Appendix C

Court of Appeal, Third Appellate District - No. C083964

S248795

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ROBERT TOMMY GARRETT, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

Appendix C.

Filed 4/17/18 P. v. Garrett CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ROBERT TOMMY GARRETT, Defendant and Appellant.	C083964 (Super. Ct. No. 14F02937)

After coming home in a drunken rage, defendant Robert Tommy Garrett beat and body-slammed his wife, fracturing several ribs and her pelvis and injuring her head. Although his wife minimized the attack in her trial testimony, her prior statements about the attack were admitted into evidence through other witnesses. The jury found defendant guilty of multiple counts and enhancements; the trial court sentenced him to an aggregate term of 13 years in state prison and he timely appealed.

Defendant contends the trial court had a sua sponte duty to instruct the jury on the lesser included offense of attempted criminal threats. He adds that the court erred in

failing to apply Penal Code section 654 to his assault and threats convictions. We conclude an instruction on attempted criminal threats was warranted; however, we find the error harmless on this record. Finding no error in sentencing, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Defendant had abused C.D. throughout their nearly 20-year marriage.

C.D. testified at trial that on the night of April 19, 2014, she worked as a nurse in Roseville. Her shift ended a little before midnight, and she returned to the home she shared with defendant in Sacramento. He was not home, and eventually she went to bed. Around 4:00 a.m. on April 20, she awoke to a commotion outside. She heard defendant talking in a loud voice; he sounded like he was intoxicated and upset. When defendant came into the master bedroom, he was rambling and hit the wall above the bed, cracking the sheetrock.

C.D. got off the bed to get away from him. Defendant was drooling and spitting and urinated on the carpet and in a nearby garbage can. C.D. slapped him to make him stop and tried to push him toward the bathroom. While both were stumbling around in the bathroom, they fell into the bathtub. Defendant was lying on top of her and they were tangled up in the shower curtain; he turned on the water.

C.D. pushed him aside and got out of the bathtub. Defendant then dragged C.D. down the hall to a back bedroom. He tore her shirt and may have pulled her hair in the process. She testified that she was not afraid, but instead irritated and angry that he was keeping her awake.

C.D. lay down on the floor near a futon in the bedroom. Then defendant fell on the lower half of her body, and she felt "a big squish" on her bladder. She testified defendant was still drunk and staggering around. She pushed him off of her, but he fell on her a second time, and then a third. She testified that she did not think he intentionally fell on her. Eventually, C.D. and defendant fell asleep on the floor. Later, C.D. awoke and pulled herself up on the futon.

Defendant then grabbed a large candle from a nearby table and hit C.D. multiple times on the head with it. The force of the blows caused her head to swell. When she tried to sit up, she got dizzy. She could not stand on her right leg because it was too painful. She told defendant, "something is not right." She asked him to bring her a walker that she kept in a closet from a previous injury.

Toward the evening, defendant saw two police officers outside the bedroom window; he panicked and left the residence. The officers were there to conduct a welfare check on C.D (as she had missed work that day). C.D. invited the officers inside. She testified that when they asked if she was hurt, she said yes, but that she did not know what was wrong.

Officer Clatterbuck testified that C.D. told the officer that her husband came home intoxicated, and that they had argued. She said defendant accused her of cheating on him, and that he became enraged when she denied it. C.D. told Clatterbuck that defendant had grabbed her by her hair and dragged her into the spare bedroom. Once in the back bedroom, he continued to body slam her onto the ground, and then hit her on the head several times with a candle. Clatterbuck testified that C.D. told her that she was in fear for her life, and that she was unable to get up and call for help due to her injuries.

When confronted with her statement to Officer Clatterbuck at trial, C.D. claimed she never told her that she was afraid of defendant.

While C.D. was speaking with the officers, Bonnie Ford, a coworker, showed up to check on her. Ford testified that C.D. appeared disheveled and her face was swollen. She was standing with the help of a walker, and appeared to be "definitely uncomfortable." C.D. told the officers that defendant had assaulted her, that he slammed his body on top of her, and that he pulled her hair and was dragging her through the house. According to Ford, C.D. said she was fearful that defendant was going to kill her one day.

An ambulance transported C.D. to the hospital where she remained for five days. She suffered a broken pelvis (for which she had surgery), as well as several rib fractures and head trauma.

On April 29, C.D. applied for a restraining order against defendant. She listed herself and her parents as protected parties. In an attachment to the application, she described the April 20 incident in relevant part as follows:

"At 4 a.m. until approximately ten a.m. I was verbally and physically abused. [Defendant] came home drunk and . . . punched a hole in the wall and then said ['fuck'] . . . . [¶] . . . [¶] His attention then turned to me who he began accusing of being against him and cheating with other men. He called me many names and said I didn't love him. He proceeded to rip my clothes off and grabbed me between my legs. [¶] . . . [¶] He then started screaming and got above me on the bed growling, drooling, spit on my face and then bit me on the left cheek. I moved to get away and he dragged me off the bed saying he was going to kill me. He kicked my legs while down on the ground. Then he pulled me by my hair into the bathroom, pushed me in the tub and turned the water faucet on with my head under it. I struggled to keep from choking on the water. He said, no, I won't kill you yet. I'm gonna let you see everyone you love die first. He pulled me out of the tub and dragged me by my hair down the hall to the back bedroom. He threw me on the day bed, hit me in the chest, kicked me, spit repeatedly and then grabbed a heavy candle from the bookshelf and began bashing my head repeatedly with it. My ears were ringing and I felt my head swelling. I tried to protect my head and he pushed me and then kicked me between my legs. I fell to the ground when he started saying, oh, you think you're a runner. He then started body slamming, dropping all of his weight on top of me."

On May 2, 2014, Detective Walker conducted a phone interview with C.D.; the recording was played for the jury. During the interview, C.D. said she was staying at a friend's house so defendant would not know where she was. She said defendant came

home around 4:00 a.m. drunk. After cursing and punching a hole in the wall, defendant turned his attention to C.D., accusing her of not loving him and of being with other men. She said defendant yelled at her and hit her. He climbed on the bed and began growling and acting like an animal. He grabbed her and ripped her clothes off. He knocked her to the ground and dragged her into the bathroom. He repeatedly kicked her in the legs, slammed her against the toilet, and then threw her into the bathtub. He turned on the water and held her head under the faucet, "trying to drown [her]." He then dragged her out by her hair and pulled her down the hall to a back bedroom. He started hitting and kicking her. She fell on the floor, and he started "body slamming [her] like a wrestler, where they just drop all their weight on you." Defendant then grabbed a "big thick candle" and repeatedly slammed it on top of her head. She estimated that he hit her "at least a dozen times." She thought he was going to smash her skull. Defendant demanded that C.D. apologize to him, and swear that she had not slept with other men. He threatened to hurt and kill her family as well as people at her church.

C.D. told Walker that throughout the ordeal, she told defendant she needed to go to the hospital because something was broken and she was in pain. Defendant responded that he would not take her to the hospital because he was not going to jail. When she tried to stand to get more comfortable, he shoved her down and hit her again in the head and chest. She kept asking to go to the doctor, but defendant refused. She felt "squishy" spots on her head and she feared that her skull was broken. She blacked out when she tried to sit up.

At some point, defendant began to sober up and he got scared. Defendant tried to get ice packs for her, but he still refused to take her to the doctor because he did not want to go to jail. He retrieved a walker C.D. had from a previous injury, and helped her up. She made her way down the hall to the master bedroom. Through the window blinds, defendant saw the police standing outside. After noting their presence, defendant left through the back door.

When asked about the threats defendant made, C.D. said defendant first said he was going to kill her, but then said he was going to kill her parents and nieces and nephews first so she would suffer, and then he would come back and kill her.

During her testimony at trial, C.D. admitted to seeking multiple restraining orders against defendant in the past for his abusive conduct and threats, although she claimed she never followed through. In late 2001 or early 2002, C.D. applied for a restraining order against defendant wherein she wrote that he had physically and emotionally abused her since 1995. He had slapped, grabbed, twisted, choked, stalked, and kidnapped her. He had also beat her with a closed fist, slammed her against the wall, and threw her on the floor. He threatened to physically maim, shoot, cripple and deform her, and he threatened to kill her family. On one occasion in 2004, she was hospitalized with broken ribs and a broken ankle.

In May 2007, C.D. prepared another restraining order application. She averred that defendant had dragged her down the hall and choked her. She suffered bruises to her arms, legs, chest, and neck. On another occasion, he had pushed her to the ground, choked her, and would not let her leave the bedroom. Another time he had choked her, lifted her up, shoved her, hit her in the face, and put his foot on her throat.

In August 2008, C.D. reported to the Sacramento Police Department that defendant had strangled her and told her he was going to kill her. He also bit her on the face, bruising her cheek.

In March 2011, C.D. claimed in an application that defendant had choked her and kicked her in the face and legs, pulled her hair, hit her head with a ceramic pot, and threatened to kill himself, her brother, and her parents. In February 2013, C.D. wrote that defendant had threatened to make her suffer, threw her against a couch, punched, kicked and choked her, pulled her hair, and knocked her unconscious.

C.D.'s mother, Madelyn Coleman, testified to seeing various injuries on her daughter. Once she saw defendant grab C.D. by her hair and put his arm around her

neck. He did not stop until Coleman hit him with a mop. He said he was sorry for hitting C.D. and that he knew he should not drink because he gets violent.

David Cropp, a retired Sacramento Police Officer, testified as an expert on the effects of domestic violence on victims. He testified that domestic violence is a pattern of abuse or coercion designed to control and intimidate a partner. It is not uncommon for victims of spousal abuse to change or recant their story. One study suggested that 80 percent of victims "will change, recant, alter their story, minimize their position, or otherwise refuse to cooperate with prosecution."

Defendant did not testify or call any witnesses.

The jury found defendant guilty of inflicting corporal injury to a spouse (Pen. Code, § 273.5, subd. (a); count two),[1] assault by means of force likely to produce great bodily injury (GBI) (§ 245, subd. (a)(4); count three), and making a criminal threat (§ 422; count four). The jury also found true enhancements for personal use of a deadly weapon, a candle (§ 12022, subd. (b)(1)), infliction of GBI (§ 12022.7, subd. (e)), and a prior domestic violence conviction (§ 273.5, subd. (f)(1)). It failed to reach a verdict on a torture charge (§ 206; count one) and the court declared a mistrial on that count.

The trial court imposed the middle term of four years for the corporal injury count plus five years, consecutive, for the GBI enhancement, plus one year, consecutive, for the weapon-use enhancement. It imposed consecutive terms of one year for the assault count, 16 months for the GBI enhancement, and eight months for the criminal threats count, all one-third the middle term.

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[1] Further undesignated statutory references are to the Penal Code.

DISCUSSION

I

Instruction on Attempted Criminal Threats

Defendant contends the trial court had a sua sponte duty to instruct the jury on attempted criminal threats, a lesser included offense to criminal threats. We agree the trial court erred, but find the error harmless on this record.

In any criminal case, the trial court must instruct on the general principles of law relevant to the issues fairly raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) That obligation includes instructing on lesser included offenses if evidence is presented that, " 'if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.' " (*People v. Rogers* (2006) 39 Cal.4th 826, 866 (*Rogers*).) "The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given." (*Breverman*, at p. 154.)

In deciding whether there is substantial evidence to support a lesser included offense instruction, a court determines only the bare legal sufficiency of the evidence, not its weight. (*Breverman, supra*, 19 Cal.4th at p. 177.) In doing so, courts "should not evaluate the credibility of witnesses," which is a task for the jury. (*Id.* at p. 162.) We review the trial court's failure to instruct on a lesser included offense de novo, considering the evidence in the light most favorable to the defendant. (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30.)

"In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat--which may be 'made verbally, in writing, or by means of an electronic communication device'--was 'on its

face and under the circumstance in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Attempted criminal threat is a lesser included offense of criminal threat. (*People v. Toledo, supra*, 26 Cal.4th at p. 226.) "[A] defendant properly may be found guilty of attempted criminal threat whenever, acting with the specific intent to commit the offense of criminal threat, the defendant performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action. Furthermore, in view of the elements of the offense of criminal threat, a defendant acts with the specific intent to commit the offense of criminal threat only if he or she specifically intends to threaten to commit a crime resulting in death or great bodily injury with the further intent that the threat be taken as a threat, under circumstances sufficient to convey to the person threatened a gravity of purpose and an immediate prospect of execution so as to reasonably cause the person to be in sustained fear for his or her own safety or for his or her family's safety." (*Id.* at pp. 230-231.) A variety of circumstances fall within the reach of the offense of attempted criminal threat (*id.* at p. 231), including when a defendant "acting with the requisite specific intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear . . . ." (*Ibid.*)

C.D. testified multiple times that she was not afraid of defendant. Her testimony alone provided substantial evidence to warrant instructing the jury on attempted criminal

threats. (*Breverman, supra*, 19 Cal.4th at p. 177 [in deciding whether there is substantial evidence to support a lesser included offense instruction, a court determines only the bare legal sufficiency of the evidence, not its weight]; *People v. Young* (2005) 34 Cal.4th 1149, 1181 [unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction].) If the jury believed C.D., it could have concluded that defendant's threats did not *actually* cause her to feel sustained fear.

The erroneous failure to instruct on a lesser included offense is "subject to harmless error review under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836-837."[2] (*Rogers, supra*, 39 Cal.4th at pp. 867-868.) "Reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of." (*Id.* at p. 868; *Breverman, supra*, 19 Cal.4th at p. 165 ["misdirection of the jury is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome"].)

On this record, it is not reasonably probable that the jury would have returned a more favorable verdict had the lesser instruction been given. The jury heard overwhelming evidence that defendant repeatedly and savagely beat and threatened C.D. throughout their nearly 20-year marriage, that she was afraid of him and sought multiple restraining orders to protect herself and her family members from him, and that she was actually and reasonably afraid of defendant when he threatened her and her family on April 20. As we have described, although C.D attempted to minimize the attack and

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[2] Defendant argues that the error deprived him of his federal constitutional rights to due process of law and to a jury trial, but concedes that the law is otherwise in California. (See, e.g., *Breverman, supra,* 19 Cal.4th at p. 165 ["We conclude that the failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility"].)

threats and her resulting fear at trial, other evidence contradicted her trial testimony, most convincingly C.D.'s own prior statements.

When officers arrived at her house to conduct a welfare check, C.D. told Officer Clatterbuck that she was in fear for her life and was "so scared." In a subsequent interview with Detective Walker, C.D. told him about defendant's threats defendant made while assaulting her. She also told him that she was staying with a friend so defendant would not know where she was. A few days after the attack, C.D. requested a restraining order against defendant. She told her coworker that she believed defendant would kill her one day. Cropp provided expert testimony that it was not uncommon for victims of domestic violence like C.D. to minimize the abuse, to change their stories, and to refuse to cooperate with a subsequent prosecution of their abuser.

Given the overwhelming evidence of C.D.'s actual fear and many reasons therefor, as well as the reasonable inference that she was minimizing her fear at trial and the expert explanation as to why, it is not reasonably probable that the jury would have found defendant guilty only of attempted criminal threats rather than criminal threats had it been properly instructed. The error was harmless.

II

Section 654

The trial court did not specifically address the application of section 654 during defendant's sentencing, and was not asked to do so by the parties. The court did choose consecutive sentences on all counts due to "the fact that the individual counts [assault with force likely and threats] were separate offenses during that prolonged [inflicting corporal injury on a spouse] assault on the victim."

Defendant now contends that his injuring, assaulting, and threatening C.D. were components of a single course of conduct with the sole objective of dominating and terrorizing her. Accordingly, he argues the trial court erred in failing to stay the sentences on his assault and threats convictions under section 654. We disagree.

Section 654 provides in pertinent part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) The statute does not prohibit multiple convictions for the same conduct, only multiple punishments. (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 713.) "In such a case, the proper procedure is to stay execution of sentence on one of the offenses." (*Ibid.*)

In any section 654 inquiry, the court must initially ascertain the defendant's objective and intent. (*People v. Porter* (1987) 194 Cal.App.3d 34, 38 (*Porter*).) "If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*Ibid.*) "Whether the defendant maintained multiple criminal objectives is determined from all the circumstances and is primarily a question of fact for the trial court, whose finding will be upheld on appeal if there is any substantial evidence to support it." (*Ibid.*)

The record in this case supports the trial court's implicit finding that the corporal injury and threats crimes involved multiple objectives. The corporal injury charge was based on defendant's beating C.D. with the candle. In beating C.D. with a candle, defendant intended to inflict physical pain and suffering on her. In threatening to kill C.D. and her family, defendant intended to terrorize her and perhaps to keep her silent about his other crimes, but not to inflict physical pain. Because defendant committed multiple and divisible acts with distinct objectives, section 654 was not violated by

sentencing him on both the corporal injury and criminal threats charges. (See, e.g., *People v. Mejia* (2017) 9 Cal.App.5th 1036, 1047 [the defendant was properly sentenced for both torture and criminal threats because a reasonable trier of fact could conclude that the criminal threats were in furtherance of a separate criminal objective, even if, in part, the threats were intended to break or beat the victim down emotionally and to discourage her from attempting to flee]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1022 [the defendant was properly sentenced under section 654 on both arson and criminal threats convictions]; *People v. Phan* (1993) 14 Cal.App.4th 1453, 1466 [robbery of mother and threat to cut off her young son's hand if she did not give more money were separate and divisible acts that could be punished separately under section 654].) The sentence on the threats count was not required to be stayed.

The assault charge was based on defendant's fracturing C.D.'s pelvis by repeatedly body slamming her. Like the corporal injury offense, defendant intended to inflict physical pain and suffering on the victim. However, the victim's testimony was that she and defendant actually fell asleep between the assault and corporal injury episodes such that clearly significant time had passed between the two assaultive crimes of conviction. Thus, the injury and assault were not part of an indivisible course of conduct.

"[I]f a series of acts are committed within a period of time during which reflection was possible [citation], section 654 does not apply." (*People v. Kelly* (2016) 245 Cal.App.4th 1119, 1136.) "Under section 654, 'a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]' [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. [Citation.]" (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

Defendant clearly had ample opportunity to reflect between the time he body slammed defendant and the time he beat her over the head with the candle. The events happened over a full day's time and the victim testified that both she and defendant even slept at some point between the two charged beatings. The sentence on the assault count was not required to be stayed.

DISPOSITION

The judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Renner, J.