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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MARTIN O. MACIEL, Defendant and Appellant.	B163924 (Los Angeles County Super. Ct. No. NA053423)

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur Jean, Judge. Affirmed.

Edward J. Haggerty, 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, Senior Assistant Attorney General, Marc E. Turchin, Michael C. Keller and Richard S. Moskowitz, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of the Procedural Background, Facts, and sections II. through IV. of the Discussion.

Defendant and appellant Martin Maciel appeals from a judgment after a jury trial in which he was convicted of attempted spousal rape (Pen. Code, §§ 664, 262, subd. (a)(1)), criminal threats (Pen. Code, § 422), and other offenses, arising out of an attack on his estranged wife. On the night in question, defendant lay in wait outside the house of his estranged wife. When she returned home, he struck her repeatedly, forced her into the house, shoved her on the bed, ripped off her clothing, and held a pillow over her mouth. He threatened to rape, then kill her. Eventually, she escaped. Defendant contends his conviction for criminal threats must be reversed as Penal Code section 422 is unconstitutionally vague. In the published portion of this opinion, we conclude Penal Code section 422 is sufficiently certain and definite to withstand a facial vagueness challenge. In the unpublished portion of this opinion, we reject defendant's remaining contentions. We affirm.

PROCEDURAL BACKGROUND

Defendant was charged by information with crimes arising out of two separate attacks on Claudia M. With respect to an attack on June 16, 2002, he was charged with spousal battery (Pen. Code, § 243, subd. (e)). With respect to an attack on June 30, 2002, he was charged with attempted spousal rape, criminal threats, and the willful infliction of corporal injury on a spouse (Pen. Code, § 273.5). He was also charged with several crimes against Antonio Valadez, Claudia M.'s brother, and Oscar Alberdin, defendant's nephew, who had intervened on June 30, 2002, to protect Claudia M. Specifically, defendant was charged with committing mayhem (Pen. Code, § 203) and assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) on Valadez, and battery (Pen. Code, § 242) on Alberdin.

The case proceeded to trial. At the close of the prosecution's case, the trial court dismissed the mayhem count, and reduced the count of assault by means of force likely to produce great bodily injury to simple battery. The amended charges were presented to

the jury, which found defendant guilty as charged after less than two hours of deliberation.

Defendant was sentenced to a total of four years in prison, the upper term on attempted spousal rape. Defendant was also sentenced to the upper term on criminal threats and willful infliction of corporal injury to a spouse, but these sentences were stayed pursuant to Penal Code section 654. Defendant received concurrent jail terms for the two misdemeanor batteries and the misdemeanor spousal battery. Defendant filed a timely notice of appeal.

FACTS

Defendant and Claudia M. separated after a seven-year marriage and the birth of two children. Claudia M. had insisted on a separation because of domestic violence.

On June 16, 2002, Claudia M. went to a swap meet. Defendant met Claudia M. at her house upon her return. He questioned her concerning her whereabouts. Defendant did not believe Claudia M. had been at a swap meet. He feared she had been having sexual relations with another man. He took her car keys from her hand. He went into the house, and Claudia M. followed him, asking for the return of her keys. Defendant went to Claudia M.'s bedroom. He grabbed Claudia M. by the arms and threw her on the bed. He grabbed her by the hair and punched her in the head with a closed fist. When Claudia M. threatened to call the police, defendant left in Claudia M.'s car.

Claudia M. called the police. Over the next few days, defendant told Claudia M. he was going to move back into the house. Claudia M. did not want him to return, and ultimately obtained a restraining order.

In the early morning hours of June 30, 2002, Claudia M. arrived at her house after a night out with some friends. She had no key to the locked front door, so she went around the back. Defendant was waiting for her in the darkness. He grabbed her by the arm and demanded to know where she had been, and where the children were. Claudia

M. said the children were in a safe place, and her whereabouts were not defendant's business. Defendant said he was still her husband and had a right to know where she was. She finally told him she had been dancing with some girlfriends, and the children were with defendant's niece. Defendant threatened to beat Claudia M. Claudia M. begged to be left alone. Defendant slapped Claudia M. all over her body, and called her a whore. Defendant threatened to rape her and then kill her. Claudia M. was scared.

Valadez and Alberdin lived in the house with Claudia M. and shared a bedroom. Claudia M. wanted to wake them, but defendant used his hand to silence her, and led her into the house by the arm. Defendant led Claudia M. to her bedroom. He removed his hand from her mouth and shoved her on the bed. He tried to kiss Claudia M.; she attempted to move away to avoid the kiss; and defendant bit her three times. He fondled her breasts over her clothing, then ripped off her shirt and bra. When she tried to yell, defendant again used his hand to silence her. Claudia M. relayed to defendant a promise not to yell, and he removed his hands from her mouth. She tried to yell for help and defendant put a pillow over her face for a few seconds. While the pillow was over her face, he partially removed her pants and underwear. He again threatened that he would rape her, then kill her, and also threatened to sodomize her. Defendant punched Claudia M. in the ribs.

Claudia M. pretended to comply with defendant's demands in order to save her life. She removed her underwear and said she would have sexual intercourse with defendant, but told him she had to use the bathroom first. She hoped to escape when going to the bathroom. Defendant accompanied Claudia M. to the bathroom. He had one hand on her arm and one hand on her mouth. He stood and watched her urinate. When she finished, he took her arm and said he also needed to urinate. When he did, she attempted to yell, and he struck her with an open hand and pulled her hair. He again threatened to kill her. Claudia M. grabbed a towel to cover herself. When defendant opened the bathroom door, Claudia M. kicked it open, hoping the noise of the door hitting the wall would waken Valadez. It did.

When Valadez opened the door of his bedroom, defendant released Claudia M. and she ran to Valadez, begging him not to leave her. Valadez asked defendant what was happening; defendant said it wasn't Valadez's problem. Words were exchanged. Ultimately, defendant asked Valadez, "Do you want trouble too?" and punched him in the face. Claudia M. ran in the bedroom and asked Alberdin for his protection. Alberdin stood and asked defendant why he was doing this. Defendant told Alberdin not to get involved and kicked him in the buttocks.

Valadez and Alberdin took defendant to the living room, and Claudia M. remained in her room to call the police. Defendant pounded on the door of Claudia M.'s bedroom, trying to get her to let him in. He broke part of the door frame in an effort to open it. He did not succeed and left the house before the police arrived. When the police arrived, Claudia M. was standing outside on the porch, with a blanket wrapped around her. She was crying and had blood residue around her lips, and various scratches and abrasions on her body. Valadez had a cut on his forehead and was bleeding profusely from his lip. The police took photographs of their injuries and the broken door frame.

The defense was that Claudia M. was lying. Defendant testified he had never hit Claudia M. When he discovered, on June 16, 2002, that Claudia M. was seeing another man, he did not strike her, although he pushed her. He left because he was angry and did not want to hit her. On June 29, 2002, defendant had gone to see Claudia M. at 10 p.m.; when he did not find her at home, he waited on the front steps to see when she would get home. When she returned in the early morning hours of June 30, 2002, he did not threaten her or force her into the house. Instead, Claudia M. invited him into the house and asked him to her room to talk. They talked about their children, and Claudia M. eventually said there was no reason to argue and they should make love instead. Claudia M. was the aggressor sexually, but defendant rejected her advances because he was angry. Claudia M. grabbed defendant's neck and shoulders to provoke him and tried to kiss him, but he pushed her away. She grabbed him by the testicles and said he was going to make love to her. Defendant did not want to make love to her and told Claudia

M. he would bite her. Claudia M. did not release her hold on him, so defendant bit Claudia M. She then released him. At one point, Claudia M. kicked defendant. Defendant pulled at Claudia M.'s clothes out of anger. Claudia M. jumped on the bed, took off her clothes, and tried to entice defendant to make love. Defendant said he did not want to make love. Naked, Claudia M. then said she had to go to the bathroom, and defendant accompanied her as was their custom. She then went to Valadez and Alberdin's room and falsely told them that defendant had been hitting and threatening her. Defendant hit Valadez and Alberdin, because they were trying to hit him when he was trying to calmly talk to his wife in his own house.

DISCUSSION

I. Vagueness

Defendant contends Penal Code section 422 is unconstitutionally vague on its face.[1] Defendant asserts that the statute's language fails to advise individuals as to those threats proscribed and grants unfettered discretion to law enforcement to determine those statements that constitute threats. We conclude the statute is sufficiently certain and definite to provide notice and prevent arbitrary enforcement.[2]

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[1] Penal Code section 422 is not unconstitutionally overbroad. (*People v. Toledo* (2001) 26 Cal.4th 221, 233.)

[2] It is not entirely clear whether defendant may challenge Penal Code section 422 on the ground of facial vagueness in light of his threat to kill the victim, a threat clearly encompassed by the statute. (*Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 39; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1095-1096; *In re Cregler* (1961) 56 Cal.2d 308, 313; *Patel v. City of Gilroy* (2002) 97 Cal.App.4th 483, 488.) The parties have not raised this issue. We will assume defendant may make a facial vagueness challenge.

A. Penal Code Section 422

Penal Code section 422 prohibits criminal threats. It provides, in pertinent part: "Any person who willfully threatens 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 or for his or her immediate family's safety" is guilty of a crime.

The crime of criminal threats may be divided into five constituent elements. (*People v. Toledo* (2001) 26 Cal.4th 221, 227.) "In order to prove a violation of [Penal Code] 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 circumstances 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." (*Id*. at pp. 227-228.) A criminal threat is the communication of an intent to inflict death or great bodily injury on another with the intent to cause the listener to believe death or great bodily injury will be inflicted on the person or a member of the

person's immediate family. (*Id*. at p. 233.) "A violation of [Penal Code] section 422 requires . . . the defendant [to] willfully threaten[] to kill or seriously injure another person." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1023.)

B. Due Process

"The Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution, each guarantee that no person shall be deprived of life, liberty, or property without due process of law. This constitutional command requires 'a reasonable degree of certainty in legislation, especially in the criminal law . . . .' [Citation.] '[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" (*People v. Heitzman* (1994) 9 Cal.4th 189, 199.) If a criminal statute is not sufficiently certain and definite, it is unconstitutionally vague and therefore void. A criminal statute is unconstitutionally vague on its face only if it is "'impermissibly vague in *all of its applications*.'" (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116.)

"It is established that in order for a criminal statute to satisfy the dictates of due process, two requirements must be met. First, the provision must be definite enough to provide a standard of conduct for those whose activities are proscribed. [Citations.] Because we assume that individuals are free to choose between lawful and unlawful conduct, 'we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly. Vague laws trap the innocent by not providing fair warning.'" (*People v. Heitzman, supra,* 9 Cal.4th at p. 199.)

"Second, the statute must provide definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement. [Citations.] When the Legislature fails to provide such guidelines, the mere existence of a criminal statute may permit a

‘“standardless sweep”’ that allows police officers, prosecutors and juries ‘“to pursue their personal predilections.”’” (*People v. Heitzman, supra,* 9 Cal.4th at pp. 199-200.)

“[I]n determining whether the relevant language [of the statute] is sufficiently certain to meet the constitutional requirement of fair notice, ‘we look first to the language of the statute, then to its legislative history, and finally to the California decisions construing the statutory language.’” (*People v. Heitzman, supra,* 9 Cal.4th at p. 200.) The language of the statute must be construed in context. (*People ex rel. Gallo v. Acuna, supra,* 14 Cal.4th at p. 1116.) “A contextual application of otherwise unqualified legal language may supply the clue to a law’s meaning, giving facially standardless language a constitutionally sufficient concreteness.” (*Ibid*.) It is not appropriate to take a single element in a criminal statute out of context and ignore the other elements that must be present in order to trigger the statute’s provisions. (*People v. Halgren* (1996) 52 Cal.App.4th 1223, 1231.)

“Statutes are presumed valid and must be upheld unless their constitutionality is positively and unmistakenably demonstrated.” (*People v. Basuta* (2001) 94 Cal.App.4th 370, 397.) “A law is void for vagueness only if it ‘fails to provide adequate notice to those who must observe its strictures’ and ‘“impermissibly delegates basic policy matters to police[officers], judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”’” (*People v. Rubalcava* (2000) 23 Cal.4th 322, 332.) “Inasmuch as ‘“[w]ords inevitably contain germs of uncertainty,”’ mathematical precision in the language of a penal statute is not a sine qua non of constitutionality.” (*In re M.S.* (1995) 10 Cal.4th 698, 718.)

A specific intent requirement in a criminal statute generally mitigates any potential vagueness in the statute. (*In re M.S., supra,* 10 Cal.4th at p. 718.) A criminal statute is not unconstitutionally vague merely because its intent element must be proved by circumstantial evidence. (*Ibid*.) A criminal statute that prohibits a threat made with the specific intent to place the victim reasonably in fear of death or great bodily injury is not unconstitutionally vague. (*People v. Heilman* (1994) 25 Cal.App.4th 391, 401.) In such

a statute, "it is the perpetrator's intent, rather than the definition of the conduct engaged in, which triggers the applicability of the statute. [Citations.] The intent element of [the statute] ensures law enforcement officials do not have boundless discretion in defining the crime." (*Ibid*.)

C. Construction of Challenged Language

Defendant challenges as vague the language in Penal Code section 422, " willfully threatens to commit a crime which will result in death or great bodily injury." We construe the challenged language in context, taking into account the other elements that must be established in order for the statute to be triggered. Penal Code section 422 does not criminalize all threats of crimes that will result in death or great bodily injury, leaving to law enforcement to determine those threats that will result in arrest. Instead, the statute criminalizes only those threats that are "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 or for his or her immediate family's safety." This language means that not all threats of crimes that will result in great bodily injury are criminalized, but only serious threats, intentionally made, of crimes likely to result in immediate great bodily injury. Moreover, the statute also includes a specific intent element: "with the specific intent that the statement . . . is to be taken as a threat." A statute that criminalizes threats of crimes that will result in great bodily injury with the intent to place the victim in sustained fear for personal safety or the safety of immediate family members adequately advises an individual and law enforcement of the conduct prohibited by the statute. One who willfully threatens violence against another, intending that the victim take the threat seriously and be fearful, cannot reasonably claim to be unaware that the conduct was prohibited.

D. "Crime Which Will Result In"

Even were we to view the challenged language out of context, we would conclude it is not vague. The phrase "crime which will result in great bodily injury" means the crime, if committed, would result in great bodily injury. (CALJIC No. 9.94.) "[T]here is no requirement that a specific crime or Penal Code violation be threatened. (*People v. Butler* (2000) 85 Cal.App.4th 745, 755.) The phrase "willfully threatens to commit a crime" is included in the criminal threats statute in order to criminalize those threats that truly pose a danger to society and thus pass muster under the First Amendment. (*Id*. at p. 757.) The phrase "will result in great bodily injury" means objectively, i.e., to a reasonable person, likely to result in great bodily injury based on all the surrounding circumstances. (*People v. Basuta, supra,* 94 Cal.App.4th at pp. 397-398; *People v. Albritton* (1998) 67 Cal.App.4th 647, 657-658; *People v. Covino* (1980) 100 Cal.App.3d 660, 668.) Such language is not unconstitutionally vague. (*People v. Covino, supra,* 100 Cal.App.3d at p. 668 [Pen. Code, § 245, subd. (a)]; *People v. Basuta, supra*, 94 Cal.App.4th at pp. 397-398 [Pen. Code, § 273ab]; *People v. Albritton, supra*, 67 Cal.App.4th at pp. 657-658 [same].) An objective standard of reasonableness provides a sufficiently reliable guide to individuals and law enforcement. (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 572-573.)

E. "Great Bodily Injury"

Similarly, the phrase "great bodily injury" standing alone is not vague. "The term 'great bodily injury' has been used in the law of California for over a century without further definition and the courts have consistently held that it is not a technical term that requires further elaboration." (*People v. La Fargue* (1983) 147 Cal.App.3d 878, 886-887.) The phrase "great bodily injury" means "a significant or substantial physical injury." (See Pen. Code, § 12022.7, subd. (f).) The phrase "great bodily injury" is

"sufficiently certain and definite to meet the constitutional requirements" and avoid vagueness. (*People v. Roberts* (1981) 114 Cal.App.3d 960, 963.)

F. Conclusion

Penal Code section 422 prohibiting criminal threats is sufficiently certain and definite in context to provide actual notice to individuals of the prohibited conduct and minimal guidelines for law enforcement to prevent arbitrary and discriminatory application of the statute. In addition, the specific phrases challenged by defendant, "crime which will result in" and "great bodily injury," are not vague even when considered in isolation. We conclude the statute is not constitutionally vague.[3]

II. Instruction on Threatened Crime

The trial court instructed the jury as to the elements of the crime of criminal threats in the language of CALJIC No. 9.94. That instruction contains no definition of the crime threatened.[4] Defendant contends the trial court erred in failing to instruct the

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[3] Defendant relies on a case in which the Nebraska Supreme Court voided Nebraska's criminal threats statute as unconstitutionally vague. (*State v. Hamilton* (Neb. 1983) 340 N.W.2d 397.) The Nebraska Supreme Court was to some extent concerned with language similar to the language challenged in this case. (*Id*. at pp. 398-399.) However, the challenged Nebraska statute did not include language that the victim must take the threat seriously or any intent element. Subsequently, the Nevada legislature adopted a new criminal threats statute modeled on the Model Penal Code and including a specific intent element. The Nebraska Supreme Court concluded that this revised statute did not suffer from unconstitutional vagueness. (*State v. Schmailzl* (Neb. 1993) 502 N.W.2d 463, 465-467.)

[4] The trial court instructed the jury as follows: "Mr. Maciel is accused in Count II of having violated section 422 of the Penal Code of our state. Every person who willfully threatens 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 is to be taken as a threat, even if there is no intent of actually carrying it out, which threat on its face and

jury sua sponte on the elements of the crime he threatened to commit. Because the statute punishes threats to "commit a crime," defendant argues the jury must be instructed on the elements of the threatened crime. This contention has been persuasively rejected by the Fifth Appellate District. (*People v. Butler* (2000) 85 Cal.App.4th 745, 758.) Neither case law nor the legislative history of Penal Code section 422 supports the theory the jury should be instructed on the elements of the threatened crime.[5] (*Ibid.*) Any such

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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 thereby causes that person reasonably to be in sustained fear for her own safety is guilty of a violation of Penal Code section 422, a crime. [¶] . . . [¶] 'Great bodily injury' means significant or substantial bodily injury or damage; it does not refer to trivial, insignificant, or moderate injury or harm. [¶] . . . [¶] The term 'sustained fear' means a period of time that extends beyond what is momentary, fleeting, or transitory. [¶] There are different degrees of unconditionality. A threat which may appear conditional on its face can be unconditional under the circumstances. [¶] Conditional threats are true threats if their context reasonably conveys to the victim that they are intended. [¶] The word 'immediate' means that degree of seriousness and imminence which is understood by the victim to be attached to the future prospect of the threat being carried out should the conditions not be met. [¶] In order to prove this crime, each of the following elements must be proved: [¶] One, that a person willfully threatened to commit a crime, which if committed would result in death or great bodily injury to another person; [¶] Two, the person who made the threat did so with the specific intent that the statement be taken as a threat; [¶] Three, the threat was contained in a statement that was made verbally; [¶] Four, the threatening statement 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 a threat, and the threatening statement caused the person threatened reasonably to be in sustained fear of her own safety. [¶] It is immaterial whether the person who made the threat actually intended to carry it out."

[5] The sole authority for the proposition appears to be the Use Note for CALJIC No. 9.94, which states, "The court must instruct on the elements of the threatened crime. It is the fact that a crime is threatened which along with the other elements, makes the utterance criminal." *People v. Butler, supra,* 85 Cal.App.4th 745 concluded "[t]he CALJIC committee's suggestion that such a instruction must be given is unsupported by case law or legislative history" (*id.* at p. 758), and further concluded "imposing requirement on the trial court to so instruct would be unwise." (*Id.* at p. 759.) In the CALJIC committee's 2003 edition of jury instructions, the Use Note requiring instruction

instruction would be problematic for two reasons. (*Id.* at p. 759.) First, ambiguous non-specific threats of death or great bodily injury are punishable as criminal threats, but identifying a specific crime for instruction would be virtually impossible. (*Ibid.*) Second, instructing on the threatened offense would cause jury confusion, because any threatened crime would have a mens rea element, yet it is not necessary for the defendant to actually intend to commit the threatened offense in order to be convicted of criminal threats. (*Id.* at pp. 758-759.)

In passing, the Fifth District addressed and rejected the argument that instruction on the threatened offense was necessary by analogy to felony murder, in which the court is required to instruct on the underlying crime. The analogy is unpersuasive because in order to be convicted of felony murder, the defendant must intend to commit the underlying felony, while to be convicted of criminal threats, the defendant need not intend to commit the threatened offense. (*People v. Butler, supra,* 85 Cal.App.4th at p. 760.) Defendant argues we should disagree with *Butler* because it failed to consider several other crimes in which instruction on an underlying offense is mandatory. But, like felony murder discussed in *Butler*, each of those crimes requires an intent to commit the underlying offense. (*People v. Hughes* (2002) 27 Cal.4th 287, 348-349 [when a defendant is charged with burglary, trial court must instruct on the underlying felony the defendant intended to commit]; *People v. Prettyman* (1996) 14 Cal.4th 248, 254 [when a defendant is charged with aider and abettor liability under natural and probable consequences doctrine, trial court must instruct on target offense the defendant intended to commit]; *People v. Williams* (1975) 13 Cal.3d 559, 562 [when a defendant is charged with misdemeanor manslaughter, trial court must instruct on misdemeanor the defendant committed]; *People v. May* (1989) 213 Cal.App.3d 118, 129 [when a defendant is charged with assault with intent to rape, trial court must instruct on rape].) None of the

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on the elements of the threatened crime has been retained, with no mention of *Butler's* disagreement. We conclude the Use Note is not an accurate statement of the law and decline to follow it.

cases on which defendant relies provide any authority for the proposition the jury must be instructed on an underlying offense when defendant does not need an intent to commit that offense. We therefore see no reason to disagree with *Butler*.

III. Instruction on Reasonable But Mistaken Belief in Consent

Defendant contends the trial court erred by failing to instruct the jury sua sponte on reasonable and good faith mistake of fact as to consent. (CALJIC No. 10.65.)[6]

To commit the crime of rape, the act must be against the will of the victim. (Pen. Code, §§ 261, 262.) Thus, if the victim consented, there was no rape. However, a person committing an otherwise criminal act under a "mistake of fact, which disproves any criminal intent" may not be held criminally liable. (Pen. Code, § 26.) The Supreme Court has determined which mistakes of fact regarding a victim's consent can constitute a defense to the crime of rape.

"In *People v. Mayberry* [(1975)] 15 Cal.3d 143, [the California Supreme Court] held that a defendant's reasonable and good faith mistake of fact regarding a person's

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6 CALJIC No. 10.65 provides, "In the crime of unlawful [forcible rape], [oral copulation by force and threats] [forcible sodomy] [penetration of the [genital] [or] [anal] opening by a foreign object, substance, instrument or device by force, [violence] [fear] [or] [threats to retaliate]], criminal intent must exist at the time of the commission of the [crime charged]. [¶] There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in [sexual intercourse] [oral copulation] [sodomy] or [penetration of the [genital] [anal] opening by a foreign object, substance, instrument, or device]. Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge. [¶] [However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of conduct by the defendant that amounts to force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of the alleged victim or another is not a reasonable good faith belief.] [¶] If after a consideration of all of the evidence you have a reasonable doubt that the defendant had criminal intent at the time of the [sexual intercourse] [oral copulation] [sodomy] [or] [penetration of the [genital] [anal] opening by a foreign object, substance, instrument, or device], you must find [him] [her] not guilty of the crime."

consent to sexual intercourse is a defense to rape. [Citation.] *Mayberry* is predicated on the notion that . . . reasonable mistake of fact regarding consent is incompatible with the existence of wrongful intent." (*People v. Williams* (1992) 4 Cal.4th 354, 360.) "The foundation . . . for the reasonable belief in consent defense is evidence from which the jury could conclude the defendant acted under a *mistake of fact* that created a reasonable belief the victim consented to the charged acts." (*People v. Rhoades* (1987) 193 Cal.App.3d 1362, 1367.)

As with all defenses, the trial court has a duty to instruct sua sponte on the *Mayberry* defense only if there exists substantial evidence of the defense and the defense is not inconsistent with the defendant's theory of the case.[7] (*People v. Maury* (2003) 30 Cal.4th 342, 424.)

To constitute substantial evidence sufficient to justify the *Mayberry* instruction, "a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent." (*People v. Williams, supra,* 4 Cal.4th at p. 361.) Moreover, the defense must be consistent with the defendant's theory of the case. While the *Mayberry* defense need not be completely reconcilable with the defendant's testimony, it is inconsistent when the defense "consists of alibi, mistaken identity, or [a] blanket denial of an obviously forced sexual encounter." (*People v. May* (1989) 213 Cal.App.3d 118, 127.) As the defense is based on the premise that the defendant intended to commit a consensual sexual act, the record must contain some evidence the defendant held that state of mind at the time of the act. (*People v. Maury, supra,* 30 Cal.4th at p. 425.) The instruction need not be given when the defendant "denie[s] his active participation in the sexual conduct at issue." (*People v. May, supra,* 213 Cal.App.3d at p. 127*;* cf. *People v. Maury, supra,* 30 Cal.4th at p. 425 [instruction

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[7] This is to be distinguished from lesser included offenses, on which the trial court must instruct even if inconsistent with the defendant's theory of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 157.)

not necessary when the "defendant never admitted that he engaged in sex with [the victim], consensual or otherwise"].)

Defendant argues there was substantial evidence of Claudia M.'s equivocal conduct sufficient to justify the instruction. We agree. Claudia M. testified she removed her own underwear. Although Claudia M. testified her actions were a product of defendant's exertion of threats and force, the issue of whether defendant's actions caused Claudia M.'s equivocal conduct is for the jury to resolve. (*People v. Williams, supra*, 4 Cal.4th at p. 364.) However, we conclude the instruction was unnecessary because the defense was inconsistent with defendant's theory of the case. Although defendant testified that Claudia M. instigated sexual conduct, the basis of his defense was that he refused her advances and attempted no sexual conduct. Defendant offered no evidence that he attempted to engage in intercourse with Claudia M. under the belief that she consented, and instead testified that no such attempt took place. Defendant denied leading Claudia M. to her room, silencing her, fondling her, attempting to kiss her, or threatening to rape her. As defendant's theory of the case was that he rejected all of Claudia M.'s sexual advances, the defense was based on the premise that defendant did not want to have sex with Claudia M. As such, the defense that he attempted to have sex with her based on a reasonable and good faith mistake of fact as to her consent was inconsistent with his theory of the case, and the instruction was therefore not required.

In any event, the failure to instruct was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence that defendant attempted to rape Claudia M. was overwhelming. Claudia M.'s testimony was confirmed by the photographs illustrating the injuries defendant inflicted on her, as well as the damage he did to the door when trying to knock it down. In contrast, the evidence that defendant acted as he did in a mistaken belief Claudia M. consented is nonexistent, as defendant never testified he acted in reliance on Claudia M.'s consent. Moreover, we note the jury, after less than two hours of deliberation, also convicted defendant of criminal threats. It is apparent the jury believed Claudia M.'s

testimony that defendant threatened to rape and kill her, and disbelieved defendant's testimony that Claudia M. was the sexual aggressor. It is inconceivable that the jury would have concluded defendant threatened to kill Claudia M., but nevertheless reasonably and in good faith believed she consented to sexual intercourse.[8] In short, any error in failing to instruct on reasonable and good faith mistake as to consent was harmless beyond a reasonable doubt.

IV. Sentencing Errors

Defendant was sentenced to the upper term on attempted spousal rape, criminal threats, and willful infliction of corporal injury to a spouse, although the latter two sentences were stayed pursuant to Penal Code section 654. Defendant received concurrent jail sentences for the batteries on Valadez and Alberdin, as well as the spousal battery on June 16, 2002.

The trial court imposed the upper term in reliance on the presence of the purported aggravating factor of "multiple victims." Defendant contends the trial court erred in its selection of the upper term because "multiple victims" is no longer enumerated as a factor in aggravation in California Rules of Court, rule 4.421. Contentions that the trial court relied on "inapplicable" sentencing factors are waived if not raised at trial. (*People v. Scott* (1994) 9 Cal.4th 331, 355.) Defendant contends the waiver rule does not apply because the sentence was unauthorized. It was not. The upper term sentence would have been justified under a different factor in aggravation not identified by the trial court, that defendant "was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences [were] imposed." (Cal. Rules of Court, rule 4.421(a)(7).) Since that factor could have applied, on the basis of the batteries of

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[8] A belief in consent based on conduct that is the product of fear is not a reasonable good faith belief. (CALJIC No. 10.65.)

Valadez and Alberdin, and the spousal battery of Claudia M. on a different occasion, an aggravating factor was present and defendant could have been subject to the upper term. As such, the sentence was not unauthorized. Defendant next contends the waiver rule does not apply because he was not granted a reasonable opportunity to object. (*People v. Scott, supra,* 9 Cal.4th at p. 356.) We disagree. At the sentencing hearing, defense counsel argued for a probationary sentence. The prosecutor argued for state prison, noting, among other things, that "there were multiple victims." The trial court then offered defense counsel a "last word." Defense counsel stated the issue was submitted, and the trial court then imposed sentence, relying on "multiple victims" as an aggravating factor. Although the trial court did not specifically invite further objections, there is nothing suggesting an objection would not have been heard. Defense counsel had the opportunity to object to the use of "multiple victims" as a circumstance in aggravation, but declined to do so. The issue has therefore been waived.[9]

Defendant next contends the trial court should have imposed one-third the middle term on the two terms stayed pursuant to Penal Code section 654, rather than the full terms. Under Penal Code section 1170.1, subdivision (a), the sentence for any subordinate term on which consecutive sentences are imposed shall be one-third the middle term. This section is inapplicable, in that defendant was not sentenced consecutively on these counts. The fact that the trial court imposed full-term sentences implies a determination to impose those sentences concurrently. Concurrent sentences

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9 Defendant also suggests the waiver rule should not apply because it would have been futile to object. Defendant reasons that defense counsel had already made it clear that a probationary sentence was appropriate, so any further objection to the upper term would have been futile. Defendant misconstrues the purpose of the waiver rule. Had defendant interposed a timely objection to the use of an improper sentencing factor, the trial court could have reconsidered the discretionary decision to impose the upper term based only on aggravating factors enumerated in California Rules of Court, rule 4.421. The fact that defendant had argued against any prison term did not render futile an objection to the use of an improper aggravating factor to select the prison term to be imposed.

are also implied by the fact the sentences were stayed pursuant to Penal Code section 654. "Sentencing judges are directed to stay, not dismiss or reverse, such counts, for in the event a sentenced count is reversed upon appeal or otherwise, upon remand, the imposition of sentence on a stayed count is preserved." (*People v. Cavanaugh* (1983) 147 Cal.App.3d 1178, 1183.) The trial court did not err.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

GRIGNON, J.

We concur:

TURNER, P. J.

MOSK, J.