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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
PERCY LOVE III,  
Defendant and Appellant.

A131687  
(Contra Costa County  
Super. Ct. No. 1014646)

**I. INTRODUCTION**

After a jury trial which lasted less than a day, and jury deliberations of about an hour, appellant was found guilty of two felony counts and one misdemeanor count. The two felony counts were inflicting corporal injury on the mother of his child and false imprisonment by violence. (Pen. Code, §§ 273.5, subd. (a), and 236/237, subd. (a).)<sup>1</sup> The misdemeanor count was for violating a court order. (§ 273.6, subd. (a).) The court sentenced appellant to a total of four years in state prison. He appeals, claiming ineffective assistance of counsel in two respects. We reject both arguments and affirm the judgment of conviction.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

By an information filed on December 31, 2010, appellant was charged with the three counts noted. The information also alleged two prison priors. (§ 667.5, subd. (b).)

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<sup>1</sup> All further statutory references are to the Penal Code.

The felonies charged related to appellant's conduct toward a young woman, Lacey Cater, the mother of appellant's one-year-old child.

A jury trial commenced on January 6, 2011, but only with opening instructions given by the court and brief opening statements by counsel. The following day, evidence was presented to the jury via four witnesses testifying for the prosecution. Appellant presented no evidence.

One of the prosecution's witnesses was a woman staying at a Marriott Inn in San Ramon, Kathreena Bohr. At approximately 1:00 a.m. on the morning of June 5, 2010, Bohr was walking around the back of the Inn's premises, when she heard a woman screaming "Help me, help me," followed by the sound of running. Bohr went to the parking lot in front of the Inn and saw a man and a woman fighting. The woman was later identified as Cater, who Bohr described as being about 20 years old, 5-feet, 5-inches tall, and weighing about 115-118 pounds with fair hair. Bohr described appellant, an African-American, as "very powerfully built [and] . . . very conditioned and strong."

Bohr testified that, when she got to the front parking lot of the Inn, she saw "a couple engaged in fighting." Cater was, Bohr continued, "running as fast as she could" away from appellant, while screaming " 'Help me' at the top of her lungs." Bohr testified that appellant caught up to Cater, threw her to the asphalt pavement of the parking lot, and "was in the process of dragging her across the asphalt." While holding on to the "upper part" of her body, appellant dragged her "six, seven feet. Enough to skin her—her legs and ankles raw."

Bohr tried to intervene, but the two kept "screaming at each other." Cater tried "backing away quickly" but appellant "caught her again" and started "punching her and they were fighting, screaming, and fighting." Appellant, she added, threw the "first punch."

Cater was able to get up, Bohr testified, but then ran away from appellant for 20 or 30 feet, while she and appellant were continuing to yell at each other. But, Bohr continued, appellant caught her again and delivered "body punches" to her, after which

Cater “was down on the ground for a few minutes more . . . . And I think he was kicking her a little bit.”

Bohr then went into the Inn lobby and to see if the desk clerk had called the police; shortly thereafter, she opened the doors to the lobby and asked Cater to “come inside,” which she did, albeit with appellant “right behind her.”

Although Bohr and a desk clerk, Ahmed Brown, were present in the lobby, the two continued to scream at each other. Cater tried to slap appellant, and he moved to punch her. According to Bohr, the things he did to her in the lobby were “[g]rab her, smack her, slap her, punch her” and “[g]rabbed for her purse.” And, during all of this, the two were continuously screaming at each other “face-to-face.” Per Bohr, the entire altercation that she witnessed, both outside and inside, lasted about 10 minutes and ended when the police arrived. She summed up the altercation she had witnessed by saying: “It was pretty angry. She—she may have been very verbally abusive, but he was excessively physically abusive in response.”

The Inn’s desk clerk at the time, Brown, also testified. He stated that he received a call from a guest who told him that “a woman was crying for help.” He sent a security agent to investigate and also called the police. After he had done so, appellant, Cater, and an older woman (almost certainly Bohr, although not specifically identified as such) came into the lobby of the Inn. Cater and appellant were arguing with “[r]aised voices.” Bohr was trying to comfort Cater and calm her down; appellant was standing in front of Cater as that was happening. Cater then “got up and she was walking away from him. And he got close to her and he bit her” on her face, which caused Cater to scream. Shortly thereafter, appellant left the lobby. The police arrived soon afterwards.

Brown testified that, on the night in question, he saw “bruising or markings” on Cater’s arms, and he also recognized the “red marks” on one of her shoulders, her middle back, and an arm area shown in police photographs.

San Ramon Police Officer Jonathan Stephens testified that, when he arrived at the Inn, appellant was sitting on an outside stairway. Cater was in the lobby, in an “hysterical crying state” albeit being “consoled” by (presumably) Bohr. Cater “calmed

down” in “a couple of minutes” after Stephens started talking to her, but remained “emotional throughout . . . my entire contact with her.” Cater had, per Stephens’ testimony, abrasions all over her body, including on her arms, back and shoulder. Photographs of those injuries were introduced into evidence and shown to the jury.

Another officer arrested appellant and took him to a squad car; Cater was, apparently, nearby, and appellant said to her: “Lacey, don’t do this to me.” Thereafter, although asked several times by Stephens, appellant declined to give his name. At the police station, appellant told Stephens that he had been in an intimate relationship with Cater and she had borne their child.

Cater was not present at the trial. The only other witness to testify was her mother, Cynthia Martinez. She testified that Cater had disappeared on December 17, 2010, leaving her child, then one year old, with Martinez. The child’s birth certificate was admitted into evidence, but it apparently did not show the name of the child’s father.

As noted above, the defense presented no evidence.

The case went to the jury at 2:45 p.m. on January 7, 2011, and it returned a verdict of guilty on all three counts a little over an hour later. The prosecution then moved to strike one of the prior conviction allegations as mistakenly charged. That motion was granted, and appellant waived a jury trial on the other prior conviction allegation.

On March 4, 2011, the court imposed a total prison term of four years, plus a restitution fine, but suspended a parole revocation fine. Appellant received custody and conduct credits totaling 322 days.

On the same day, appellant filed a notice of appeal.

### **III. DISCUSSION**

#### *A. Appellant’s Contentions and the Applicable Standard of Review.*

In urging reversal of his conviction, appellant makes only one argument: his trial counsel did not provide effective assistance of counsel in two respects: (1) he did not urge the jury to convict appellant on the two lesser-included offenses of the two felony counts, i.e., simple assault or simple battery regarding count one and false imprisonment

without violence as to the second count; and (2) he did not object to alleged “prosecutorial misconduct” when the prosecutor suggested that Cater did not appear at the trial because she might have been either “dead” or “scared.” Appellant also argues that the combination of these two alleged deficiencies amounted to “cumulative error.”

As our Supreme Court has recently summarized the applicable law: “To prevail on a claim of ineffective assistance of counsel, defendant ‘must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. [Citation.] Tactical errors are generally not deemed reversible; and counsel’s decision making must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . .’ [Citation.] Finally, prejudice must be affirmatively proved; the record must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.]” (*People v. Hart* (1999) 20 Cal. 4th 546, 623-624.)

More recently, the same court reiterated this highly deferential standard of review. In *People v. Weaver* (2001) 26 Cal.4th 876, 925-926, the court wrote: “ ‘ “[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel’s performance was ‘deficient’ because his ‘representation fell below an objective standard of reasonableness . . . under prevailing professional norms.’ [Citation.] Second, he must also show prejudice flowing from counsel’s performance or lack thereof. [Citation.] Prejudice is shown when there is a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citation.]” [Citation.] [Citation.] [Citation.] [¶] ‘Reviewing courts defer to counsel’s reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a “strong presumption that counsel’s conduct falls within the wide

range of reasonable professional assistance.”’ [Citations.] ‘[W]e accord great deference to counsel's tactical decisions’ [citation] and we have explained that ‘courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight’ [citation]. ‘Tactical errors are generally not deemed reversible, and counsel’s decisionmaking must be evaluated in the context of the available facts.’ [Citation.] [¶] In the usual case, where counsel’s trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel’s acts or omissions.”

Finally, as our Supreme Court has noted several times recently, “rarely will an appellate record establish ineffective assistance of counsel.” (*People v. Thompson* (2010) 49 Cal.4th 79, 122.) Whenever such is found, it is usually via a habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; see also *People v. Snow* (2003) 30 Cal.4th 43, 111.)

*B. Under These Standards, There Was No Ineffective Assistance of Counsel.*

Appellant’s first argument regarding the alleged ineffective assistance of counsel is that trial defense counsel should have argued that the jury should only convict appellant of the lesser-included offenses under both of the charged felony counts.

As noted above, appellant was charged with two felony counts, the first for inflicting corporal injury on the mother of his child and the second for false imprisonment with violence. On both counts, the court specifically instructed the jury regarding both the charged offense *and* the respective lesser included offenses. Indeed, its instructions regarding the respective lesser included offenses were lengthier than those on the offenses charged in the information.<sup>2</sup> And in its instructions regarding the charged

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<sup>2</sup> A point which makes appellant’s repeated references to *People v. Babich* (1993) 14 Cal.App.4th 801 irrelevant. In that case, our colleagues in Division Three of this court found reversible error in the trial court’s failure *to instruct* on lesser-included offenses of the charged felony false imprisonment. That opinion is simply not relevant to whether, and how much, defense counsel should *argue to the jury* concerning such an option, and particularly so in a case where, as here, there was so much evidence of “violence and menace” being inflicted on the victim.

offenses, the court made clear that the offense required a showing of “a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force.” As to the false imprisonment charge, i.e., the second count, the court made clear that such required evidence that appellant “intentionally and unlawfully restrained or confined or detained someone by violence or menace. . . .”

After the prosecutor’s opening final argument to the jury, defense counsel made several arguments as to why the jury should not find appellant guilty of the charged felonies. First of all, he noted that the alleged victim, Lacey Cater, was “not here” and his client was thus being denied the “right to confront and cross-examine our accusers” a right “not being afforded to my client in this case.” He then conceded that they “had a child together” and had also had some prior legal issues which had led to a restraining order issuing against appellant.

He then discussed the evidence presented by witnesses Bohr and Stephens as to what happened between appellant and Cater. In so doing, defense counsel specifically mentioned “the lesser offenses which have somewhat fewer elements.” This was immediately followed by the main thrust of defense counsel’s closing argument, i.e., that Cater was just as much an aggressor as appellant, i.e., that what was involved was “mutual combat.” Defense counsel pointed out that, considering the respective build of appellant and Cater “it’s pretty clear that if he had really punched her six times like we heard described, she’d have been out cold. She wouldn’t have been getting up, backing up, scrambling away, and so on and so forth. That just makes no sense at all, that testimony.”

Then defense counsel pointed out that Bohr had “tried to break them up. She tried to calm them down. She described her efforts and reactions in detail. They’d get calmed down. They’d start talking peacefully. And then Ms. Cater would go off and she’d start yelling and screaming and swinging.”

He also noted that, contrary to what had been said in the prosecutor’s opening statement to the jury, the latter had not established that appellant had “lied about his name.”

But, as noted above, clearly the most important evidence supporting the jury's verdict to convict appellant on the charge greater offenses, and not on the lesser-included offenses, were (1) the testimony of Bohr, Brown and Stephens regarding the injuries suffered by Cater and (2) the police photographs, introduced into evidence and shown to the jury, which specifically showed those injuries.

Regarding the first point, Bohr testified that she saw appellant dragging Cater across the asphalt paving of the Inn's parking lot, and that he dragged her "six, seven feet. Enough to skin her—her legs and ankles raw." Bohr also saw appellant "punching her" in the outside area and, once the couple was in the Inn's lobby, she saw him "[g]rab her, smack her, slap her, punch her."

Brown, the desk clerk at the Inn, also testified that he saw appellant bite Cater, on the latter's face or ear and saw "bruising or markings on her arms" afterwards.

As noted above, Officer Stephens arrived somewhat later, but found Cater with "numerous abrasions all over her body, her arms, her back, her shoulders." His pictures of her were introduced into evidence and shown to the jury. These pictures, which are in the record before us, clearly show a woman's body with multiple wounds and abrasions.

Based on this evidence, it seems clear why defense counsel did not argue more to the jury regarding the lesser-included offense on the first count, the count alleging "corporal injury resulting in a traumatic condition" (see § 273.5.) to Cater: there was substantial evidence before the jury of such injury. The court had specifically instructed the jury that a "traumatic condition is a wound or other bodily injury, *whether minor or serious*, caused by the direct application of physical force." (Emphasis supplied.) In view of this and the evidence before the jury, any argument by defense counsel, either brief or extended, that there was no such injury would have bordered on the frivolous.

Regarding the first count, i.e., the charge of inflicting corporal injury on the mother of appellant's child (§ 273.5, subd. (a)), appellant argues to us that "the victim in this case did not testify and the evidence of injuries came from one witness, who provided disparate snapshots of the event. The argument could and should have been

made that there was only proof of misdemeanor conduct in that the injuries could have come from another time.”

This argument is simply flatly inconsistent with the record before us. Bohr and Brown both saw some portions of the fight between the two and both testified as to the injuries inflicted on Cater by that fighting. Officer Stephens, one of the responding officers who came, apparently rather promptly, in response to Brown’s call, took the pictures that were admitted into evidence, and there was and is nothing remotely “disparate” about them, either as compared to one another or as compared to the testimony of Bohr and Brown as to what they saw appellant do to Cater.

The same result applies to the second count, which alleged “false imprisonment by violence.” The court instructed the jury that a finding of guilty on this offense required a finding that the “defendant intentionally and unlawfully restrained or confined or detained someone by violence or menace; and [¶] The defendant made the other person stay or go somewhere against that person’s will. [¶] Violence means using physical force that is greater than the force reasonably necessary to restrain someone.” The court’s instruction regarding the lesser-included offense under the false imprisonment count specifically omitted the words “violence” or “menace” or any similar words or phrases. Again, in view of the testimony of, especially, Bohr and Brown, any argument by defense counsel that Cater had been restrained, but that such had been accomplished without any “violence” or “menace,” would have been very weak. Defense counsel’s decision not to make either argument was clearly not ineffective assistance of counsel.

With regard to the second count, false imprisonment by violence or menace, appellant rather inaccurately summarizes the testimony of Bohr<sup>3</sup> as to what she saw both outside and inside the Inn on the night in question, and she concludes: “Ms. Bohr’s

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<sup>3</sup> Appellant also argues that defense counsel was ineffective for failing to note Bohr’s “potential bias,” an alleged bias apparently based on the facts that (1) she apparently had a 1993 misdemeanor conviction for soliciting for prostitution and (2) had apparently commented to an investigating detective that what she had seen on the night in question “was like the way a pimp would treat a whore.” These arguments do not, in the slightest, demonstrate any ineffective assistance of counsel.

account made clear that appellant and Ms. Cater engaged in a mutual struggle.” This is very incomplete. As noted above, Bohr, a paying guest at the Inn, testified extensively about appellant’s “punching” of Cater, his dragging her six or seven feet over an asphalt parking area, and his hitting of her inside the Inn’s lobby. And it omits Bohr’s testimony that appellant was “excessively physically abusive” to Cater.

Finally, appellant’s suggestion that his defense counsel should have argued for a misdemeanor conviction because Cater’s “injuries could have come from another time” borders on the absurd when the testimony of Bohr, Brown, and Officer Stephens, and the multiple pictures taken by the latter, are considered.

Appellant’s second “ineffective assistance” argument is that trial defense counsel should have objected to the prosecutor’s alleged “misconduct” in the latter’s closing argument. The specific misconduct alleged by appellant in his briefs to us consists of this statement in the prosecutor’s rebuttal argument: “He [defense counsel] infers that this case is not important to Lacey Cater. Maybe it’s not, but that’s just an inference. Maybe she’s dead. Maybe she’s scared. You don’t know and you don’t have evidence of that, whatever the situation is.”

This argument constituted “misconduct,” appellant argues in his briefs to us, because it proffered “a fact he knew to be false. Ms. Cater felt safe to appear in court before the preliminary hearing and trial. The district attorney, in fact, had requested her return, and then requested the warrant in response to Ms. Cater’s failure to appear at the preliminary hearing.”

There are several things wrong about this statement. First of all, it omits the two immediately following sentences from the prosecutor’s argument: “And it’s not your job to decide [what the situation is]. It’s only your job to decide what facts are true, do those facts prove the allegations made.”

Second, although it is correct that the prosecutor had, at a hearing on November 30, 2010, requested, and the court had ordered, Cater to appear at a hearing on December 16, 2010, it is not correct that the record for January 7, 2011, indicates that the prosecutor had “requested the warrant in response to Ms. Cater’s failure to appear at the preliminary

hearing.” Cater did, in fact, appear in court at the next (December 16, 2010) hearing. Her mother testified that she had been missing since December 17, 2010,<sup>4</sup> which was apparently the basis for a bench warrant for her which the trial court ordered on December 20, 2010.

Third and most importantly, the prosecutor clearly *had* to say something about Cater. In the opening portion of his closing statement, all he had said was: “We don’t know much about Lacey Cater. . . . We do know that she’s a human being and all human beings have a right to be free, free to walk, free of assault, free of restraint, and free of violence. And it’s clear she lost that right.’ He said very little else about Cater in that portion of his argument, other than adding that she was “white” while appellant “happens to be black” and their child “mixed.” He then discussed the two eye witnesses he had called, Bohr, Brown, argued that their testimony was quite credible, but said nothing more about the witnesses who had testified, much less Cater.

In response, appellant’s trial counsel seized on Cater’s absence, stating that the case is “apparently not important to Lacey Cater because she’s not here. And that I think is the missing link.”

In light of this (totally appropriate) argument by defense counsel, clearly the prosecutor had to say *something* about Cater’s absence from the trial. A failure to say anything more on that subject would, at the minimum, have left the jurors scratching their heads. And that is what he did, i.e., by addressing defense counsel’s inference that this case is “not important to Lacey Cater . . . .”

In short, we find no prosecutorial misconduct in the prosecutor’s statements about the whereabouts of Cater at the time of trial, and thus no ineffective assistance by defense counsel in his not challenging the prosecutor’s statement regarding Cater’s unknown whereabouts.

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<sup>4</sup> The mother used the date “December 17th, 2000,” but obviously meant 2010, because Cater was at the November 30, 2010, hearing, and was then and there ordered to appear in court on December 16, 2010, which she did.

Finally, we also reject appellant’s final “cumulative prejudice” argument because, as noted above, “there was no error to accumulate.” (*People v. Weaver* (2012) 53 Cal.4th 1056, 1077.)

**IV. DISPOSITION**

The judgment is affirmed.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Richman, J.