to work, Diego received a text message from appellant that read: “I’m going to get even with you for every insult, every embarrassing moment, every lie, and all of my disappointments that you have caused. A little cut at a time. I’m going to mark you so you will never forget me. You’re going to wallow in repentance.” The message further frightened Diego. When she got off work, she went to see her friend Sylvia Belmonte, who agreed to help Diego get her belongings from the house she shared with appellant. Unfortunately, that turned out to be a tougher task than they envisioned.

When Diego and Belmonte arrived at the house, there were several people there, including appellant and his sister. They refused to let Diego inside, so to avoid a confrontation Diego and Belmonte left and parked about a block away. Diego called the Anaheim Police Department and asked for assistance in retrieving her belongings. In fact, she called the police several times, but no one showed up to help her.²

As Diego was contemplating her plight, she saw appellant driving toward her and Belmonte with his lights off. Diego and Belmonte turned tail and drove toward the police station. Appellant followed them for a while, but when they got close to the station, he turned around. Diego and Belmonte found a policeman at a nearby gas station, and he escorted them back to appellant’s house. The officer spoke to appellant,

² This may have been attributable to Diego’s limited ability to speak and understand English. During her testimony, Diego said she had a hard time communicating with the police dispatcher.

and Diego was allowed to get her belongings. She and Belmonte then drove to Belmonte's home, where they spent the night.

At trial, Belmonte corroborated Diego's version of events. In addition, Belmonte testified that while she and Diego were waiting for the police to arrive and help them out, appellant called and left a message on Diego's phone. In that message, he threatened to kill Diego; then he threatened to kill Belmonte and her family for helping Diego. Belmonte also testified appellant swerved his car toward her and Diego while they were driving to the police station. Appellant's actions prompted Belmonte to seek a restraining order against him. At the hearing on that request, appellant flashed a playing card at Belmonte – the ace of spades, which she interpreted as a death threat.

During appellant's trial, Belmonte also testified to statements Diego made when Diego first arrived at her house on the night in question. Among other things, Diego told Belmonte that appellant had – knife in hand – threatened to kill her and her daughter.

Diego did not report these threats to any of the police officers she spoke to that evening. The next day, she did try to get a restraining order against appellant, but she had trouble filling out the paperwork and could not get an order until the following day. At that time, a social worker advised her to make a formal police report, which she did. The police photographed the slight bruising on her neck and arm. In the wake of the incident, her throat was sore for about a week, and she had difficulty eating.

Appellant painted a very different picture of events when he took the witness stand. For starters, he said his big falling out with Diego occurred on the night of June 28, 2013, not the morning of June 30, as Diego alleged, and it transpired much differently than Diego's narrative. According to appellant, Diego confronted *him* about a text message on *his* phone when *he* came out of the shower. The message was from another woman – Cassie O'Connor – which angered Diego. Diego got even more upset when appellant admitted he had been seeing O'Connor on the side for the past two

months. Diego told appellant he had to choose between her and O'Connor, and he picked O'Connor. At that point, Diego threw the phone at appellant, giving him a bloody nose. Appellant retreated to the bathroom momentarily, and when he came back out, Diego was looking through his phone again. It rang, and appellant tried to grab it. But Diego bit him on his arm and chest, so he let go of the phone and took cover in the bathroom. When he returned to the bedroom later on, Diego was gone, and so was his phone.³

The next night, June 29, appellant spent with O'Connor. The following morning, he went to Diego's workplace to reclaim his phone. He told Diego that if she did not give him his phone she should not bother coming home to get her belongings because they would not be there. But he denied threatening her in any way or damaging her car.

Appellant also denied interfering with Diego's efforts to retrieve her belongings from their house later that night. He said that when Diego and Belmonte first arrived at the house that evening, he stayed out of their way and made no attempt to follow them when they left. And he steered clear of them when they arrived later on with the police. He did admit sending Diego a text message that day, but he said the message was not intended as a threat; he was merely trying to explain to Diego why he did not want to be with her anymore.

Three days later, on July 3, the police arrested appellant as he was leaving his house. According to the arresting officer, appellant gave a false name – Jose Lopez – during questioning at the scene. Appellant denied that, testifying he told the police his real name. Upon arrival at the police station, he showed the officer bruises on his arm that he claimed were from Diego biting him.

Ana Borja was appellant and Diego's landlady and housemate at the time they were living together. She testified that Diego moved out of the house on the night of

³ When Diego testified, she denied taking appellant's phone when she left the house.

June 28 and that following Diego's departure, she saw bite marks on appellant's arms. The next evening, the 29th, appellant brought another woman over to the house, and everything was peaceful there on the morning of the 30th. However, that evening there was a dustup at the house when Diego came to retrieve her belongings. Initially, appellant refused to let Diego enter the house, but when she returned later on with a police officer, appellant stayed out of the way. Borja, whose daughter is married to appellant's brother, testified appellant is a peaceful person, but Diego is rather violent. In fact, Borja once saw Diego physically attack appellant and throw a rock at him, and appellant did not fight back. Borja's son Carlos also witnessed that particular attack. Like his mother, Carlos testified Diego had aggressive tendencies, while appellant was passive.

VERDICT AND SENTENCING

Diego was the only named victim in the case. As to her, the jury found appellant guilty of domestic battery with corporeal injury, assault with force likely to cause great bodily injury (gbi), assault with a deadly weapon, and three counts of making a criminal threat. (Pen. Code, §§ 273.5, subd. (a), 245, subds. (a)(4) & (a)(1), 422, subd. (a).) The jury also found true an enhancement allegation that appellant personally used a deadly weapon in making one of the criminal threats. (Pen. Code, § 12022, subd. (b)(1).) At sentencing, the trial court imposed the lower term of two years on the domestic battery count and consecutive terms of one-third the midterm on the remaining counts, except the assault with gbi count, which it stayed pursuant to Penal Code section 654. The court also imposed a full one-year term for the weapon enhancement, bringing appellant's aggregate sentence to six years in prison.

DISCUSSION

Over the course of nearly 200 pages of briefing, appellant raises 13 separate claims of error. Two of those claims are undisputed, and two others are moot. The first undisputed claim is based on the fact appellant was convicted of two counts of making a

criminal threat for the threats he made to Diego while he was choking her. Even though appellant made multiple threats to Diego at that time, dual convictions were improper because the threats were made during the course of a single encounter. (*People v. Wilson* (2015) 234 Cal.App.4th 193, 201.) Thus, as respondent concedes, one of appellant's convictions for making a criminal threat must be reversed. Given this, appellant's claims that the trial court erred in failing to instruct the jury on the factual basis for the criminal threat counts and in failing to stay sentence on one of those counts under Penal Code section 654 are moot.

It is also undisputed the trial court erred in sentencing appellant to a full one-year term for the weapon enhancement. Because the court imposed a term of one-third the midterm on the criminal threat count to which the enhancement attached, the court should have only imposed an enhancement of one-third of a year, or four months. (Pen. Code, § 1170.1, subd. (a); *People v. Hill* (2004) 119 Cal.App.4th 85, 91.) With these issues resolved, we now turn to appellant's remaining arguments.

Evidentiary Issues

The bulk of appellant's claims relate to the trial court's evidentiary rulings. As to those rulings, we apply the deferential abuse of discretion standard. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) That means that unless the subject ruling exceeds the bounds of reason, we are powerless to disturb it. (*People v. Beames* (2007) 40 Cal.4th 907, 920.)

Admissibility of Diego's Statements to Belmonte

Over appellant's objection, Belmonte testified that when Diego came over to her house after work on June 30, 2013, Diego told her about the various threats that appellant had made to her at knifepoint earlier that day. Appellant contends the trial court erred in admitting these hearsay statements into evidence. We disagree.

Hearsay evidence is generally inadmissible at trial. (Evid. Code, § 1200.) However, "[i]t has long been recognized that when . . . a witness's silence is presented as

inconsistent with his or her later testimony, a statement made at the earliest opportunity after the silence that is consistent with the witness's later testimony may be admissible as a prior consistent statement" (*People v. Lopez* (2013) 56 Cal.4th 1028, 1067, overruled on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216, citing *People v. Gentry* (1969) 270 Cal.App.2d 462, 474.) A witness's prior consistent statement will be admitted in this situation so long as the witness "suffered from an incapacity that prevented [her] from speaking and . . . [she] made the prior consistent statement at the 'earliest opportunity' after the incapacity was removed. [Citation.]" (*People v. Lopez, supra*, 56 Cal.4th at p. 1068.)

Appellant admits he impugned Diego's credibility at trial on the basis she failed to tell anyone at her workplace about the threats he allegedly made to her earlier that morning. However, appellant maintains this failure was not attributable to any incapacity on Diego's part, and therefore her subsequent statements to Belmonte about the threats should not have been admitted to rehabilitate her credibility. Not so. When Diego reported to work on the morning in question, she was not laboring under a grave physical incapacity, nor was she in imminent danger from appellant. But she had just been physically attacked and threatened by appellant. And, soon after she arrived at work, appellant showed up there and told her she was going to be sorry she had ever been born. Thus, from a personal safety standpoint, Diego had good reason to keep quiet about appellant's threats. (See *People v. Lopez, supra*, 56 Cal.4th at p. 1068 [victim's fear of repercussions from the defendant was sufficient to explain her failure to immediately report his alleged mistreatment of her].)

In addition, we agree with respondent that Diego's failure to report appellant's threats to her work colleagues "can easily be explained by concerns about keeping her work and private lives separate and being able to perform her duties as a cashier that day." Domestic abuse is such an intimately personal issue that it defies common sense to expect Diego to have brought it up to her fellow employees. As soon

as she got off work and was in the company of her trusted friend Belmonte, Diego felt comfortable enough to speak about appellant's threats. These circumstances support the conclusion Diego revealed appellant's threatening statements at the earliest time she could have reasonably been expected to do so. We cannot fault the trial court for so concluding and admitting Diego's statements to Belmonte as prior consistent statements.

Admissibility of Uncharged Act of Vandalism

Appellant contends the evidence suggesting he scratched Diego's car was improperly admitted to attack his character and show he is the type of person who would commit the charged offenses. We disagree.

Evidence of uncharged misconduct is generally inadmissible to prove the defendant's conduct on a particular occasion or to show he has a propensity for criminal conduct. (Evid. Code, § 1101, subd. (a).) However, such evidence may be admitted if it is relevant to a material issue in the case, such as intent or the presence of a common plan or design. (*Id.*, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393-394.) While evidence of uncharged conduct may be excluded under Evidence Code section 352 if its probative value is substantially outweighed by its prejudicial effect, the trial court has considerable discretion in making this determination. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 404-405.) Rulings in this area will not be disturbed on appeal unless they are arbitrary, capricious or patently absurd. (*People v. Rogers* (2013) 57 Cal.4th 296, 326.)

In this case, the evidence of appellant's involvement in the vandalism of Diego's car was not admitted to besmirch his character or show his propensity for committing crimes. Rather, it was offered to corroborate the prosecution's theory that appellant was purposely targeting Diego as part of a revenge scheme. In that regard, the evidence was probative because it suggested appellant's actions on the day in question were not mere random events but part of an overarching plan to threaten, frighten and punish Diego for the way she allegedly mistreated him during their relationship. The evidence also cast light on the purpose of the text message that appellant sent to Diego

that day. Whereas appellant claimed the text was simply his way of breaking up with Diego, the vandalism evidence suggested the text was intended as the criminal threat it was alleged to be. And finally, the vandalism evidence was relevant from a credibility standpoint in that it corroborated Diego's claim that appellant was in a very angry mood, and not simply looking for his phone, when he confronted her at work that day.

Against this backdrop, it cannot be said that the vandalism evidence was unduly prejudicial. It was not any more inflammatory than the charged offenses, it took up relatively little time at trial, and it related to acts that occurred in close proximity to the charged offenses. While appellant contends the vandalism evidence should have been excluded for lack of proof he is the person who actually scratched Diego's car, security guard Jose Espinoza saw appellant circling around in the parking lot of the market where Diego worked on the morning in question. At trial, Espinoza testified he saw appellant driving near Diego's car but never saw him park his vehicle. But in speaking with the police about a week after the incident, Espinoza said he did see appellant park his vehicle near Diego's car. Either way, there was sufficient evidence to connect appellant to the vandalism because soon after he exchanged words with Diego, Espinoza noticed Diego's car was scratched. Coupled with the circumstances leading up to his visit to the market, appellant's proximity to Diego's car and the timing of the scratches strongly support the inference he is the one who vandalized her car. We discern no abuse of discretion in the trial court's decision to admit evidence pertaining to this incident.

Evidence Appellant Lied to the Police

Appellant contends the trial court erred in allowing the prosecution to use his false statements to the police to show his consciousness of guilt. We disagree.

As this court stated in *People v. Fritz* (2007) 153 Cal.App.4th 949, "[A]ny false or misleading statements [the defendant] may make to the arresting officers or others with relation to material facts, for the purpose of misleading, or warding off suspicion . . . is receivable in evidence as indicating a consciousness of guilt . . ." (*Id.*

at p. 959, quoting *People v. Turner* (1948) 86 Cal.App.2d 791, 801.) Appellant acknowledges this rule but claims his false statements to the police should have been excluded because there was no evidence he knew the police were looking for him in connection with Diego's allegations at the time that he made them. The claim does not withstand scrutiny.

The police arrested appellant on July 3, 2013, three days after the alleged crimes occurred. According to the arresting officer, he stopped appellant and another man as they were leaving appellant's residence in a pickup truck. During the stop, the officer asked appellant for identification, and he said he did not have any. The officer then twice asked appellant what his name was, and both times he said it was Jose Lopez. After the officer told appellant that he knew he was lying and what his real name was, appellant finally admitted he was Hugo Barraeta.

Appellant claims his false statements were not indicative of his desire to avoid culpability in this case; rather, he "could have been afraid that there was a warrant for his arrest related to parking tickets," he "could have been concerned that his [companion] had done something wrong and did not want it associated with him," or he simply "could have distrusted the police." These explanations are all plausible, but when appellant testified in court, he flatly denied lying about his name. This casts doubt on his proffered explanations for why he might have lied.

In any event, the circumstances surrounding the statements strongly suggest appellant made them to avoid culpability *in this case*. Just three days earlier, appellant had violently assaulted Diego with a knife and threatened to kill her and her daughter. He also sent Diego a text message that was laced with violent imagery and promises of revenge. And, perhaps most importantly, appellant knew Diego had contacted the police after he attacked her. Appellant had no way of knowing what, if anything, Diego told the police about him. But any reasonable person in appellant's position would logically suspect that a police visit during this timeframe would likely be attributable to his violent

and threatening behavior. Therefore, appellant's false statements to the police were properly admitted as reflecting his consciousness of guilt with respect to the charges in this case.

Borja's Testimony about Appellant's Physical Condition

The next issue requires only short shrift. Appellant complains the court improperly prevented him from clarifying with landlady Borja whether he had any bite marks on him after Diego moved out of the house. The record shows that when defense counsel first asked Borja that question, she answered through an interpreter, "No he didn't." Thinking Borja's answer was mistranslated, defense counsel asked the same question two more times, but the court sustained the prosecutor's objections on the grounds of "asked and answered." But then the interpreter chimed in and confirmed that Borja did in fact answer the initial question in the affirmative. After that, defense counsel asked Borja the same question, and she confirmed she saw bite marks on appellant's arms after Diego moved out of the house. Thus, appellant got the answer he wanted, and any error or confusion that occurred during the previous questioning on this issue was cured in full. It's difficult to understand how this could be assigned as error.

Diego's Knowledge of Appellant's Relationship with O'Connor

Appellant also maintains the trial court impermissibly restricted his ability to question Diego about whether she knew he wanted to be with O'Connor rather than her. We find no reversible error in connection with this issue.

By way of background, it is helpful to recall that Diego and appellant offered two starkly different scenarios as to how their troubled relationship came to an end. According to appellant, Diego became violent with him on June 28, 2013, after she found a text from O'Connor on his phone and he told Diego he wanted to be with O'Connor rather than her. According to Diego, appellant attacked her on the morning of June 30, after seeing a text on her phone that he suspected was from another man. During her testimony, Diego did admit seeing a text from O'Connor on appellant's

phone. However, she testified that was not on June 28, but on June 30 at around two o'clock in the morning. And while Diego knew the text was from O'Connor, she could not understand what it said because it was in English. When she asked appellant about the text, he became upset, so she dropped the subject, and they went to bed. Diego testified she was not really that bothered by the text and that nothing more transpired between her and appellant until several hours later when she got up for work and he confronted her about the text message on her phone.

While cross-examining Diego, defense counsel tried to establish that the incident involving the O'Connor text really happened on June 28 and that Diego actually got a lot more upset about the text than she let on in court. Regarding the latter issue, defense counsel asked Diego what appellant told her while they were discussing the text. Defense counsel wanted to know if appellant told Diego that he wanted to be with O'Connor rather than her, which is what appellant claimed in his testimony. When the prosecutor objected to the question as calling for hearsay, defense counsel asserted the question was offered to prove appellant and Diego's state of mind and to put everything in context. However, the trial court sustained the objection and granted the prosecutor's motion to strike the question.

Appellant contends the court's ruling was erroneous because Diego's testimony about what appellant told her was not being offered for the truth of the matter asserted, and even if it was, it was admissible under the doctrine of completeness to establish the full extent of Diego's conversation with appellant. (See Evid. Code, §§ 1200 [only out-of-court statements offered for their substantive truth are barred by the hearsay rule]; 356 [where part of a conversation is admitted into evidence, "the whole on the same subject may be inquired into by an adverse party"].) However, even if the court's ruling was erroneous, it was not prejudicial because defense counsel was subsequently allowed to question Diego about what appellant said about O'Connor. In particular, defense counsel asked Diego, "Isn't it true that on June 28th, [appellant] told

you that he no longer wanted you, that he wanted Cassie (O'Connor)?" Diego answered no. She also testified that appellant never said that to her while they were fighting on June 30 and that she did not find out appellant had "another girl" until sometime after then.

Appellant has no basis to complain. Diego's answers may not have been to his liking, but the record clearly shows he was eventually permitted to ask Diego about her knowledge of appellant's relationship with O'Connor. Any error in preventing Diego from doing so earlier was thus harmless under any standard of review.

Cumulative Error

Appellant avers the cumulative prejudicial effect of the trial court's evidentiary errors violated his right to a fair trial. Having determined no prejudice resulted from any of the alleged errors, we reject this claim.

Alleged Prosecutorial Misconduct

Appellant contends the prosecutor committed prejudicial misconduct in closing argument by distorting the state's burden of proof. The contention is premised on the belief the prosecutor told the jurors they could convict appellant if they believed Diego's version of events was reasonable. In fact, appellant asserts the prosecutor "repeatedly stated [appellant] could be convicted because Diego's version was reasonable and [his] was not." Because the record does not bear this out, appellant's contention fails.

It is no doubt misconduct for the prosecutor to misstate the burden of proof in a criminal trial. (*People v. Hill* (1998) 17 Cal.4th 800, 831-832.) However, "[w]hen attacking the prosecutor's remarks to the jury [on appeal], the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging

meaning from the prosecutor's statements. [Citation.]' [Citations.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 667 (*Centeno*).)

In *Centeno*, the Supreme Court found the prosecutor's comments impermissibly "confounded the concept of rejecting unreasonable inferences, with the standard of proof beyond a reasonable doubt." (*Centeno, supra*, 60 Cal.4th at p. 673.) The problem was, "the prosecutor did not simply urge the jury to "accept the reasonable and reject the unreasonable" in evaluating the evidence before it." (*Ibid.*) Instead, the prosecutor "repeatedly suggested that the jury could *find defendant guilty* based on a 'reasonable' account of the evidence[,]" which impermissibly diluted the prosecution's burden of proof. (*Ibid.*) In fact, at one point during her closing argument, the prosecutor told the jurors they could convict the defendant if they reasonably believed he was guilty of the charged offense. (*Id.* at pp. 671-672.)

That did not happen here. Since this case came down to a credibility contest between Diego and appellant, it comes as no surprise that the prosecutor urged the jury to reject appellant's testimony as unreasonable and to find Diego and Belmonte were telling the truth on the basis their actions and allegations were reasonable. As appellant admits, there was nothing improper about this aspect of the prosecutor's argument. However, appellant claims the prosecutor went too far in his concluding remarks by stating the following:

"Now this has really turned into something and I kind of mentioned it in the jury selection about credibility and your ability to use your common sense in order to determine what makes sense and that's really where we're at that's a credibility call and that's why you're here it's for you to decide and I submit to you that based on what I just discussed of all these things of all the consistencies, all the little pieces add up to make the big picture. What it really is is the crimes that the defendant committed and he's not the victim. [¶] We're asking for guilty verdicts on all counts."

Given the prosecutor's earlier assertion that Diego's testimony was reasonable and appellant's was not, appellant interprets these remarks as an impermissible attempt to obtain a conviction solely on that basis. But unlike the case in *Centeno*, the prosecutor never urged the jury to convict appellant simply on the basis that Diego's testimony was more reasonable than appellant's. Nor did the prosecutor conflate the concept of rejecting unreasonable inferences with the concept of reasonable doubt. Rather, the prosecutor expressly informed the jury that it could only convict appellant if the evidence established beyond a reasonable doubt that he was guilty of the charged offenses. The record also shows that defense counsel emphasized this point to the jury in his closing argument and that the trial court properly instructed the jury on the prosecution's burden of proof. Therefore, we reject appellant's claim of prosecutorial misconduct. Based on the entire record of the case, it simply is not reasonably likely the jury construed the prosecutor's complained-of remarks in an improper or erroneous manner.⁴

Failure to Instruct on Simple Assault

In count 2, appellant was charged with, and convicted of, assault with force likely to cause gbi based on his actions in choking Diego. Appellant contends the conviction must be reversed because the trial court did not instruct on the lesser included offense of simple assault, but we see no error in the failure to so instruct.

“California law has long provided that even absent a request . . . a trial court must instruct a criminal jury on any lesser offense ‘necessarily included’ in the charged offense, if there is substantial evidence that only the lesser crime was committed.” (*People v. Birks* (1998) 19 Cal.4th 108, 112.) However, “a defendant may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial

⁴ For the same reason, we reject appellant's claim his attorney was ineffective for failing to object to the challenged remarks.

court not to instruct on a lesser included offense supported by the evidence.’ [Citations.]” (*People v. Horning* (2004) 34 Cal.4th 871, 905.)

During the discussion of jury instructions in this case, the trial court indicated to the parties that simple assault was a lesser included offense of assault with force likely to cause gbi. When defense counsel informed the court he was not asking for instructions on simple assault, the court directed him to discuss the matter with appellant, which he did. After that, defense counsel told the court that appellant agreed with his decision to forego instructions on simple assault. The court then asked defense counsel and appellant if they were making a “strategic choice” in that regard, and they both said “yes.” Under these circumstances, it’s hard to fault the trial court for not instructing on simple assault. Since appellant and defense counsel stated that, as a tactical matter, they did not want instructions on that offense, the doctrine of invited error bars appellant’s claim of instructional error. (*People v. O’Malley* (2016) 62 Cal.4th 944, 984.)

At any rate, there is not substantial evidence appellant committed only simple assault as opposed to the charged offense of assault with force likely to cause gbi. The difference between the two crimes is that the former requires a wrongful act that is likely to result in the application of any physical force to the victim (Pen. Code, § 240; *People v. Williams* (2001) 26 Cal.4th 779, 790), whereas the latter requires the use of force that is likely to cause gbi, meaning significant or substantial injury (Pen. Code, § 245, subd. (a)(4); *People v. Brown* (2012) 210 Cal.App.4th 1, 7). However, the latter offense does not require the victim to actually suffer gbi. Instead, it focuses on the *likelihood* of such harm occurring under the circumstances presented. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.)

The record shows appellant attacked Diego in a jealous rage after reading a text message on her phone that he suspected was from another man. Describing the attack, Diego testified appellant lunged at her and wrapped his hands around her throat in an aggressive manner. While berating Diego, he then squeezed her throat “real hard” for

a considerable period of time, making it difficult for her to breathe. The record does not reveal precisely how long the choking lasted, but Diego testified it continued throughout the time she fell to the floor and appellant obtained a knife, held it up against her cheek and repeatedly threatened to kill her and her daughter. Granted, the bruising on Diego's neck was rather slight by the time the police photographed her injuries. But that was several days after the attack occurred, and Diego testified she had a sore neck and difficulty swallowing for several days after. These facts do not constitute substantial evidence that only a simple assault occurred. The trial court did not err in failing to instruct the jury on that offense.

Sentencing

At sentencing, defense counsel asked the trial court to grant appellant probation or alternatively impose concurrent sentences for the subject offenses. The court denied both requests, but it did select the low term on the base count due to appellant's minimal criminal record. In explaining its decision to impose consecutive sentences on the remaining counts, the court stated "that is really the desire of the Legislature when this type of crime occurs when it is a serious felony[.]"

As appellant points out, there is nothing in the sentencing rules that requires consecutive sentencing for the types of crimes he committed or for serious felonies in general. (See Cal. Rules of Court, rule 4.425.) However, we need not decide whether the trial court abused its discretion in imposing consecutive sentences because, as we explained at the outset of our discussion, resentencing is required due to the disposition of other issues in this appeal. In light of the fact that one of appellant's criminal threat convictions must be reversed and that he was erroneously sentenced on the weapon enhancement, we will vacate his sentence and remand the matter so the trial court can

sentence him anew. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 509; *People v. Edwards* (2011) 195 Cal.App.4th 1051, 1060.)⁵

DISPOSITION

Appellant's conviction for making a criminal threat as alleged in count 3 is reversed. In addition, appellant's sentence is vacated, and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.

⁵ This disposition moots appellant's subsidiary claim his attorney was ineffective for failing to object to the imposition of consecutive sentences.