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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALICIA JO ALCALA,

Defendant and Appellant.

B261520

(Los Angeles County
Super. Ct. No. KA101888)

APPEAL from a judgment of the Superior Court of Los Angeles County. Juan Carlos Dominguez, Judge. Affirmed.

Benjamin P. Lechman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb, and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Alicia Alcala challenges her convictions for assault with a deadly weapon, corporal injury to a spouse, and leaving the scene of an accident involving injuries. While driving her car late at night, Alcala struck her husband, Eduardo Abba, injuring him severely. She then left the scene of the accident without notifying the police or attempting to ensure that her husband received medical attention. Alcala contends that the trial court erred in the instructions it gave the jury regarding the mental state required for her convictions. She also argues that the prosecutor violated her Fifth Amendment privilege against self-incrimination by commenting on her failure to tell the police or others about the events that she claimed led to the collision. Finally, she contends that the trial court erred by imposing a consecutive sentence for leaving the scene of an accident. We reject all these arguments and affirm Alcala's convictions.

FACTS AND PROCEEDINGS BELOW

On Saturday night, May 11, 2013, Alcala and her husband Abba went out for dinner at a restaurant in Downey. Abba drank approximately five 25-ounce beers during the course of the evening. Alcala testified that she only drank one beer that night, but Abba claimed she matched him drink for drink.

At the end of the evening, Abba drove Alcala's car from the restaurant toward Azusa, where Abba was living in his aunt's house. Alcala, who was serving in the army, was stationed at Fort Irwin, near Barstow. According to Abba, he became annoyed with Alcala during the drive. Abba stopped the car in the middle of the street a few houses away from his aunt's house and got out, intending to walk the rest of the way. Alcala took the wheel, drove alongside Abba, and asked him to get back into the car. Abba grew angry and, according to Alcala, yelled at her. Alcala pulled the car up at an angle in front of another car parked along the side of the road, partially blocking Abba's path.

According to Abba, he continued walking forward, trying to get around Alcala's car. Alcala then put the car in reverse, so that it was out of Abba's field of vision. Abba then heard the sound of an engine, was struck from behind, and found himself pinned to a parked car. Alcala's version of these events differed. She testified that when she pulled the car alongside Abba, he reached inside the car and grabbed her by the hair. Abba had

done this several times in the past, and Alcalá believed Abba was about to hit her or otherwise hurt her. Alcalá stated that she put the car into reverse in order to get away from Abba. She then pulled forward, unintentionally striking the car in front of her with the front left side of her car. According to Alcalá, she did not see her husband and did not realize she had hit him.

Abba's right leg was pinned between two fenders. He suffered a compound leg fracture that ultimately required two surgeries involving skin grafts and the insertion of a metal rod and plates in his leg bones. At the time of the trial almost 18 months later, he had not fully recovered from his injuries.

A neighbor heard the sound of the crash and came out to see what had happened. He found Abba lying on the hood of the parked car, yelling for help. Alcalá had continued driving after the collision, but then made a U-turn and drove back. According to Alcalá, she intended to stop and leave a note on the car she had hit. The neighbor flagged down Alcalá as she returned. The neighbor spoke to Alcalá through the passenger window of her car, which was open. With Abba directly behind him on the hood of the parked car, the neighbor asked to use Alcalá's cell phone to call 911. According to the neighbor Abba said, "That's her. The one who hit me." Alcalá appeared surprised and drove off quickly without responding. Alcalá testified that she left because she heard her husband's voice yelling, "That's her." "Get her." She stated that she still did not realize that she had hit him.

Alcalá returned to the scene yet again approximately 30 seconds later. By the time she returned again, several neighbors had congregated around Abba and the damaged car. Another neighbor testified that Abba again said, "That's her." Alcalá testified that she saw her husband's eyes glaring at her and panicked, believing the neighbors were relatives of Abba and were going to attack her. According to Alcalá, she still was not aware at this point that she had injured Abba. Alcalá drove away again, swerving around a neighbor who was standing in the street.

Alcalá drove the car to Glendora, where her mother lives, and spent the night with a friend. The next day, Sunday, May 12, she went back to her mother's house, arriving at

around 11:00 a.m. and leaving at around 6:00 p.m. to return to Fort Irwin. On Monday, May 13, Alcalá called the Azusa Police Department to report that she had been involved in an accident. During that phone call, she told an officer, “I don’t know what happened to my husband.” Alcalá testified that she said this because she had been calling Abba all day, but his cellular phone was off. According to Alcalá, it was only when a detective drove to Fort Irwin to interview her that she learned that she had struck and injured Abba in the collision. Later the same day, Alcalá was arrested and transported to a police station in Azusa. An officer read her *Miranda*¹ rights. She admitted that she had hit another vehicle, but denied that she knew she had hit her husband, then invoked her right to remain silent and declined to make any further statements.

An information charged Alcalá with assault with a deadly weapon, in violation of Penal Code section 245, subdivision (a)(1),² corporal injury to a spouse, in violation of section 273.5, subdivision (a), and leaving the scene of an accident, in violation of Vehicle Code, section 20001, subdivision (a). The information also alleged that Alcalá personally inflicted great bodily injury, as defined in section 12022.7, subdivision (e), in committing assault with a deadly weapon. A jury convicted Alcalá on all counts and found the allegation of infliction of great bodily injury true. The trial court sentenced Alcalá to a total of seven years imprisonment. The sentence consisted of three years, the midterm for assault with a deadly weapon, plus one additional year, one-third the midterm for leaving the scene of an accident, and three more years for the great bodily injury enhancement. The court also sentenced Alcalá to three years, the midterm for corporal injury to a spouse, but stayed this sentence pursuant to section 654.

DISCUSSION

Alcalá contends that the trial court committed instructional error and improperly allowed the prosecution to argue to the jury that it could convict Alcalá of assault with a deadly weapon and corporal injury to a spouse even if Alcalá had only been negligent in

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

² Unless otherwise specified, subsequent statutory references are to the Penal Code.

striking Abba with her car. She also contends that the trial court erred by allowing the prosecution to introduce evidence of Alcalá's silence after the accident, violating Alcalá's Fifth Amendment privilege against self-incrimination. Finally, Alcalá contends that the trial court erred by imposing a consecutive sentence for leaving the scene of an accident, when the facts underlying that conviction were elements of the other crimes for which Alcalá was sentenced. We affirm.

I. *Instructional Error*

Alcalá contends that her convictions for assault with a deadly weapon and for infliction of an injury on her spouse must be reversed because the jury received incorrect instructions regarding the mental state required for these offenses. According to Alcalá, the jury instructions were erroneous because they allowed the jury to find her guilty of assault with a deadly weapon and corporal injury to a spouse even if the jurors believed that she had acted only negligently when she struck Abba. We disagree and hold that the instructions correctly described the mental state required for Alcalá's offenses.

Assault with a deadly weapon is a species of assault, and is therefore a general-intent crime. (See *People v. Golde* (2008) 163 Cal.App.4th 101, 108.) In 2001, our Supreme Court clarified the mental state required in assault cases in *People v. Williams* (2001) 26 Cal.4th 779 (*Williams*). A defendant need not intend to harm the victim. "Rather, assault 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." (*Id.* at p. 790.)

Infliction of corporal injury on a spouse likewise requires only that the defendant act with general intent. (*Donley v. Davi* (2009) 180 Cal.App.4th 447, 458.) It "requires only the mens rea of intending to do the assaultive act," not to cause the resulting injury. (*People v. Thurston* (1999) 71 Cal.App.4th 1050, 1055.)

In this case, the trial court instructed the jury pursuant to pattern jury instructions pertaining to assault with a deadly weapon and corporal injury to a spouse. (CALCRIM No. 875 & No. 840.) Both instructions stated that the defendant must have acted

“willfully” in order to be guilty, and both instructions defined willfully as follows:
“Someone commits an act willfully when she does it willingly or on purpose.” (*Ibid.*)

Alcala contends that this definition of “willfully” was erroneous, because it implied that she could be guilty even if she acted only negligently. According to Alcala, when the instruction stated that she could be guilty if she acted “*willingly or on purpose,*” it implied that she was guilty if she struck Abba intentionally, or if she acted merely “negligently, without being purposeful.” (Italics added.)

We are not persuaded. The jury instructions were correct in stating that Alcala must have acted willfully in order to be guilty. In general, “willful” action is what is required for a general-intent offense. (*People v. Johnson* (1998) 67 Cal.App.4th 67, 72; accord, *People v. Thurston, supra*, 71 Cal.App.4th at p. 1055.) Furthermore, the instructions’ definition of “willfully” was not erroneous, in that it closely mirrored the language of the Penal Code itself: “The word ‘willfully,’ when applied to the intent with which an act is done . . . , implies simply a *purpose or willingness* to commit the act It does not require any intent to violate law, or to injure another.” (§ 7, subd. (1), italics added.) This definition correctly indicates that a defendant need not act with an intent to injure in order to have acted willfully. Nothing about the definition suggests, however, that a defendant may be guilty if she has been only negligent.

Alcala contends that the court’s decision in *People v. Smith* (1997) 57 Cal.App.4th 1470 (*Smith*) shows that the instructions here were erroneous, but we are not persuaded. In *Smith*, the Court of Appeal held that the trial court erred by instructing the jury that the defendant was guilty of assault with a deadly weapon if he “intended to commit an act, the direct, natural and probable consequences of which if successfully completed would be the application of physical force upon the person of another.” (*Id.* at p. 1477.) The court held that the instruction created a negligence standard for assault because “the act (moving the car forward) is made culpable solely by reason of the natural and probable consequences of the act.” (*Id.* at p. 1479.) The instructions in this case were not flawed in the way described in *Smith*. Here, the instructions stated that “the People must prove that . . . [¶] [w]hen the defendant acted, *she was aware* of facts that would lead a

reasonable person to realize that her act by its nature would directly and probably result in the application of force to someone.” (Italics added.) In other words, the defendant is not guilty solely because of the natural and probable consequences of her act, but rather because she had actual knowledge of the facts regarding the likely consequences of her action. This is in accordance with the mental state our Supreme Court established in *Williams, supra*, 26 Cal.4th at p. 790, which postdated *Smith* and in which the Court cited *Smith* in formulating its statement of the mental state required for assault.

Because there was no error in the trial court’s definition of the term “willfully,” the court did not err when it responded to the jury’s question regarding the definition of willfully by instructing the jurors to refer to the jury instructions. (*People v. Davis* (1995) 10 Cal.4th 463, 522 [when instructions are accurate and complete, trial court has discretion regarding how to respond to jury questions, including where appropriate by referring jury to the original instructions].)

Alcala also contends the jury received improper instructions because the prosecutor argued to the jury that Alcala could be guilty of assault with a deadly weapon on a negligence theory. Although this allegation might typically be regarded as a form of prosecutorial error or misconduct, Alcala characterizes it as “instructional error.” She contends that the prosecutor’s arguments to the jury magnified the effect of the error in the court’s instructions to the jury. Because we have held that there was no error in the court’s instructions, this argument fails.

Alcala forfeited any claim of prosecutorial misconduct when she failed to object to the prosecution’s arguments during trial. (*People v. Brown* (2003) 31 Cal.4th 518, 553.) Nevertheless, even if we consider Alcala’s situation on the merits, we see no evidence of prosecutorial misconduct. Although a prosecutor has wide latitude to argue a case vigorously, “it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements.” (*People v. Marshall* (1996) 13 Cal.4th 799, 831.) Alcala has not shown that the prosecutor here erred in this manner. The prosecutor did not argue that Alcala could be convicted on a negligence theory.

Alcala quotes from one section in the prosecution's closing argument, and one in the rebuttal argument, in which she alleges that the prosecution argued for a conviction on the basis of negligence. During closing argument, the prosecutor stated as follows: "And, again, there's no intent that is required that she intended to use force against someone when she acted." Later, the prosecutor continued: "Now, what are the facts? Well, we know that she stepped on the gas. She accelerated. She moved the car in an erratic manner. We know it was done on purpose. Moving the car in that way given the circumstances, we know that the victim Mr. Abba was right in that vicinity and she knew it. He was at one point. She says right on the side of her as she was trailing him." Shortly thereafter, the prosecutor provided an example: "I always feel that assault with a deadly weapon—the wording can be confusing. The driver deliberately races through a red light at a busy intersection and collides with another vehicle, causing injury to another person can be convicted with assault with a deadly weapon."

In selectively quoting these sections of the closing argument, Alcala has skipped over other passages in which the prosecutor clarified the mental state required for assault with a deadly weapon. Shortly after saying that intent was not required for assault with a deadly weapon, the prosecutor said that the defendant's act must be "[w]illful: Aware of facts that would cause her to realize that it's probably going to result in application of force." After providing the example of running the red light, the prosecutor clarified, "[s]o the person that he hit maybe he never intended to hit him, but his actions, knowing, as a reasonable person would know that racing down the street, going through a red light at a busy intersection is probably going to result in harmful contact with someone else." With these statements, the prosecutor correctly described the standard that our Supreme Court established in *Williams*: "[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*Williams, supra*, 26 Cal.4th at p. 788.) With the prosecutor's statements in their proper context, it is clear that the prosecutor did not misstate the law to the jury. If there were any doubt about the mental state required, the prosecutor cleared it up when she returned to this example during her rebuttal argument:

“If you take that example of the guy racing down the street and running through the red light in the intersection, it doesn’t matter whether it’s daytime or nighttime. The crux of that element is you are aware. As a reasonable person you are aware that doing something like that could probably and would probably result in harmful or reasonable touching.”

Alcala alleges that the prosecutor misstated the law with respect to another passage from the rebuttal argument. In that section, the prosecutor stated that the jurors could vote to convict even if they believed Alcala hit Abba by accident. In the context of that section of argument, however, it is clear that the prosecution was referring to the charge of leaving the scene of the accident. The prosecutor stated, “Given everything you have heard, she was aware that there is that possibility [that Abba was injured], and she didn’t do one of the things. Stop immediately. Provide assistance. Contact the police. She didn’t do those things, ladies and gentlemen.” Because the defendant may be guilty of leaving the scene of an accident regardless of whether she caused the accident deliberately (see Veh. Code, § 20001, subd. (b)), the prosecutor did not err in this section of the argument.

II. *Commenting on Alcala’s Silence*

Alcala contends that the prosecution violated her Fifth Amendment privilege against self-incrimination by commenting on her previous silence regarding her allegation that Abba had grabbed her by the hair just prior to the collision. She cites *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), in which the United States Supreme Court held that a prosecutor may not attempt to impeach a defendant regarding her exculpatory story by cross-examining her about her silence regarding that story after the police read her *Miranda* warnings. (*Id.* at p. 611.)

In this case, Alcala had two interactions with the police before asserting her *Miranda* rights. After returning to Fort Irwin, she called the police to report the accident. Later on the same day, a police detective visited her at Fort Irwin and took her into custody. At the police station, an officer read her *Miranda* rights. Alcala admitted that

she had hit another vehicle, but denied that she knew she had hit her husband, then invoked her right to remain silent and declined to make any further statement.

At only one point in the trial did the prosecutor arguably comment on the issue of Alcalá's post-*Miranda* silence. This occurred during cross-examination of Alcalá, when the prosecutor asked, "[I]n fact, Ms. Alcalá, this is the first time you ever are telling anyone that [Abba grabbed her hair just before the collision]?" Alcalá's attorney objected, arguing that the question was improper in that it implicitly commented on Alcalá's silence after she invoked her *Miranda* rights. The prosecutor noted that Alcalá had spoken on several occasions prior to invoking her *Miranda* rights, including when she spoke to her mother and when she called the police to report the accident. The prosecutor concluded, "I think it's fair game to question her on that. And once she invoked [her *Miranda* rights], I don't question her about that." Alcalá's counsel replied, "I agree with the exact areas that [the prosecutor] has just expressed. So anything up until the point in time that she invokes absolutely is fair game." With this understanding in place, the trial court overruled the objection.

Subsequently, the prosecutor asked Alcalá several more questions about the conversations she had had before she was taken into custody. The prosecutor then summarized, "So from the time that this accident occurred, Ms. Alcalá, you spoke to your mom in between that time; the next day you went . . . to Fort Irwin; you spoke to Detective Wenrick. You spoke to the sergeant on the telephone. You spoke to the operator, 911, and never did you say that this was a result of you being assaulted, correct?" The prosecutor went on, "And at no time—" Alcalá responded, "No, ma'am." The prosecutor asked, "Did you take any one of the opportunit[ies] to say, 'this is what happened'? 'I hit the car, because I was trying to get away from being assaulted'?" Alcalá answered, "I did not say that, ma'am." At no point in this questioning, however, did the prosecutor refer to Alcalá's invocation of her right to remain silent, nor her silence afterward.

As our Supreme Court has noted, "the Fifth Amendment privilege against self-incrimination does not categorically bar the prosecution from relying on a defendant's

pretrial silence. The prosecution may use a defendant's pretrial silence as impeachment, provided the defendant has not yet been Mirandized." (*People v. Tom* (2014) 59 Cal.4th 1210, 1223, italics omitted.) Because the prosecutor asked only one question that might be interpreted as a comment on Alcala's post-*Miranda* silence, and the court sustained her counsel's objection before she could answer, there was no prejudicial *Doyle* violation here.

Alcala also contends that the prosecutor violated her Fifth Amendment rights by commenting on her phone call to police to report the collision. Under Vehicle Code section 20002, subdivision (a), a driver who has been involved in an accident resulting in property damage must either (1) locate and notify the owner of the vehicle or (2) leave a note on the vehicle and "without unnecessary delay notify the police department of the city wherein the collision occurred." Under Vehicle Code section 20003, subdivision (a), "[t]he driver of any vehicle involved in an accident resulting in injury to or death of any person shall also give his or her name, current residence address," and other information "to any traffic or police officer at the scene of the accident." Under Vehicle Code section 20001, the failure to fulfill a duty established by Vehicle Code section 20003 is a felony.

In *California v. Byers* (1971) 402 U.S. 424, a plurality of the United States Supreme Court ruled that these reporting requirements are constitutional because they are essentially regulatory, rather than criminal in nature, and because "[d]isclosure of name and address is an essentially neutral act." (*Id.* at p. 432 (plur. opn. of Burger, C. J.)) According to Alcala, the prosecutor violated her Fifth Amendment privilege by commenting on her failure to comment beyond the basic requirements that the Vehicle Code imposed. Although the Vehicle Code imposes only minimal speech requirements on motorists involved in accidents, it nevertheless compels speech, and therefore brings Alcala's phone call to the police within the ambit of the Fifth Amendment. (See *People v. Tom, supra*, 59 Cal.4th at p. 1223.) By commenting on her refusal to provide more information than she was legally required to provide, the prosecution violated her

Fifth Amendment privilege against self-incrimination just as if it had commented on her post-*Miranda* silence in violation of *Doyle*.

We need not resolve this issue for two reasons. First, Alcala forfeited the issue by failing to object at trial. (*People v. Tully* (2012) 54 Cal.4th 952, 979-980.) Indeed, her attorney explicitly stated that any questioning regarding Alcala's silence "up until the point in time that she invokes [her right to silence] absolutely is fair game." If she had raised an objection, the trial court could have addressed the issue immediately and prevented an error from occurring. Second, even if the prosecutor erred by questioning Alcala in this manner, any error was harmless beyond a reasonable doubt. (See *People v. Galloway* (1979) 100 Cal.App.3d 551, 559 [prosecutor's comment on defendant's Fifth Amendment-protected silence is reversible unless harmless beyond a reasonable doubt].) Alcala testified that she called the police in order to report that she had been involved in a hit and run. The jury would not have expected her to have explained the details of the incident at that moment, and the prosecutor's impeachment of her on this subject was not likely effective. Moreover, this was only one moment out of several when Alcala could have told someone about Abba's alleged attack against her. The prosecutor could still have impeached her testimony by pointing out the other occasions on which she did not tell someone about the attack.

III. *Consecutive Sentence*

Alcala contends that the trial court erred by imposing a consecutive sentence for her conviction for leaving the scene of an accident that resulted in a permanent, serious injury, in violation of Vehicle Code section 20001, subdivision (a).

A trial court has discretion to choose whether to impose a concurrent or consecutive sentence for an offense (*People v. Sandoval* (2007) 41 Cal.4th 825, 850), but must articulate reasons for choosing a consecutive sentence. (*People v. Neal* (1993) 19 Cal.App.4th 1114, 1117.) In exercising its discretion, a trial court must consider the criteria established in rule 4.425 of the California Rules of Court. In particular, a court should consider "whether or not . . . [¶] [t]he crimes and their objectives were predominantly independent of each other" (Cal. Rules of Court, rule 4.425(a)). But a

“fact used to otherwise enhance the defendant’s prison sentence” or a “fact that is an element of the crime may not be used to impose consecutive sentences.” (Cal. Rules of Court, rule 4.425(b).)

According to Alcala, the decision to impose a consecutive sentence was improper because it violated California Rules of Court, rule 4.425, in that Alcala committed only a single act against a single victim. She contends that the trial court improperly used the elements of the assault with a deadly weapon charge as aggravating factors justifying the imposition of a consecutive sentence for the charge of leaving the scene of an accident. We disagree, and we hold that the trial court acted within its discretion when it imposed consecutive sentences.

In explaining its sentencing decision, the trial court stated that it “imposed consecutive sentences by reason of the separate nature of the [committed] offenses. We had the actual attack on the victim here and then the fleeing the scene. And then the overall aggr[av]ating factors that are [present] in this case.” The court adopted the aggravating factors contained in the prosecution’s sentencing memorandum. The sentencing memorandum included the following aggravating factors: (1) The crime involved great violence and the infliction of pain, and Alcala refused to help when the neighbor asked to use her cell phone to call the police; (2) Alcala used a deadly weapon; (3) The victim was defenseless when Alcala struck him; and (4) Alcala’s actions show she poses a serious danger to the lives and safety of others.

Because Alcala failed to object to the court’s reasoning in imposing consecutive sentences, that argument is forfeited on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354-356.) Even if the argument had been properly preserved, we perceive no error in the court’s exercise of discretion. Alcala is correct that being involved in an automobile accident is an element of the offense of leaving the scene of an accident involving a serious injury. (See Veh. Code, § 20001, subs. (a) & (b).) Being involved in an accident involving injuries, however, is not in itself criminal: “ ‘The gravamen of a section 20001 offense . . . is not the initial injury of the victim, but leaving the scene without presenting identification or rendering aid.’ ” (*People v. Harbert* (2009)

170 Cal.App.4th 42, 59.) This is entirely different from assault with a deadly weapon, or corporal injury to a spouse, where the act of willfully injuring Abba formed the basis of the offense. (See §§ 245, subd. (a), 273.5.)

In *People v. Butler* (1986) 184 Cal.App.3d 469, 474 (*Butler*), the court addressed a similar situation in which the defendant had committed vehicular manslaughter, then fled the scene of the collision. The court noted that “two separate states of mind are evident. There was, in fact, a divisible course of conduct based upon the intent and objective of the defendant and the trial court so found. In the act of vehicular manslaughter the defendant was acting with general intent; he negligently drove a motor vehicle while under the influence of alcohol and caused a fatal accident. Defendant then violated Vehicle Code section 20001 by intentionally leaving the scene of the accident instead of remaining and rendering aid as required by law. This was an independent and separate criminal act. Defendant’s intent and objective, when he left the car initially, returned to get his keys, and again left the scene, was to flee in an attempt to conceal his identity and his state of inebriation.” (*Id.* at pp. 473-474.) It is true, as Alcala points out, that the court in *Butler* decided whether separate punishment was prohibited under section 654, whereas Alcala’s argument is in regard to consecutive sentencing. *Butler* nevertheless remains applicable to this case because with respect to both issues, one of the key questions is whether the crimes and objectives were independent of one another. (See Cal. Rules of Court, rule 4.425, subd. (a)(1); *People v. Butler, supra*, at pp. 472-473.)

Furthermore, the trial court considered other aggravating factors that were not elements of any of the offenses for which Alcala was convicted. These included the violent nature of the assault, Alcala’s refusal to lend her cellular phone to the neighbor who wanted to help, the defenselessness of Abba when Alcala struck him. The court acted within its discretion in concluding that these factors, in addition to the fundamental independence of the assault and the flight from the scene were sufficient to warrant a consecutive sentence.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

LUI, J.