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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.

JESSE ALEXANDER HERNANDEZ,

Defendant and Appellant.

G051694

(Super. Ct. No. 14NF1790)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
Lance Jensen, Judge. Affirmed.

Erica Gambale, 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, Barry Carlton and  
Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \*

## **INTRODUCTION**

A jury found Jesse Alexander Hernandez guilty of second degree robbery in violation of Penal Code sections 211, 212.5, subdivision (c)) (count 1), aggravated assault (with a knife) in violation of Penal Code section 245, subdivision (a)(1) (count 2), misdemeanor vandalism in violation of Penal Code section 594, subdivisions (a)(1) and (b)(1) (count 3), and aggravated assault (with a beer bottle) in violation of section 245, subdivision (a)(1) (count 4). The trial court sentenced Hernandez to three years in prison on count 1. Execution of sentence on counts 2 and 4 was stayed pursuant to Penal Code section 654, and sentence on count 3 was suspended.

Hernandez argues the trial court erred by overruling his Evidence Code section 352 objection and admitting evidence that, at the courthouse, his mother referred to a prosecution witness as a “rat” and a “bitch.” He also argues the court erred by instructing the jury with CALCRIM No. 371 (“Consciousness of Guilt: Suppression and Fabrication of Evidence”) without also giving Alternative C to that instruction. We conclude any error was harmless in light of the strong evidence of guilt and therefore affirm the judgment.

## **FACTS**

On March 19, 2014, at about 2:00 a.m., Hernandez’s cousin, Abel Saldana, was with Evelyn Barrios at her home. At about 3:30 a.m., while Barrios, Saldana, and a friend of his were watching a movie, Mario S. sent Barrios a text message asking if he could get together with her to talk about something. Barrios had had a dating/sexual relationship with Mario for a while in 2013. Saldana, who had noticed that Barrios had received a text message from Mario, told her that “you should have him meet up so we can go hang out like old friends used to.” Barrios then sent a text message to Mario telling him, “sure, let’s hang out.”

Saldana told Barrios that Mario owed him \$20. Saldana wanted to get in touch with Mario to get that money back. Mario sent Barrios a text message asking her to meet him at a spot in Anaheim. Saldana asked Barrios to tell Mario to meet her at a closer location. Mario agreed to meet Barrios at a park. Barrios asked Mario to bring gas money for her. She intended that money to be for Saldana. Mario agreed to bring \$5.

Barrios drove to the park in a dark gray Toyota Camry owned by Saldana's mother. Saldana sat in the front passenger seat. On the way to the park, Saldana called Hernandez and told him to "be ready" and "he needed his help and that he had gotten a car for himself." Before arriving at the park, Barrios stopped to pick up Hernandez. Saldana got out of the car to get him. When Saldana returned to the car, Barrios noticed he was hiding something to the right side of his arm.

Saldana and Hernandez got into the car and Barrios drove them to the park. Mario pulled his car behind Barrios's car and "flicked" his headlamps to make sure it was her. Saldana and Hernandez slouched over so that Mario would not see them. Mario was on the phone with Barrios, who told him to follow her. Saldana had asked Barrios to tell Mario there were too many cops at the park.

Mario followed Barrios to a different spot down the street from the park. They parked the cars and got out. Saldana and Hernandez remained inside the car, slouched over so Mario could not see them. Mario and Barrios said hello to each other and hugged. Mario asked Barrios if she was alone. She lied and said she was. Mario suggested Barrios return to her car because it was parked in a no-parking zone.

As Barrios approached her car, Saldana and Hernandez jumped out and ran toward Mario. Saldana had a knife. Saldana called Mario a "bitch" and said, "you think you can . . . [¶] . . . [¶] . . . fuck with me?" Mario ran. Saldana and Hernandez chased and caught up with him and started a fistfight.

During the fight, Saldana and Hernandez demanded that Mario give them everything he had. Saldana stabbed Mario in the chest and either Saldana or Hernandez hit Mario in the face with a beer bottle. Mario gave Saldana \$5, thinking that would satisfy them, but they demanded Mario's car keys too. Mario refused to give them his car keys.

The fight continued until Saldana and Hernandez ran back to the Toyota Camry. They got in the car, and as Barrios started to drive away, Hernandez hopped out of the car, jumped on the roof of Mario's car, tried opening the car door, and pushed in the side view mirrors. Hernandez got back into the Toyota Camry. Saldana told Barrios, "hurry the fuck up and get out of here."

Barrios saw Mario stumbling along a sidewalk. Hernandez and Saldana, with knife in hand, jumped out of the car and ran toward Mario. Mario ran. This time, Saldana and Hernandez were not able to catch him.

Saldana and Hernandez returned to the car and got inside. Hernandez asked Saldana where he had put the knife. Saldana said he had it. Saldana gave the knife to Hernandez. While the car was stopped at a stop sign, Hernandez got out and thrust the knife into the ground in the yard of a house.

Hernandez got back into the car and Barrios dropped him off at the house where she earlier had picked him up. Before Hernandez went inside the house, he told Barrios, "you better not say anything 'cuz we know where you live." At some point, Barrios heard Hernandez say, "I thought I was going to have a car."

After Barrios dropped off Hernandez, Saldana repeatedly told her, "you better not say anything." When Barrios asked Saldana what had happened, he told her, "shut the fuck up and drive."

Barrios sent Mario a text message asking him what had happened, but she received no response. When Barrios arrived at her home, Saldana told her, "don't say anything." Saldana warned her, "we know enough information" and "we know where

your kid is.” Barrios went to her room and sent a text message to the grandfather of her child to tell him what had happened. He responded, “[g]o to the cops and let them know what happened.”

Saldana returned to Barrios’s home and from the back window asked to be let in because “the cops were at his house.” Barrios would not let him in.

Barrios received a call from Mario’s phone. It was a police officer. That morning, police officers went to Barrios’s house to speak with her. The officers detained Barrios and took her to a police station for questioning. On the way, Barrios directed the officers to the place where Hernandez had thrust the knife into the ground and said, “that’s where we dropped it off.” At the police station, Barrios told the police what had happened. She explained her involvement, as well as the involvement of Saldana and Hernandez. She identified Hernandez in a photographic lineup. Barrios later pleaded guilty to robbery, assault with a deadly weapon, and vandalism.

As a result of the attack, Mario suffered a stab wound to the chest, a broken nose, and a swollen eye.

Hernandez testified on his own behalf. He denied any involvement in the charged offenses and claimed he was not present when Mario was attacked.

## **DISCUSSION**

### **I. Evidence of Statements Made by Hernandez’s Mother**

The focus of the appeal is testimony by Barrios that Hernandez’s mother called her a “rat” and a “bitch.” Hernandez contends the trial court erred by overruling his counsel’s objection under Evidence Code section 352 and permitting Barrios to so testify. The challenged testimony is as follows:

“Q. [(The prosecutor)] Now, I know you’ve come to court a couple of times. [¶] Has anyone harassed you in that process?

“A. [(Barrios)] Yes.

“Q. And who specifically has harassed you while you’ve been coming to court?

“A. [Hernandez]’s mother.

“Q. Did she ever call you anything?

“A. Yes.

“Q. What did she call you?

“A. A ‘rat’ and a ‘bitch.’

“Q. I’m sorry, one more time.

“A. A ‘rat’ and a ‘bitch.’”

Those statements made by Hernandez’s mother caused Barrios to fear for the safety of her child.

The prosecutor cross-examined Hernandez and asked him if he knew what a “rat” is. Hernandez testified he considered a rat to be somebody who “tells on another person to get a benefit out of it.” He was aware that a rat might be a crime partner who “comes forward.” Hernandez heard Barrios testify that his mother had called her a rat.

Evidence Code section 352 allows for the exclusion of evidence “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” A trial court’s decision to admit or exclude evidence pursuant to section 352 ““will not be disturbed on appeal unless there is a manifest abuse of that discretion resulting in a miscarriage of justice.”” (*People v. Thomas* (2011) 51 Cal.4th 449, 485, quoting *People v. Cain* (1995) 10 Cal.4th 1, 33.)

Evidence of third party threats, made outside of the defendant’s presence, is admissible to show the defendant’s consciousness of guilt if there is evidence the defendant authorized the threats. (*People v. Williams* (1997) 16 Cal.4th 153, 200.) In this case, however, no evidence was presented that Hernandez authorized his mother to

threaten Barrios. Evidence that a third party made threats against a witness is also admissible to show the witness is credible. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1084-1085.) Evidence of threats made by Hernandez's mother to Barrios was relevant to the issue of Barrios's credibility. "Just as the fact a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility [citation], the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility." (*Ibid.*) Hernandez asserts the trial court did not give the jury an instruction to limit consideration of evidence of his mother's statements to evaluating witness credibility. As a consequence, he argues, the testimony had little, if any, probative value.

But the testimony of threats made by Hernandez's mother did not necessitate undue consumption of time, and did not create any danger, much less substantial danger, of undue prejudice, of confusing the issues, or of misleading the jury. Thus, the probative value of the testimony was not "*substantially outweighed* by the probability that its admission [would] . . . necessitate undue consumption of time or . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352, italics added.) We conclude the trial court did not abuse its discretion by admitting the testimony that Hernandez's mother called Barrios a "rat" and a "bitch."

The harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) applies to error in admitting evidence of third party threats against witnesses. (*People v. Mason* (1991) 52 Cal.3d 909, 947.) Thus, if the trial court erred by admitting the evidence of comments made by Hernandez's mother, the issue is whether "it is not reasonably probable that, but for [Barrios]'s testimony about the threats, the verdict would have been more favorable to [Hernandez]." (*Ibid.*)

The evidence of guilt was very strong. Barrios and Mario testified in detail about what had happened in the early morning of March 19, 2014. Their testimony is

related in the Facts section of this opinion. Soon after the crimes were committed, the police found the knife where Barrios said Hernandez had hidden it. Hernandez did not contend that crimes never took place; his primary defense to the charges was that he was not there. But soon after the crime, Barrios identified Hernandez in a photographic lineup. At trial, she testified that Hernandez was the man she picked up on the way to the park. Mario too identified Hernandez in a photographic lineup.

In addition, Barrios testified that when dropping off Hernandez at his home, he told her, “you better not say anything ’cuz we know where you live.” No evidence was presented to suggest Barrios or Mario had any reason to implicate Hernandez. The strong evidence of guilt leads us to conclude it was not reasonably probable the jury would have reached a result more favorable to Hernandez in the absence of any error in admitting the evidence of the statements made by his mother. (*Watson, supra*, 46 Cal.2d at p. 836.)

## **II. Instructional Error**

The trial court instructed the jury with CALCRIM No. 371, modified to read as follows: “If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.”

The instruction was proper because Barrios testified that Hernandez made threats directly against her. Hernandez argues the trial court erred by not also giving Alternative C to CALCRIM No. 371, which reads: “If someone other than the defendant tried to create false evidence, provide false testimony, or conceal or destroy evidence, that conduct may show the defendant was aware of (his/her) guilt, but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person’s actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself.”

Hernandez argues that without Alternative C, “the jury was left with the impression that it was [Hernandez] who threatened Barrios by calling her a ‘rat’ and a ‘bitch.’” He contends failure to give Alternative C “allowed the jury to assume [Hernandez] condoned his mother’s behavior without instructing them that they should use this evidence *only if* [Hernandez] authorized such behavior” and “permitted the jury to erroneously use the evidence of the mother’s statements to Barrios as evidence of [Hernandez]’s guilt without first determining if [Hernandez] authorized such statements.”

Jurors are presumed to generally understand and follow jury instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) The plain meaning of CALCRIM No. 371 is the jury may infer consciousness of guilty if the *defendant* tried to hide evidence or discourage someone from testifying against him or her. No reasonable juror would have interpreted the instruction to permit a conclusion of consciousness of guilt when somebody other than the defendant made the threat. (Cf. *People v. Jennings* (1991) 53 Cal.3d 334, 386 [“The plain meaning of these instructions merely informs the jury to reject unreasonable interpretations of the evidence and to give the defendant the benefit of any reasonable doubt. No reasonable juror would have interpreted these instructions to permit a criminal conviction where the evidence shows defendant was ‘apparently’ guilty, yet not guilty beyond a reasonable doubt.”].)

Assuming the trial court erred, as Hernandez asserts, by not instructing the jury with Alternative C to CALCRIM No. 371, the error was harmless. Error in instructing on suppressing evidence as proof of consciousness of guilt is subject to the “reasonably probable” standard of *Watson, supra*, 46 Cal.2d at page 836. (*People v. Hannon* (1977) 19 Cal.3d 588, 603 [predecessor to CALCRIM No. 371].) We reject Hernandez’s argument that the constitutional beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24 applies. An instruction that improperly describes or omits an element of the crime from the jury’s consideration is subject to the harmless error standard of *Chapman v. California* (*People v. Lamas* (2007) 42 Cal.4th

516, 526) as is an instruction that lowers the prosecution's burden of proof of proving guilt beyond a reasonable doubt (*People v. Aranda* (2012) 55 Cal.4th 342, 365-369). But an instructional error that does not amount to federal constitutional error is reviewed under the harmless error standard of *Watson*. (*People v. Chism* (2014) 58 Cal.4th 1266, 1299.)

Any arguable error in the failure to give Alternative C to CALCRIM No. 371 was harmless because, as we have explained, a reasonable juror would not have construed that instruction as applying to the testimony about threats made by Hernandez's mother. In addition, the jury properly could have considered evidence of those threats to evaluate Barrios's credibility. (*People v. Mendoza, supra*, 52 Cal.4th at pp. 1084-1085.) If, as Hernandez argues, CALCRIM No. 371 permitted the jury to erroneously use the evidence of those threats to Barrios as evidence of Hernandez's consciousness of guilt, the error was harmless. As we explained above, the evidence of guilt, including evidence of threats made by Hernandez to Barrios, was quite strong. It was not reasonably probable the jury would have reached a verdict more favorable to Hernandez if the trial court had given Alternative C to CALCRIM No. 371.

#### **DISPOSITION**

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.