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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DALE FRANKLIN WENSINGER, Defendant and Appellant.	G044400 (Super. Ct. No. 02CF2890) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank Fasel, Judge. Affirmed in part and reversed in part.

William J. Kopeny for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton, Teresa Torreblanca and Scott Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, only the introductory paragraph, the facts, the part under the subheading in the Discussion section "*Double Jeopardy Barred Retrial of Defendant for Threatening Marquez*," and the Disposition are certified for publication.

In 2010, we reversed the judgment against defendant Dale Franklin Wensinger in *People v. Wensinger* (Oct. 15, 2007, G035534) [nonpub.opn.] (*Wensinger I*). On retrial, a jury convicted defendant of two counts of assault by means of force likely to produce great bodily injury (counts 1 & 3, victims Delaine Carlson and John Doe, respectively) (Pen. Code, § 245, subd. (a)(1)),[1] and three counts of making criminal threats (counts 2, 4, & 5, victims Carlson, Doe, and Ignacio Marquez, respectively) (§ 422). The court sentenced defendant to 19 years 4 months in prison, including a consecutive term of 16 months for count 5 (criminal threat against Marquez) and 10 years for two prior convictions (§ 667, subd. (a)(1)).

On appeal, defendant challenges the judgment on many grounds, including that his retrial on count 5 was barred by reason of double jeopardy or judicial estoppel. We agree the double jeopardy clause of the Fifth Amendment of the United States Constitution barred the People from retrying count 5; we therefore reverse the judgment on that count. In all other respects, we affirm the judgment.

FACTS

On the morning of May 20, 2002, Carlson was walking on the sidewalk outside Lilly King Park when he saw defendant and his Rottweiler walking toward him. As the dog came close, it jumped up and snapped its jaws in front of Carlson's face, no more than 12 inches away. Two weeks earlier, the same thing had happened in the park, but Carlson had "just jumped back and kept going." This time, however, Carlson said to defendant: "Wow. That dog needs a shot." Defendant, who seemed a little angry, said, "You want to shoot my dog?" Carlson replied: "No. He needs a shot. He is a hyper

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

dog. Apparently he needs something." Defendant repeated, "You want to shoot my dog?"

Carlson moved a step away from the dog as defendant moved a step closer, leaving the men about two steps apart. At this point, the dog was on a leash. Carlson and defendant repeated their verbal exchange one or two more times, with Carlson explaining the dog needed a shot to calm it down and defendant becoming more angry.

Carlson started to walk away. After taking about 10 steps, Carlson heard defendant say, "Attack. Attack." Carlson looked back over his shoulder and saw the dog running at him. Defendant was no longer holding the dog's leash.

The dog bit Carlson's left inner thigh. Carlson was "scared to death," and yelled for defendant to get the dog away from him. Defendant asked Carlson, "Do you want more?" Carlson yelled, "No." Defendant pulled his dog away.

Carlson walked away quickly and did not look back. He was shaking and scared. Later, Carlson saw that a piece of flesh hung from his thigh, with blood and puncture marks. The wound took about a week to a week and a half to heal and left a faint scar.

Two weeks after the incident, Carlson walked past defendant and his dog on the sidewalk inside the park. Again, the dog snapped its jaws less than 12 inches from Carlson's face. Carlson gave a hard look and kept on walking.

On October 31, 2002, at around 6:00 a.m., Marquez was at Lilly King Park walking his pit bull when he heard someone screaming, "Help me." Marquez turned around and saw an older man, between 65 to 70 years old, being followed or chased by a person with a big Rottweiler. The person with the Rottweiler was about two or three feet behind the older man and was shouting, "I'm going to kill you," "son of a bitch," and other obscenities. The dog was attacking, barking, growling, and lunging. Marquez ran toward them. He asked a park employee to phone 911, then continued running toward

the two men, who were heading for some condominiums across the street from the park. Marquez shouted at the person with the dog, "Stop. Stop."

At the condominiums, neighbors had come outside and were screaming. The man with the dog stopped running, turned toward Marquez, shouted obscenities, and said, "I'm going to kill you." The man was about 20 to 30 feet away from Marquez; the Rottweiler was growling and barking. Marquez took the threat to kill him seriously and felt intimidated and scared. Marquez shouted back, "Stop," and "I'm calling the police." The man took off toward the park across the street.

At trial, Marquez did not recognize defendant. Marquez did, however, identify on People's exhibit 1 the house where the man with the dog lived.

Within the four months prior to this incident, Marquez had seen the man at the park three or four times when Marquez and his son were practicing football there. The man with the Rottweiler had approached Marquez and his son, screamed, and said, "I'm going to kill you."

When an investigator showed Marquez a photograph of John Woolston, Marquez said he was "70 percent sure" Woolston was the man he saw being chased.

A police officer responded to Lilly King Park around 6:15 a.m. on October 31, 2002. The officer spoke with some people. He then went to 418 Harvey Street in Santa Ana, a house depicted on exhibit 1, and contacted defendant, who was exiting the residence from the garage. Defendant said people had moved his trash cans. The officer asked if defendant knew why he (the officer) was there. Defendant said it was because "he was yelling at people with his dog in the park." The officer said that people in the park were complaining about defendant "sicking" his dog on them and yelling obscenities. Defendant said they were lying and they would have to prove it.

The officer asked defendant questions about his dog, such as its license and vaccination status. Defendant said, "Nobody's taking my dog," and uttered some

obscenities. At that point, defendant's demeanor changed drastically; he became very excited and was almost yelling.

Uncharged Conduct

Stanley Brunner testified that he lives near defendant. A few months before October 2002, he walked through Lilly King Park toward defendant's house to have a conversation with him. Brunner had a sprained ankle and was walking with a cane. Defendant was in his garage; Brunner stayed in the park about 15 to 20 yards away. As they talked, defendant became angry and started calling Brunner insulting, vulgar names. He threatened to attack Brunner physically and to send his Rottweiler after him. The Rottweiler was not in the garage at the time.

Defense Case

Woolston testified he was 65 years old in 2002 and lived near Lilly King Park. At some point in 2002, he heard defendant cursing loudly, and making references to trash cans and a car. Defendant had a dog with him. That was the only time Woolston saw defendant yelling and cursing. Defendant and his dog did *not* chase Woolston on that date or on any other date. In response to a subpoena in this case, Woolston sent a letter to the district attorney's office saying they should not call him as a witness because he was not victimized.

DISCUSSION

Double Jeopardy Barred Retrial of Defendant for Threatening Marquez

Defendant argues his conviction for making a criminal threat against Marquez must be reversed, either on grounds of double jeopardy or judicial estoppel, because the People conceded in *Wensinger I*, that insufficient evidence supported his

conviction for that offense in his first trial. In *Wensinger I*, he was charged in count 7 (former count 7) with criminally threatening Marquez on October 31, 2002. On retrial, he was charged with the identical offense in count 5 (current count 5).

In *Wensinger I*, we reversed the judgment on all counts due to a missing reporter's transcript of a court hearing under *People v. Marsden* (1970) 2 Cal.3d 118.[2] In doing so, we did not address defendant's contention that there was insufficient evidence to support his conviction on former count 7, although we did take note of his contention. In *Wensinger I*, the Attorney General conceded defendant's conviction for former count 7 should be reversed because, under the evidence, it was "impossible to know if [defendant] willfully threatened to commit a crime which would 'result in death or great bodily injury,' or if the threat was 'so unequivocal, unconditional, immediate, and specific,' as to convey to [Marquez] 'a gravity of purpose and an immediate prospect of execution of the threat,'" as required under section 422.

On retrial of this case, defense counsel moved prior to trial to dismiss current count 5, noting that in *Wensinger I*, this court stated "that the People conceded . . . there was insufficient evidence presented at the trial to support the" offense. In *Wensinger I*, we stated, "Defendant was convicted of making criminal threats to Marquez even though the People concede there was insufficient evidence that defendant threatened to commit a crime against Marquez." Defense counsel argued the People were "estopped by their concession" from proceeding on current count 5 and that there was an "implied acquittal."

The prosecutor countered that in *Wensinger I*, this court did not rule on the issue on the merits. The prosecutor stated she agreed with the Attorney General that the

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[2] We take judicial notice of the appellate briefs, reporter's transcript, and our opinion in *Wensinger I*. Appellant's separate request to receive the appellate briefs, this court's opinion, and the reporter's transcript into evidence is unnecessary.

evidence presented at the first trial on the offense was insufficient, but that she believed she could present additional evidence in the new trial. Indeed, because the trial judge seemingly was concerned about "bad faith" or "professional responsibility" of the prosecutor, the prosecutor took pains to show the additional evidence she could present to overcome the deficiency. In an offer of proof, the prosecutor stated: "[T]here was no testimony at any point about statements made to [Marquez] by the defendant. When we are talking about criminal threats, the statements are really the bulk of the evidence. [¶] In the police report . . . , Marquez told [the officer] that the defendant said to Mr. Marquez that he was going to [sic] his dog on him and 'I am going to kill you.'" The prosecutor explained that this evidence was never presented in the first trial. She also stated: "[I]n the police report Mr. Marquez indicated that the defendant continued to advance on him with his dog and [Marquez] continued to retreat. [The officer] was called at trial; however, none of that information was elicited." In an ensuing discussion of the evidence adduced at the first trial, the prosecutor and defense counsel referred to specific pages of the reporter's transcript of the first trial.

The court denied defendant's motion to dismiss current count 5. The court declined to reweigh the evidence presented in the first trial, particularly because the jury there was convinced beyond a reasonable doubt that defendant was guilty of the offense.

In this appeal, the Attorney General again "agrees that the evidence at the first trial was insufficient to support that conviction," making this the third time the People have conceded the point.

If this court had reversed former count 7 in *Wensinger I* for lack of substantial evidence, the double jeopardy clause of the Fifth Amendment to the United States Constitution would clearly have barred the People's retrial of defendant for the offense: "*The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding*." (*Burks v. U.S.* (1978) 437 U.S. 1, 11 (*Burks*), fn. omitted,

italics added.) "The Clause does not allow 'the State . . . to make repeated attempts to convict an individual for an alleged offense,' since '[t]he constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'" (*Ibid*.) "[O]nce the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal." (*Id.* at p. 18.)

For double jeopardy purposes, whether an appellate court, instead of a trial court, decides that a defendant should be acquitted is "a purely arbitrary distinction." (*Burks, supra*, 437 U.S. at p. 11.) While it clearly would have been more efficient had we reached the insufficiency of the evidence argument in *Wensinger I*, the insufficiency issue did not somehow disappear because we failed to do so. Procedural niceties aside, the bedrock constitutional principal is clear, and bears repeating: "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." (*Burks*, at p. 11, fn. omitted.) A violation of that bedrock principle is precisely what the prosecutor on remand unabashedly sought to do. The prosecutor stated: "There were things that the prior trial prosecutor could have done and did not do to support [former count 7], and that is the only reason I am asking to proceed on that." "I would not be proceeding if I was just going to be presenting the same evidence. I think there was additional evidence that can be presented, admissible evidence that — in addition to what was presented at the first trial to support that charge." In other words, the prosecutor was impermissibly asking for "another opportunity to supply evidence which it failed to muster in the first proceeding." (*Ibid.*, fn. omitted.)

On remand the trial court should have dismissed the offense charged in current count 5 based on the clear insufficiency of the evidence in the first trial. As the prosecutor acknowledged: "There was no testimony at any point [in the first trial] about

statements made to [Marquez] by the defendant." "So my feeling was there are statements that are critical to this count that are attributed to the defendant *that were never elicited*, and I feel that they would be admissible in this matter." True, in *Wensinger I*, we reversed the entire case for a new trial. Normally, "reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect . . . . [¶] The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial . . . ." (*Burks*, *supra*, 437 U.S. at pp. 15-16.)

It is immaterial we reversed the judgment in *Wensinger I* on grounds entirely unrelated to the sufficiency of the evidence. There was no final judgment in the matter, nor did the law of the case doctrine preclude inquiry into the sufficiency of the evidence.[3] The issue was still open and the court was required to adjudicate it on remand. When defense counsel moved to dismiss current count 5 in the trial court, based on insufficiency of the evidence in the first trial, the trial court was obligated either to accept the People's concession that the evidence had been insufficient, or, if it chose to do so, to review the record of the first trial to determine whether the evidence was indeed insufficient. The court erred by declining to review the sufficiency of the evidence, despite its access to the first trial transcript.

United States v. Marolda (9th Cir. 1981) 648 F.2d 623, was a procedurally similar case, and raised the same double jeopardy argument presented in the instant appeal. In *Marolda*, the defendant, in his first appeal, challenged his conviction on

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[3] Application of the law of the case doctrine requires that "'the point of law involved must have been necessary to the prior decision[and] that the matter must have been actually presented *and determined* by the court . . . .'" (*People v. Shuey* (1975) 13 Cal.3d 835, 842, italics added, disapproved on a different point in *People v. Bennett* (1998) 17 Cal.4th 373, 389-390, fn. 5.)

several grounds, including that the evidence was insufficient to support the conviction. (*Id.* at p. 624.) But the appellate court's opinion "made no mention of Marolda's sufficiency of the evidence argument" and reversed the judgment on other grounds. (*Ibid.*) On remand, the defendant moved in the district court "to dismiss on double jeopardy grounds, contending there had been insufficient evidence." (*Ibid.*) The defendant argued, and the government conceded, "that, if the evidence was insufficient to support a conviction at the first trial, double jeopardy bars retrial." (*Ibid.*) The district court denied the defendant's dismissal motion. (*Ibid.*) On appeal, the appellate court reviewed the record from the first trial, found the evidence was insufficient to support the verdict, and held that the district court should have granted the defendant's motion to dismiss. (*Id.* at p. 625.)

Likewise, the reporter's transcript of the first trial is now before us. As the People have acknowledged on three separate occasions, it is clear the evidence was insufficient to support former count 7 in the first trial. Accordingly, the judgment on current count 5 is reversed, and we direct the entry of judgment of acquittal on that count.

Substantial Evidence Supports Counts 3 and 4

Defendant contends the evidence is insufficient to sustain his convictions on counts 3 and 4 (assault of Doe by means of force likely to cause great bodily injury, and criminal threat to Doe, respectively). Accordingly, we first summarize the applicable standard of review. "In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-

1054.) "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) An appellate court may set aside a judgment for insufficiency of the evidence to support the jury's verdict only if it clearly appears "that upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) This standard of review dooms defendant's insufficiency of the evidence argument regarding counts 3 and 4.

1. *Substantial evidence supports the jury's finding on count 3 that defendant assaulted Doe*

The jury convicted defendant of assaulting Doe by means of force likely to produce great bodily injury under section 245, subdivision (a)(1). Defendant contends insufficient evidence showed he committed an act which would directly and probably result in the application of force to Doe. He points out that his dog did not bite Doe and that he (defendant) did not let the dog off the leash and "sic" it on Doe. He notes there was no touching of Doe, only yelling and threats.

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) "'[A]ssault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.'" (*People v. Golde* (2008) 163 Cal.App.4th 101, 108.) The crime of assault likely to produce great bodily injury does not require an actual injury. (*People v. Hopkins* (1978) 78 Cal.App.3d 316, 320.) "Ordinarily, '[a]n assault occurs whenever

"'[t]he next movement would, at least to all appearance, complete the battery.'"'" (*People v. Page* (2004) 123 Cal.App.4th 1466, 1473.) "'[T]he question of whether or not the force used was such as to have been likely to produce great bodily injury, is one of fact for the determination of the jury based on all the evidence, including but not limited to the injury inflicted.'" (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066.)

"'Holding up a fist in a menacing manner, drawing a sword, or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault. So, *any other similar act*, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of *using actual violence* against the person of another, will be considered an assault.'" (*People v. Colantuono* (1994) 7 Cal.4th 206, 219.) "A dog may be the instrumentality of an attack causing great bodily injury just as a loaded gun or knife can be." (*People v. Frazier* (2009) 173 Cal.App.4th 613, 618.) "[W]hether a specific dog in a given case is a 'deadly weapon or instrument' is ultimately a question of fact for the jury." (*People v. Nealis* (1991) 232 Cal.App.3d Supp. 1, 4.)

Defendant's contention lacks merit. The following substantial evidence supports the jury's finding defendant's actions would have naturally and probably resulted in the application of the requisite force against Doe: Defendant and his Rottweiler chased Doe. Doe ran from them and called for help. Defendant was only two to three feet behind Doe. The Rottweiler was attacking, barking, growling, and lunging. Defendant yelled, "I'm going to kill you," "son of a bitch," and other obscenities. Even though defendant kept the dog on a leash, he and the Rottweiler chased Doe. Had they caught up to Doe, the dog could have attacked the victim.

2. *Substantial evidence supports the jury's finding on count 4 that defendant's threat caused Doe to be in sustained fear*

The jury convicted defendant of making a criminal threat against Doe in violation of section 422. Defendant contends insufficient evidence showed his threat caused Doe to be in reasonable and sustained fear as required by the statute. He argues: (1) there is a dispute as to Doe's identity, (2) Marquez could only speculate from a distance about what was going on in Doe's mind, and (3) there was no evidence Doe's fear was sustained.

Among the elements of a section 422 violation are "that the threat actually caused the person threatened 'to be in sustained fear . . . ,' and . . . that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 228.) "Sustained" fear refers to "a period of time that extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.)

Defendant's contention lacks merit. Regardless of Doe's identity, the following substantial evidence supports the jury's finding Doe was in sustained fear: Defendant and his Rottweiler chased Doe from the park to the condominium complex across the street, a distance of 30 to 40 yards; Doe ran from them, screaming, "Help. Help me"; defendant was about two to three feet behind Doe; the Rottweiler was attacking, barking, growling, and lunging; and defendant yelled, "I'm going to kill you," "son of a bitch," and other obscenities.

The Court Properly Instructed the Jury on Count 3

Defendant contends the jury instructions on count 3 (assault of Doe by means likely to cause great bodily injury) were ambiguous and misled the jury.

The court instructed the jury with CALCRIM No. 875 on assault with force likely to produce great bodily injury, as follows: "To prove that the defendant is guilty of

this crime, the People must prove that: [¶] 1(A). The defendant did an act that by its nature would directly and probably result in the application of force to a person, and, [¶] 1(B). The force used was likely to produce great bodily injury; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] AND 4. When the defendant acted, he had the present ability to apply force likely to produce great bodily injury. [¶] Someone commits an act willfully when she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage. [¶] The terms application of force and apply force mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind. [¶] The touching can be done indirectly by causing an object, an animal, or someone else to touch the other person. [¶] The People are not required to prove that the defendant actually touched someone. [¶] The People are not required to prove that the defendant actually intended to use force against someone when he acted."

Defendant notes there was no evidence of any physical contact between him or his dog and Doe. He argues, because the instruction states that no touching of the victim was required, the jury *should* have been instructed he could be convicted of count 3 only if the jury concluded "he was chasing and threatening John Doe and that his act of chasing John Doe would, by its nature, directly and probably result in the application of force likely to produce great bodily injury to John Doe." He seems to argue the jurors could have understood the instruction to allow them to convict him of count 3 even if they found he did not *chase* Doe, but merely *threatened to touch* Doe with his dog.

A court bears a sua sponte duty to instruct the jury on (1) the elements of an offense (*People v. Flood* (1998) 18 Cal.4th 470, 481), (2) an affirmative defense

supported by substantial evidence and not inconsistent with the defendant's theory of the case (*People v. Mentch* (2008) 45 Cal.4th 274, 288), and (3) """the general principles of law relevant to the issues raised by the evidence[, i.e.,] those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case""" (*People v. Breverman* (1998) 19 Cal.4th 142, 154). "[W]ithout any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case." (§ 1093, subd. (f).)

"Once the trial court adequately instructs the jury on the law, it has no duty to give clarifying or amplifying instructions absent a request." (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1331.) "'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) A defendant who fails to object below may not raise a claim of instructional error on appeal, unless the claim raises issues concerning substantial rights. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1315 & fn. 43; § 1259.)

An appellate court reviews assertions of instructional error de novo. (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469.) It independently reviews the wording of a jury instruction "and assesses whether the instruction accurately states the law." (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1574.) """In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding . . . all jury instructions which are given.""" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) Furthermore, "we consider the arguments of counsel in deciding whether the jury misunderstood the instructions [citation]." (*People v. Huggins* (2006) 38 Cal.4th 175, 193.) """If the charge as a whole is ambiguous, the

question is whether there is a '"reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.'"'" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 182.)

In the prosecutor's closing argument to the jury, she clarified that the question for the jurors was whether defendant chased Doe with the Rottweiler: "[R]emember that a touching does not have to be proven. Only that it was likely to result. That it was probable. The touching or the likely touching in this case would have been done by an animal, the Rottweiler." "What was the act that the defendant did in relation to John Doe to satisfy element one? The act was the chasing of John Doe with the Rottweiler. Yelling at John Doe, 'I'm going to kill you,' with the dog lunging and barking and growling. That's the act. The act is the chasing of John Doe. [¶] Would that act, the chasing of John Doe, was it probable that it would result in John Doe being offensively touched by that dog in some way? Of course, it is probable. It is irrelevant that it didn't happen. Only that . . . it . . . could . . . have happened."

Given the prosecutor's closing argument and the legal presumption that jurors are capable of understanding the court's instructions, we conclude there is no reasonable likelihood the jury misunderstood the instructions on count 3.

The Court Did Not Abuse Its Discretion by Admitting Uncharged Conduct Evidence

Defendant contends the court abused its discretion by admitting Brunner's testimony about defendant's threat against him. He argues the court failed to make an "explicit determination" under Evidence Code section 352. He further asserts defendant's encounter with Brunner (during which the dog was not present) was dissimilar to the charged crimes and therefore insufficiently probative.

The People moved before trial for a ruling on the admissibility of defendant's uncharged threats against Carlson, Marquez, Brunner, and Brunner's wife. Defense counsel did not object to the evidence concerning Carlson. As to the evidence

concerning Marquez, the court noted the defense might argue the charged conduct was "a one-time thing, . . . inadvertent, . . . an accident . . . ." The court continued: "Separate and apart from the specific intent issue, [Evidence Code section 1101, subdivision (b)] allows evidence to show absence of mistake or accident. I can see where it is probative and relevant with respect to that and in doing [an Evidence Code section] 352 weighing. So the objection is overruled."

The court and counsel then discussed the incidents where defendant called Brunner's wife a "fucking bitch," causing Brunner to go to defendant's house to confront him. The court stated: "[I]f [defendant], every time he is confronted with an adverse situation or he gets upset with somebody . . . , he wants to go and use his dog as the muscle . . . behind him , . . . that's classic [Evidence Code section 1101, subdivision (b) evidence] with respect to intent and common scheme or plan and absence of mistake. [¶] It goes to his state of mind. 'I got this dog. If you mess with me, I am sicking my dog.'" But the court found defendant's statement to Brunner's wife was "problematic and . . . might rise to the level of inadmissible character evidence and [was] not [Evidence Code section] 352 probative. . . . Maybe it is a redaction type thing that [defendant] goes over there . . . and they are not getting along and, [defendant threatens Brunner] by using his dog. [¶] [T]hats what's probative. What happened to the wife to get [Brunner] over there, [is not] necessarily admissible because the court has some Evidence Code section 1100 issues with respect to that." Accordingly, the prosecutor agreed not to introduce evidence that defendant called Brunner's wife a "fucking bitch."

After the close of evidence, the court instructed the jurors with CALCRIM No. 375, stating they could consider evidence of the uncharged acts for the limited purpose of deciding defendant's intent, motive, mistake, accident, or plan, but not to conclude that defendant has a bad character or is predisposed to commit crime.

Under Evidence Code section 1101, character evidence is inadmissible when offered to prove a defendant's "conduct on a specified occasion," except to prove

certain facts such as intent, plan, or absence of mistake (and not predisposition to commit an act). (*Id.*, subds. (a), (b).) To be probative of such facts, a defendant's uncharged conduct must be sufficiently similar to the charged offense. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 401-402 (*Ewoldt*).) The required degree of similarity varies with the type of fact to be proved. As relevant here, a greater similarity between the uncharged conduct and the charged offense is required to establish a common plan, as opposed to demonstrating a defendant's intent or lack of mistake. (*Id.* at p. 402.)

As to a defendant's intent or lack of mistake, "'the recurrence of a similar result . . . tends (increasingly with each instance) to [negate] accident . . . or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .'" (*Ewoldt*, *supra*, 7 Cal.4th at p. 402.) "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."'" (*Ibid.*)

"A greater degree of similarity is required in order to prove the existence of a common design or plan. [I]n establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but 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.'" (*Ewoldt*, *supra*, 7 Cal.4th at p. 402.)

"Because evidence of other crimes may be highly inflammatory, its admissibility should be scrutinized with great care." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1007.) "[I]n order to be admissible such evidence 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.'" (*People v. Balcom* (1994) 7 Cal.4th 414, 426.) Evidence Code section 352 affords a court the discretion to "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." "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

We review for an abuse of discretion the court's ruling that defendant's uncharged conduct against Brunner was relevant to establish intent, common plan, and absence of mistake. (*People v. Catlin* (2001) 26 Cal.4th 81, 120.) In doing so, we examine the evidence in the light most favorable to the court's ruling. (*Ibid.*) Defendant's angry threats against Brunner were similar enough to his threats against Carlson and Doe to show his intent to scare and intimidate each victim, and that his conduct was no mistake.[4] As to the existence of a common plan, the uncharged act and the charged crimes shared the following common features: Defendant angrily yelled obscenities and vulgar names. He threatened to attack or kill the victim. Although the Rottweiler was present during the charged conduct, but not during the incident with Brunner, each encounter included defendant's threat to use the dog against the victim; with Carlson and Doe, defendant displayed the dog, whereas with Brunner, defendant verbally threatened to send out the Rottweiler. We conclude the court properly exercised its discretion in ruling defendant's threat against Brunner was relevant.

Nor did the court abuse its discretion in not excluding the conduct under Evidence Code section 352. "[T]he trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of

[4] We do not include the charged threat against Marquez in our analysis since we have concluded retrial of that offense was barred by double jeopardy.

justice.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) A trial court need not expressly mention all relevant factors under Evidence Code section 352 "'if the record as a whole shows the court was aware of and performed its balancing function'" under the statute. (*People v. Lewis, supra*, 46 Cal.4th at p. 1285.) Indeed, "a trial court, in making a determination whether certain evidence is substantially more prejudicial than probative, 'need not expressly weigh prejudice against probative value — or even expressly state that [it] has done so . . . .'" (*People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6; see also *People v. Catlin*, *supra*, 26 Cal.4th at p. 122 ["such explanations are not required"].)

Here, the court listened to defense counsel's argument that the uncharged acts evidence was cumulative, nonprobative, and too prejudicial. The court ruled defendant's statement to Brunner's wife was insufficiently probative under Evidence Code section 352 to be admissible. The record shows the court was aware of and exercised its discretion under Evidence Code section 352. The court's ruling admitting Brunner's testimony was not arbitrary, capricious, or absurd. There was no abuse of discretion.

There Was No Cumulative Error

In his final contention, defendant asserts cumulative errors require reversal of the judgment. We have found only one error, i.e., that the People improperly retried defendant for making a criminal threat against Marquez. Accordingly, we have reversed the judgment on current count 5. Defendant contends the error allowed the jury to hear Marquez's testimony about defendant's threats against him, and the testimony prejudiced defendant as to counts 2 and 4 (criminal threats against Carlson and Doe, respectively). Defendant's contention lacks merit. Even if defendant had not been tried for current count 5, Marquez's testimony about defendant's October 31, 2002 threat would have been admissible as uncharged conduct probative of intent, plan, and lack of mistake. The

evidence on counts 2 and 4 was strong. It is not reasonably probable a result more favorable to defendant on counts 2 and 4 would have been reached in the absence of the error concerning current count 5. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment of conviction on current count 5 is reversed, the trial court is directed to enter a judgment of acquittal on that count, and the judgment is modified by striking the 16 month consecutive prison term on current count 5. The trial court is directed to prepare an amended abstract of judgment reflecting the modified sentence and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.