Filed 10/19/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MONTI KIRK STONE, Defendant and Appellant.	B169504 (Los Angeles County Super. Ct. No. MA026323)

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas R. White, Judge. Affirmed and reversed.

Patricia A. Andreoni, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Joseph P. Lee and Stephanie A. Mitchell, Deputy Attorneys General, for Plaintiff and Respondent.

---

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I and II of the Discussion.

Monti Kirk Stone appeals from a judgment entered upon his conviction by jury of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1))[1] and making a criminal threat (§ 422). The trial court sentenced him to an aggregate prison term of four years. Appellant contends that (1) the trial court erred in admitting prior bad acts evidence, (2) the trial court erred in refusing his request for a midtrial continuance to subpoena witnesses, (3) the trial court erred in denying his request to withdraw his pro. per. status, (4) he was denied his rights to due process and a fair trial by a series of impediments to presentation of his case, and (5) the trial court exceeded its jurisdiction by entering restraining orders against him that precluded his contacts with his victims.

We reverse the restraining orders and affirm the judgment.

FACTS

Theodore Walton resided on Gadsden Avenue, in Lancaster, County of Los Angeles. Appellant resided with him, having responded to Walton's newspaper advertisement seeking a roommate. When Walton interviewed appellant, appellant told him that he was on probation for assault for a "silly" incident of which he was not guilty, but nonetheless went to prison. Walton subsequently learned the length of time appellant spent in prison. Walton told appellant during the interview that he was gay.

After they began rooming together, Walton observed things missing from the apartment. He asked appellant on four occasions if he had taken any of them. Appellant's response was always to holler or say, "No." On March 28, 2003, Walton noticed that all of the toilet paper had disappeared. At approximately 2:30 p.m., he was in the kitchen when appellant entered. As appellant was leaving, Walton asked if there was any toilet paper. Appellant turned around and punched Walton in the face, knocking him to the floor, stunned and surprised. Appellant straddled Walton while he was on the floor and punched him two more times in the face as he yelled, "'I am going to kill you, faggot.'" Walton feared for his life, recalling that appellant had been in prison for

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

assault. Appellant squeezed Walton's neck with his hands for 30 seconds. He got off of Walton only when Walton kneed him twice in the groin. Appellant then went into his bedroom.

Stephen Humphreys, Walton's houseguest, was asleep on the couch in the living room when the altercation occurred. He was awakened by "scuffling sounds" in the kitchen. Although he was half asleep, he thought he heard someone say, "'I am going to kill you, faggot.'" He did not see anyone in the kitchen over the chest-high wall that separated the kitchen and living room. Without getting up, he tried to go back to sleep.

Frightened and shaken, Walton went to his bedroom or the bathroom and then to the leasing office to telephone 911. The police arrived four or five hours later. From the leasing office, Walton returned to his apartment. Appellant had left to pick up his friend, Robert, who returned with him to the apartment.

As a result of appellant's assault, paramedics arrived and took Walton to Lancaster Community Hospital, where doctors gave him morphine injections for pain. Walton suffered a contusion on his brow, a black and blue eye and cheek and an exacerbation of a preexisting back injury. He also experienced severe head pain and headaches and could not sleep on his right side for several weeks.

Michele Magnosa testified to a prior assault by appellant. On December 21, 2000, he had been staying for 10 days at her home in Lancaster, where she resided with her husband and two children. He was Magnosa's brother's friend and had asked her if he could stay with her for only a day or two, because he was evicted from his residence. On the morning of December 21, 2000, Magnosa finally told appellant to leave. He became angry and yelled at her. She also told him that if he did anything to her, she would call the police. He threatened that if she called the police, he would kill her and her children. He then punched her on the right side of her face, knocking her to the floor. She got up and reiterated her demand that he leave. Appellant again punched her, knocking her to the floor where he continued punching her 20 to 30 times, mostly in the face, and also kicking her. When Magnosa got up and tried to leave the house, appellant grabbed her by

the hair and threw her across the room. She finally escaped through the front door and went to her neighbor Kimberly Ernest's house. Ernest telephoned 911.

When the police arrived, Magnosa passed out and was taken by ambulance to an emergency room. The police took photographs of her injuries that were introduced in evidence. She testified at trial that she still feared appellant.

Appellant presented no evidence in his defense.

DISCUSSION

I. Other crimes evidence

Appellant was charged with assault likely to cause great bodily injury and making a criminal threat. The prosecutor made a motion under Evidence Code section 1101, subdivision (b)[2] to admit evidence at trial of appellant's prior bad acts against Magnosa. He argued that this evidence was offered in connection with the criminal threat charge on the issue (1) of appellant's intent to cause fear by his threat to Walton, (2) of whether Walton was in reasonable sustained fear that appellant would carry out his threat to kill him, and (3) of appellant's identity as the perpetrator, as he appeared to be claiming that the charged offenses never occurred.[3] The prosecutor further argued that the probative value of this evidence outweighed any prejudice. The trial court granted the motion over appellant's relevance objection.

---

[2] Evidence Code section 1101, subdivision (b) provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

[3] In his opening statement, appellant stated: "By the time this trial is complete, I will show a very reasonable doubt that this alleged incident ever took place." Later in the trial, he indicated that he wanted to call Robert Thompson, who testified at the preliminary hearing that he was at appellant's residence at the time of the alleged offense and that nothing happened.

Magnosa testified regarding the 2000 incident in which appellant assaulted her, providing the details of that attack and describing the injuries she suffered. She also identified five photographs of her injuries, which were shown to the jury over appellant's objection. He stated, "I don't understand why the jury needs to see those photographs. That has nothing to do with this case whatsoever, Your Honor." At the conclusion of her testimony, the trial court allowed the five photographs into evidence over appellant's relevance objection.

Appellant contends that the trial court abused its discretion (1) in allowing Magnosa's testimony, and (2) in permitting admission of the five photographs. He argues that the prejudice of such evidence outweighed its probative value because the prior offense was dissimilar to the charged offense, the prosecutor relied heavily on evidence of appellant's prior misconduct in his opening statement and closing argument, Magnosa had an emotional outburst under questioning by appellant, creating undue jury sympathy for her and bias against appellant, and the photographs of her injuries were inflammatory. He also argues that such evidence required the undue consumption of time, as Magnosa's testimony consumed nearly one-third of the trial testimony. These contentions have merit, but the errors were harmless.

Admission of evidence of misconduct other than that charged produces an "overstrong tendency to believe the accused guilty of the charge merely because he is a likely person to do such acts." (1A Wigmore, Evidence (Tillers rev. 1983) § 58.2, p. 1215.) Such evidence "will have an inevitable tendency to suggest that the defendant has a general criminal propensity or disposition, and thus an inevitable tendency to persuade a trier that the defendant is somewhat more likely to have committed the crime currently charged." (*People v. Scott* (1980) 113 Cal.App.3d 190, 198.) Consequently, other crimes evidence, as a general proposition, is inadmissible to prove a defendant's disposition. (Evid. Code, § 1101, subd. (a).)[4]

---

[4] Evidence Code section 1101, subdivision (a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a

Evidence Code section 1101, subdivision (b) expressly carves out an exception to this rule. It provides that such evidence is admissible if it is relevant to an issue other than disposition to commit the act, such as intent, identity or plan. Admissibility of other crimes evidence depends upon (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crime to prove those facts, and (3) any policy requiring exclusion, such as Evidence Code section 352. (*People v. Carpenter* (1997) 15 Cal.4th 312, 378-379; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404 ["[T]o be admissible such evidence [of other misconduct] 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352. [Citations.]'"].) "Even if evidence of other crimes is relevant under a theory of admissibility that does not rely on proving disposition, it can be highly prejudicial." (*People v. Thompson* (1980) 27 Cal.3d 303, 318.) "Since 'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have substantial probative value. If there is any doubt, the evidence should be excluded." (*Ibid*., fn. omitted.)

We review the trial court's Evidence Code sections 352 and 1101, subdivision (b) rulings under the abuse of discretion standard. (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532 [review of Evid. Code, § 352 ruling]; see also *People v. Lewis* (2001) 25 Cal.4th 610, 637 [review of Evid. Code, § 1101 ruling].) "'The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules. . . . [Citation.]'" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.) Abuse occurs when the trial court "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

---

trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

Materiality

A "plea of not guilty puts in issue every material allegation of the accusatory pleading, except those allegations regarding previous convictions of the defendant to which an answer is required by Section 1025." (§ 1019; see *People v. Steele* (2002) 27 Cal.4th 1230, 1243 [Intent to kill, premeditation, and deliberation were material and the guilty plea to the charged murder "put in issue all of the elements of the offenses"].)

To sustain a finding that appellant made a criminal threat, the prosecution must show: (1) appellant willfully threatened to commit a crime that would result in death or great bodily injury; (2) he made the threat with the specific intent that it be taken as a threat, regardless of whether appellant intended to carry it out; (3) the threat, on its face and under the circumstances in which it was made, was 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; and (4) the threat caused the person threatened reasonably to be in sustained fear for his own safety or that of his family. (§ 422;[5] *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536.) A purported threat must be examined on its face and under all of the circumstances in which it was made, including the prior history of disagreements between the perpetrator of the threat and the victim, in order to assess if it conveyed the required gravity of purpose and immediate prospect of execution. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137-1138.)

The prosecution sought to introduce evidence of appellant's prior misconduct to establish his intent that it be taken as a threat, that Walton was in reasonable, sustained

---

5 Section 422 makes it a crime to "willfully threaten[] to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is 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, and thereby causes that person reasonably to be in sustained fear for his or her own safety . . . ."

fear for his safety and appellant's identity as the perpetrator. All of these issues were material to this action.

Probative value

"In ascertaining whether evidence of other crimes has a *tendency* to prove the material fact, the court must first determine whether or not the uncharged offense serves "'logically, naturally, and by reasonable inference'" to establish that fact. [Citations.] The court 'must look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense. . . .'" (*People v. Thompson, supra,* 27 Cal.3d at p. 316.) "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'"probably harbor[ed] the same intent in each instance."'" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402.) "The least degree of similarity between the crimes is needed to prove intent. [Citation.]" (*People v. Steele, supra,* 27 Cal.4th at p. 1244.)

In *People v. Ewoldt, supra*, 7 Cal.4th at page 393, our Supreme Court stated that the "'presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done.' [Citation.]" Such a plan or design can be proven by showing that the defendant has performed such acts having "'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" (*Id*. at p. 393.) "[E]vidence of a defendant's . . . misconduct is relevant where the . . . misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan." (*Id*. at pp. 401-402.)

On the issue of appellant's intent to cause fear in his victim by means of his criminal threat, evidence of his prior misconduct was cumulative. Appellant threatened to kill Walton as he viciously beat and strangled him.[6] Such conduct, without more, presented the ultimate evidence that appellant's threat to kill Walton was made with the

---

[6] Appellant does not question whether a threat made under such circumstances can constitute a criminal threat under section 422, and we express no opinion on that issue.

intent to cause fear. With such an outward manifestation of appellant's intent, evidence that he previously made such a threat incident to an assault was cumulative and unnecessary. (See *People v. Ewoldt*, *supra*, 7 Cal. 4th at pp. 405-406 ["In many cases the prejudicial effect of [other crimes] evidence would outweigh its probative value, because the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute"].)

Evidence Code section 1101, subdivision (b) permits prior bad conduct evidence on the issue of identity. The prosecutor sought to introduce appellant's prior offense to establish a common plan or scheme, amounting to appellant's signature on the offenses so as to identify him as their perpetrator. To constitute the signature of the perpetrator, the uncharged offense and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person was responsible for both. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 403.) The marks of similarity must be highly distinctive. (*People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1065.)

Here both the prior offenses and charged offenses were spontaneous outbursts in different situations against different victims. In the prior offenses, appellant made a threat to dissuade the victim from calling the police, while the current offense was unprovoked and had no similar objective. Other than the fact of physical violence, common to all physical attacks, there were no unique characteristics of the offenses to suggest that appellant was the likely perpetrator. Prior wrongdoing cannot be admitted to show a design or plan if it is simply "spur of the moment response[s] to an unexpected event" (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1021 [in prosecution for hit-and-run and vehicular manslaughter it was improper to admit into evidence defendant's previous conviction for fleeing the police]) or "independent . . . and apparently spontaneous" (*People v. Sam* (1969) 71 Cal.2d 194, 205 [in murder prosecution where defendant was alleged to have killed the victim by stomping his foot in the victim's stomach, it was improper to admit evidence of two prior incidents of kicking people]).

Finally, the prosecutor argued that the prior conduct was relevant to whether Walton was reasonably placed in sustained fear for his safety. On this issue, the

proposed testimony was cumulative and not sufficiently relevant to justify the extensive testimony that was admitted. Walton testified that he was told when he interviewed appellant to be his roommate that appellant was on probation for a prior assault and that this knowledge enhanced the fear he felt when appellant threatened to kill him. Therefore, testimony by Magnosa that she was assaulted was cumulative and unnecessary. Further, Walton did not know the details of the prior incident at the time appellant threatened him, making them irrelevant to whether he was in sustained fear from the threat.

Evidence Code section 352

Evidence Code section 352 provides: "The court in its discretion may exclude 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."

As discussed *ante*, given the minimal, if any, relevance of appellant's prior conduct, the prejudice from that evidence far outweighed its relevance. Evidence of the prior offenses likely engendered greater jury sympathy than the charged offense simply because Magnosa was a woman being physically abused by a man, contrary to prevalent social mores. But there were other prejudicial aspects of this testimony. Magnosa testified extensively about the incident, including great detail regarding what precipitated it, the blows struck and the injuries she suffered. The details regarding the injuries she suffered were of minimal, if any, relevance. She also testified that she was still in fear of appellant, which testimony was irrelevant to the issues on which the prosecution purported to base the admission of her testimony. Her testimony consumed a substantial portion of the trial testimony. During her examination conducted by appellant, Magnosa broke down on the stand, leading the trial court to inquire whether she required a break to compose herself and likely engendering jury sympathy toward her and bias against appellant. Dwelling so intensively on this prior incident necessarily diverted attention from the charged incident.

The photographs

The trial court allowed five photographs depicting Magnosa's severe injuries to be published to the jury and admitted in evidence. They were irrelevant to the issues for which they were admitted,[7] and were even more prejudicial than the oral testimony regarding her injuries, given their graphic nature.

We conclude that the trial court abused its discretion in admitting evidence of appellant's prior offense and in admitting into evidence the photographs of the injuries suffered by the prior victim. The prejudice of such evidence far exceeded its diminimus relevance. We nonetheless conclude that the error was harmless.

Harmless error

We evaluate the prejudice caused by the erroneous admission of prior misconduct evidence under the *Watson (People v. Watson* (1956) 46 Cal.2d 818) standard that reversal is not compelled unless a result more favorable to the defendant would have been reasonably probable if such evidence were excluded. (*People v. Scheer, supra,* 68 Cal.App.4th at pp. 1018-1019.) The errors here in admitting evidence of appellant's prior bad acts and the photographs related to them were harmless. Evidence of appellant's guilt was overwhelming and uncontradicted, and no defense was presented. Walton testified that appellant beat and threatened to kill him, and Stephen Humphreys confirmed hearing appellant's threat. Photographs showing the injuries Walton suffered were introduced in evidence, confirming the beating. Appellant introduced no evidence that the beating did not occur or that he was not the perpetrator. Additionally, the trial court instructed the jury in accordance with CALJIC Nos. 2.50 and 2.50.1, informing the jury that evidence of the prior offenses could only be considered by it on the issues of intent and common plan or scheme. We presume that the jury followed the instructions. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1121.)

---

[7] As we find the photographs irrelevant, we need not consider respondent's contention that appellant waived his claim that the evidence was improperly admitted under Evidence Code section 352.

II. Procedural rulings

Appellant suffered a series of adverse procedural rulings that he now contends deprived him of due process and a fair trial. Before trial began, he requested $40 of supplemental "pro per funds" for telephone calls. He had previously received that sum and claimed that he required more. The trial court gave him only $20 of the additional funds he requested, stating that it would be adequate because, "You won't have to contact the overlap witnesses because the People are going to be contacting them as well. . . ."

At the close of the People's case-in-chief, appellant informed the trial court that he had contacted witnesses "to ask them if they would come to court," but had not subpoenaed them because "I have no power of subpoena, Your Honor. I gave a subpoena list to the People to subpoena for me." When appellant learned that none of his witnesses had voluntarily appeared for trial, he requested a seven- to 10-day continuance to subpoena them. The trial court denied the request because the case was in midtrial, and appellant's predicament was of his own doing. At that juncture, appellant challenged the trial court for prejudice pursuant to Code of Civil Procedure section 170.6. That motion was denied as untimely. Appellant then requested "court-ordered phone calls" to the witnesses "to see if they will show up for court." The court denied that request. Appellant followed this denial, by stating: "The court is being ridiculous, not even letting me subpoena anybody or call any witnesses to that effect." The trial court cautioned appellant against such contemptuous statements.

Apparently frustrated by these adverse rulings, appellant indicated that he was not ready to proceed and asked the trial court to recess early for the day to allow him time to consider "exactly what I want to do." The trial court initially refused the request and stated: "If you are not prepared to present a case, then I would have no option but to advise the jurors that, in effect, you are resting and not proceeding with the case in chief, and deem you to have rested the case." When the prosecutor stated that he had no objection to going over jury instructions that afternoon and beginning appellant's case the next morning, the trial court agreed, effectively giving appellant the continuance until the next day that he had requested.

Only after these adverse rulings did appellant complain that he was given a "co-counsel" who never appeared in court[8] and that he no longer wished to represent himself. Because trial had begun, the trial court advised him that it had discretion to deny that request and that he had no absolute right to speak with counsel. The trial court did not rule at that time on the issue of self-representation.

The following morning, appellant stated that he had contacted a couple of witnesses and "they may be here today." He did not subpoena them. Appellant told the trial court that he had just learned the previous day that Thompson, his alibi witness, was in Oregon, and appellant did not know when he would be back to testify. He stated that he wanted to use Thompson's preliminary hearing transcript in lieu of his testimony. The prosecutor objected because appellant made no effort to locate Thompson and subpoena him . The trial court agreed and denied appellant's request. Appellant reiterated that he was not trying to intentionally delay the trial, but that the investigator appointed to assist him had never contacted him. The investigator was the one that was going to deliver his subpoenas. Appellant had not previously informed any judge that there was any problem with the investigator.

Finally, appellant renewed his request to withdraw self-representation, which the trial court denied, stating: "in consideration of all factors involved in the case, the fact that you had inquiry along the way as to whether or not you should be in pro per status; the fact that you remained in pro per status all of the way through the People's case in chief, and even at the point of preparing instructions for the jury; the fact that we have had discussions with regard to motions and rulings on motions and other issues in the case. [¶] I find that the request at this time is untimely. Just as you do not have an absolute right to have pro per status, it is tempered by any disruption of court proceedings or abuse of the system, disruption of the trial proceedings, it is also a requirement that any request that you make with regard to issues in the case be timely made, and to wait

---

8 In fact, the trial court had appointed "standby counsel" when it allowed appellant to represent himself.

until this last minute to request that counsel come into your case, when we're already mid-trial or beyond, I deem to be completely untimely, and the request is denied."

Appellant contends that by its conduct and rulings, the trial court deprived him of his rights to due process and to a fair trial. He specifically contends that the trial court erred in denying his request for a seven- to 10-day continuance and his request to withdraw self-representation. He further contends that those rights were violated because he was denied a meaningful opportunity to present a defense by reason of his difficulty in obtaining funds from the trial court to allow him to make telephone calls, the failure of the court-appointed standby counsel to appear at trial or to assist him, and the failure of the court-appointed investigator to contact him. These contentions lack merit.

A. Failure to grant continuance of trial

A continuance is to be granted only upon a showing of good cause (§ 1050, subd. (b)) and is reviewed on appeal under the abuse of discretion standard (see *People v. Mickey* (1991) 54 Cal.3d 612, 660). There can be no good cause where the party and his counsel have failed to use due diligence in their preparations. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) We must look to the circumstances in each case to determine if the denial of a request was an abuse of discretion. (*People v. Howard* (1992) 1 Cal.4th 1132, 1171-1172.) Good cause for obtaining a continuance in order to procure the attendance of a witness requires that the defendant have "'exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven."' (*People v. Jenkins, supra,* at p. 1037.)

In evaluating appellant's actions, we begin with the proposition that he is to receive no special consideration or privileges because he was representing himself but is to be treated the same as if he were an attorney. (*Faretta v. California* (1975) 422 U.S. 806, 836; *People v. Lopez* (1977) 71 Cal.App.3d 568, 572.)

Appellant sought a continuance of seven to 10 days after the prosecution had completed presentation of its case-in-chief, claiming that he needed additional time to

subpoena his witnesses, none of whom were under subpoena. He claimed that he failed to subpoena them because, "I have no power to subpoena but gave his witness list to the prosecution to subpoena for him." This excuse was both disingenuous and inadequate.

Until completion of the prosecution's case-in-chief, the record suggests that only a lack of due diligence caused appellant's failure to subpoena witnesses. At appellant's arraignment on May 9, 2003, he submitted a "Petition to Proceed in Propria Persona" in which he acknowledged that he had the "right to use the power of the court to subpoena witnesses or any records that [he] may need in [his] defense." At a pretrial conference on May 30, 2003, appellant provided the court with a witness list and stated that "[t]he names on there are names of people that I want to subpoena. I need the investigator to find out addresses for me." He did not suggest that the prosecutor was going to subpoena the witnesses on his behalf.

On the first day of trial, appellant announced ready and informed the trial court that he had not subpoenaed any witnesses. When asked if there was "[a]ny reason why [he] didn't do that," he responded, "No, there isn't." He again gave no hint that he believed the prosecution was doing it for him. At no time did he indicate any problems in subpoenaing his witnesses.

Despite this state of the record, appellant nonetheless points to the trial court's statement in connection with his request for supplemental funds that: "You won't have to contact the overlap witnesses [those on appellant's witness list and the prosecution's witness list] because the People are going to be contacting them as well." He argues that this misled him into believing that the prosecutor was going to be subpoenaing witnesses on his behalf. We find this assertion disingenuous. Appellant told the trial court he failed to subpoena his witnesses because he had never been contacted by the investigator appointed to assist him who was supposed to deliver the subpoenas, undermining his assertion that he did not know he was responsible for serving them. Further, the trial court did not say that the prosecutor would be subpoenaing appellant's witnesses. In the context presented, it appears that the trial court simply was indicating that the prosecutor would contact the witnesses and tell them "their court appearance dates." Even if the trial

court's comments could be interpreted as appellant suggests, it clearly only applied to those witnesses who were on both appellant's and the People's witness list, which did not include Thompson, appellant's primary alibi witness. Finally, being held to the standard of an attorney, appellant would have known that he was required to subpoena his own witnesses. It was his ineffectiveness in not knowing this rudimentary principle that led to his failure to have any witnesses available to testify.

Consequently, given the fact that the failure to have his witnesses under subpoena was the result of appellant's own indolence and/or lack of basic understanding of his obligations to procure their attendance, that the trial was in midstream when appellant requested the continuance, and that the continuance would have greatly burdened the court, the jury and the People, the trial court did not abuse its discretion in denying his request.

B. Failure to allow withdrawal of pro per. status

A right to self-representation is implied in the Sixth Amendment to the United States Constitution. (*Faretta v. California, supra,* 422 U.S. at p. 819.) The right to counsel, guarantees a defendant the *assistance* of counsel if the defendant wants it. It does not require a defendant to use an attorney. "[I]n order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial. Accordingly, when a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be." (*People v. Windham* (1977) 19 Cal.3d 121, 128.)

"Once defendant had proceeded to trial on a basis of his constitutional right of self-representation, it is thereafter within the sound discretion of the trial court to determine whether such defendant may give up his right of self-representation and have counsel appointed for him." (*People v. Elliott* (1977) 70 Cal.App.3d 984, 993.) Whether to allow the defendant in midtrial to again change his mind regarding representation and withdraw self-representation is determined based on the totality of the circumstances.

(*People v. Smith* (1980) 109 Cal.App.3d 476, 484.) Some of the factors to be considered are (1) the defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel representation, (2) the reasons given for the request, (3) the length and stage of the proceedings, (4) disruption and delay which reasonably might be expected to ensue if the motion is granted, and (5) the likelihood and effectiveness of the defendant's continued self-representation. (*People v. Elliott, supra,* at pp. 993-994.)

Here, appellant was given numerous opportunities before trial began to have counsel appointed. On May 9, 2003, appellant's petition for pro. per. status was granted. In it, he acknowledged that it was unwise to represent himself, that depending on the stage of the proceedings he might not be able to give up that status even if he changed his mind, that it would be difficult to conduct his defense because he was in custody, and he would not likely be able to obtain continuances. Appellant represented himself at his preliminary hearing on May 15, 2003. When assigned to the trial court on July 7, 2003, the trial judge asked appellant if he desired to retain pro. per. status, to which appellant indicated that he would.

At no time before the conclusion of the prosecution's case, a very late stage in the proceedings, did appellant request to withdraw his self-representation status. This occurred only after appellant's request for a seven- to 10-day continuance was denied, he was rebuked by the trial court for a contemptuous comment he made, a challenge to the trial court for prejudice pursuant to Code of Civil Procedure section 170.6 was denied, a request for "court ordered phone calls" to witnesses was denied, and his request to recess the proceedings until the following day had also been denied. It appears that the motivation for the request to withdraw self-representation may have been to force a continuance that had already been denied. Moreover, allowing appellant to withdraw his self-representation would have necessitated a continuance of unknown duration. Although appellant had been appointed standby counsel, that counsel had not been

present at trial and would presumably have required some time to prepare to complete the trial.[9]

We therefore conclude that the trial court did not abuse its discretion in denying appellant's request to withdraw self-representation.

C. Appellant was not denied a meaningful opportunity to defend himself

Appellant was not denied due process or a fair trial as a result of his purported difficulty in obtaining money for costs and lack of communication with standby counsel and his investigator. Appellant received money for telephone calls and other expenses, albeit not the amount he requested. The record is devoid of any indication of how the pro. per. funds he received were used, why additional funds were needed, why the $20 supplemental funds were inadequate, or how the lack of the additional $20 prejudiced him.

With regard to standby counsel, "[t]he role and duties of advisory and/or standby counsel are not clearly established or defined." (*Brookner v. Superior Court* (1998) 64 Cal.App.4th 1390, 1395.) It has even been suggested that because of the amorphous nature of the role of such counsel, it should be discarded. (*Id.* at p. 1394.) While a criminal defendant retains the right to represent himself or herself, the waiver of representation is a waiver of representation. We have been referred to no case suggesting that a criminal defendant who represents himself is entitled to standby counsel to cocounsel the case with him and provide whatever assistance is required. To the contrary, appellant's request for pro. per. status specifically indicated that he was not entitled to any assistance by a trained attorney. Appellant cites no authority that appointment of such counsel is mandatory or that such counsel must do anything besides be available to step in for a pro. per. defendant if the defendant's pro. per. status is withdrawn.

---

9 Appellant cites no authority indicating that standby counsel is required to be present at trial at all times so as to be able to instantaneously assume the defense if a defendant abruptly decides to withdraw his pro per. status.

Regarding appellant's failure to have been contacted by the investigator appointed on his behalf, he made no effort to advise the trial court of any difficulty in that regard until his request for a continuance was denied. It was his obligation to bring such difficulties to the trial court's attention in a timely fashion so as not to disrupt the trial.

We therefore conclude that the purported impediments with which appellant was faced, did not deprive him of a fair trial or the opportunity to defend himself.

III. Restraining orders

After the jury had been instructed, the People requested the trial court to issue restraining orders restricting appellant's contact with Walton and Magnosa. The orders restrained appellant from "annoy[ing], harass[ing], strik[ing], threaten[ing] . . . or otherwise disturb[ing] the peace of the protected persons named." The order also required appellant to surrender to law enforcement authorities or sell to a licensed gun dealer any firearm in or subject to his immediate control within 48 hours and file a receipt with the court showing compliance with the order within 72 hours of receipt of the order.

The Judicial Council form utilized by the trial court for the order, form No. MC-220,[10] is entitled "Protective Order in Criminal Proceedings." The top of the form provided three boxes that could be checked, including a box stating, "Order Pending Trial," a box stating, "Order Post-trial Probation Condition" and a box stating, "Modification." Here, the trial court checked the box entitled, "Order Post-trial Probation Condition," and the orders provided that they were to expire on July 10, 2006.

Appellant contends that because he was not granted probation, a restraining order that is a probation condition is an unauthorized sentence. He argues that the restraining orders were issued prematurely before appellant's conviction and that the appropriate procedure would have been to obtain a restraining order under Code of Civil Procedure section 527. We agree that the restraining orders must be reversed.

---

10 Effective January 1, 2003, Judicial Council form No. MC-220 was revised and replaced by Judicial Council form No. CR 160.

It is not the content or format of the Judicial Council form that determines the propriety of the challenged protective order, but the authorizing statute. (*People v. Hall* (1995) 8 Cal.4th 950, 960 [Judicial Council cannot adopt rules inconsistent with the governing statute].) The restraining orders here were issued pursuant to section 136.2 which authorizes any court with jurisdiction over a criminal matter which has a "good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur," to issue a restraining order. The statute specifies a nonexclusive list of restraining orders that are permissible, among others, an order protecting victims and witnesses from annoying, harassing or threatening contacts. (§ 136.2, subds. (d) & (g).) Section 136.2 does not provide a maximum duration for which such a restraining order can be effective nor does it provide any details regarding the procedure to be followed for obtaining such an order. The restraining order is to be issued on forms adopted by the Judicial Council of California and approved by the Department of Justice but "the fact that an order issued by a court pursuant to this section was not issued on forms adopted by the Judicial Council and approved by the Department of Justice shall not, in and of itself, make the order unenforceable." (§ 136.2, subd. (g).)

Although section 136.2 does not indicate on its face that the restraining orders it authorizes are limited to the pendency of the criminal action in which they are issued or to probation conditions, it is properly so construed. It authorizes injunctions only by courts with jurisdiction over criminal proceedings and is aimed at protecting only "victim[s] or witness[es]," an indication of its limited nature and focus on preserving the integrity of the administration of criminal court proceedings and protecting those participating in them. This is in stark contrast to Code of Civil Procedure section 527.6 which is applicable to protect any "person who has suffered harassment," harassment defined in that section as "unlawful violence [or] credible threat of violence." The narrower scope of section 136.2 suggests that the Legislature did not intend it to authorize restraining orders beyond those germane to the proceedings before the criminal court.

This is further corroborated by the placement of section 136.2 in title 7, entitled "Of Crimes Against Public Justice," Chapter 6, entitled "Falsifying Evidence, and Bribing, Influencing, Intimidating or Threatening Witnesses," of the Penal Code. Section 136.1, immediately preceding section 136.2, deals with intimidation of witnesses and victims. This placement of section 136.2 reinforces our conclusion that its only purpose is to protect victims and witnesses in connection with the criminal proceeding in which the restraining order is issued in order to allow participation without fear of reprisal.

Additionally, the absence of any express time limitation on the duration of a restraining order issued under section 136.2 suggests that its duration is limited by the purposes it seeks to accomplish in the criminal proceeding. If not so limited, restraining orders under section 136.2 would usurp the similar restraining orders obtainable under Code of Civil Procedure section 527.6, and undermine the numerous procedural protections for the restrainee afforded by that section.[11] The lack of such protections in section 136.2 is further evidence that its sweep is more narrow.

Finally, nothing in section 136.2 suggests an intention that it supplant Code of Civil Procedure section 527.6, or other injunction statutes.

Here, the restraining orders were issued for three years. They were not limited to the pendency of the criminal proceeding and were not a probation condition, as appellant was not given probation. The restraining orders therefore transcended the authorization of section 136.2 and must be reversed.

Reversal is required for yet another reason. There was no evidence in the record to support the trial court's finding of good cause for their issuance. In order to issue a restraining order under section 136.2, there must exist a "good [faith] belief that harm to, or intimidation or dissuasion of, a *victim* or *witness* has occurred or is reasonably likely to

---

[11] Included among the procedural protections of Code of Civil Procedure section 527.6 are the requirements of a hearing on the petition for restraining order, the taking of testimony, proof by clear and convincing evidence, and the three-year limitation on the duration of the restraining order. (Code Civ. Proc., § 527.6, subd. (d).) Section 136.2, on the other hand, fails to specify these procedural protections.

occur." (Italics added.) As indicated by the italicized words, it is only wrongdoing aimed at a victim or witness that justifies the restraining order. This reflects, as we previously stated, that the restraining orders authorized by section 136.2 are those aimed at preserving the integrity of the administration of criminal court proceedings and protecting those involved in them. It therefore follows that the required good cause must show a threat, or likely threat to criminal proceedings or participation in them.

At the time of appellant's attacks on Walton and Magnosa, neither was a witness nor victim with regard to any ongoing criminal prosecution and therefore those attacks presented no direct threat to the administration of any criminal proceedings or to their participation in them. There was no additional evidence here that either Walton or Magnosa were ever harmed, intimidated or dissuaded, or that there was a likelihood that that would occur, after they became victims or witnesses in an ongoing criminal proceeding. There was no evidence, for example, that after being charged in this matter, appellant, or anyone on his behalf and at his behest, made any efforts by threat or force to dissuade either Walton or Magnosa from testifying against him or proceeding with the prosecution. The fact that he had assaulted both of them before there were any criminal proceedings, and without any intent to interfere with such proceedings, is insufficient to justify the restraining orders.

DISPOSITION

The restraining orders against appellant are reversed. The judgment is otherwise affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

_____, Acting P.J.

NOTT

We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST