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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DEDRICK TURNER,

Defendant and Appellant.

C065566

(Super. Ct. No.
09F07752)

A jury found defendant Dedrick Turner, aka Dedrick T. Dennis, guilty of battery causing serious bodily injury (Pen. Code, § 243, subd. (d))¹ and assault by means likely to cause great bodily injury (§ 245, subd. (a)(1)) on Cortney Burton Kavanoas. The jury also found true allegations defendant personally inflicted great bodily injury upon Kavanoas in the

¹ Further undesignated statutory references are to the Penal Code.

commission of those offenses. (§§ 1192.7, subd. (c)(8), 12022.7, subd. (a).) In a bifurcated proceeding, defendant admitted allegations he served four prior prison terms. (§ 667.5, subd. (b).)

The trial court sentenced defendant to an aggregate term of 11 years in state prison, consisting of four years (the upper term) for the assault, plus a consecutive three years for the great bodily injury enhancement pursuant to section 12022.7, subdivision (a), plus one additional year for each of his four prior prison terms. The court stayed defendant's sentence for the battery pursuant to section 654. The court imposed, among other things, a \$30 court facilities assessment for each conviction. (Gov. Code, § 70373, subd. (a).)

Defendant appeals, contending (1) his trial counsel was ineffective in failing to oppose the prosecution's motion to exclude evidence of third party culpability, and (2) the imposition of a \$30 court facilities assessment on his battery conviction constitutes an unauthorized sentence because his sentence for that offense was stayed.

We shall conclude that defendant has failed to show his trial counsel was ineffective in failing to oppose the prosecution's motion to exclude evidence of third party culpability. While defendant proffered evidence that Kavanas' former boyfriend might have had a motive to harm Kavanas, defendant has failed to proffer any evidence linking the boyfriend (or anyone else) to the actual perpetration of the crime. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 367-368

(*McWhorter*).) Moreover, where, as here, the proffered evidence does not sufficiently connect the other person to the crime, it may be excluded without violating the federal Constitution.

(*Holmes v. South Carolina* (2006) 547 U.S. 329, 327 [164 L.Ed.2d 503, 510] (*Holmes*).) Accordingly, any opposition to the prosecution's motion would have been meritless, and as a result, defendant cannot show his trial counsel was ineffective in failing to oppose the motion. We shall further conclude that the trial court was required to impose a \$30 court facilities assessment for defendant's battery conviction even though punishment for that offense had been stayed. Accordingly, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prior to the incident, defendant and Kavanas were friends. In June 2009, Kavanas moved out of her boyfriend's home and she and defendant began to spend more time together. On July 25, 2009, defendant was driving Kavanas and others to a party, when he suddenly stopped the car, walked around to passenger side of the car where Kavanas was seated, opened the door, told Kavanas, "I'm not playing with you anymore," dragged her out of the car, pushed her against the trunk, struck her in the face several times, and drove off with Kavanas' purse and cell phone still inside his car. The next day, defendant dropped off Kavanas' purse and cell phone at her next door neighbor's apartment.

The next day, July 26, 2009, Kavanas went to the hospital where she was interviewed by a sheriff's deputy and identified

defendant as her attacker. Kavanas suffered a broken jaw as a result of the attack.

Defendant testified in his defense at trial. He denied seeing or speaking with Kavanas on July 25, 2009. He denied ever hitting or pushing her. He also denied possessing Kavanas' cell phone or purse after the incident or returning those items to Ruffin.

DISCUSSION

I

Defendant's Trial Counsel Was Not Ineffective In Failing to Oppose The Prosecution's Motion to Exclude Evidence of Third Party Culpability

Defendant contends his trial counsel was ineffective in failing to oppose the prosecution's motion to exclude evidence of third party culpability. We disagree.

Prior to trial, the prosecution moved to "exclude evidence of third party culpability unless the defense establishes direct or circumstantial evidence linking the third person to the actual perpetration of this crime, which raises reasonable doubt." The prosecutor explained that her "main concern . . . is that we don't go down a path where there's implications on cross-examination or in argument that it could have been either [the man] who is now [Kavanas'] husband or some other person she was seeing at the time that actually committed the crime instead of the defendant." Defendant's trial counsel did not oppose the motion, explaining she was not seeking to introduce evidence of third party culpability.

In support of his assertion that his trial counsel was ineffective, defendant points to the following evidence presented in a prior trial in the case that resulted in a hung jury: at the time of the incident "Kavanas had a boyfriend, but that she was also dating another man, who later became her husband," and "the current boyfriend was unaware that Kavanas was 'two-timing' him."² As we shall explain, such evidence was inadmissible to show that someone other than defendant may have attacked Kavanas, and thus, defendant's trial counsel was not ineffective in failing to oppose the prosecution's motion to exclude it.

A criminal defendant has the right to present evidence of third party culpability if the evidence is capable of raising a reasonable doubt about his or her own guilt. (*McWhorter, supra*, 47 Cal.4th at pp. 367-368.) The admission of such evidence, however, remains subject to the general requirement of relevance and the trial court's discretion to exclude unduly prejudicial or confusing evidence. (*Ibid.*) As our Supreme Court has repeatedly indicated, "to be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime."

² While defendant's opening brief refers to a "current boyfriend," the reporter's transcript from the prior trial indicates that at the time of the incident Kavanas' "ex-boyfriend" did not know she was dating another man.

(*Ibid.*) “[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.” (*People v. Hall* (1986) 41 Cal.3d 826, 833.)

Here, defendant's entire argument focuses on evidence of *motive*, specifically, that of Kavano's former boyfriend to harm Kavano for cheating on him. Even ignoring the fact that the proffered evidence indicated the boyfriend was unaware of Kavano's cheating at the time of the incident, defendant offers no argument to show how any of the evidence on which he intended to rely to support his third-party culpability theory “link[ed] [the former boyfriend] to the actual perpetration of the crime.” (*People v. Hall, supra*, 41 Cal.3d at p. 833.) Indeed, defendant essentially admits there is no such evidence. Accordingly, any opposition to the prosecution's motion to exclude evidence that other persons harbored animosity towards Kavano, and thus had a motive to do her harm would have been meritless.

To the extent defendant contends he nevertheless had a federal constitutional right to present evidence that Kavano's former boyfriend had a motive to harm her, he is mistaken.

The constitutional rights to confront witnesses and to due process guarantee a criminal defendant the right to cross-examination and to present a defense. (*People v. Box* (2000) 23 Cal.4th 1153, 1203, disapproved on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.) Evidence

proffered to show third party culpability, however, "may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial.'" (*Holmes*, supra, 547 U.S. at p. 327 [164 L.Ed.2d at pp. 510-511]; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1243 ["[w]e . . . reject defendant's various claims that the trial court's exclusion of the proffered [third party culpability] evidence [under Evidence Code, §§ 350, 352] violated his federal constitutional rights to present a defense There was no error under state law, and we have long observed that, "[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [state or federal constitutional] right to present a defense.""] As detailed above, defendant has failed to point to any potential evidence linking Kavanas' former boyfriend (or anyone else) to the crime. Absent such evidence, defendant cannot establish he had a federal constitutional right to present evidence that Kavanas' former boyfriend (or anyone else) had a motive to harm her.

On this record, defendant cannot establish that his trial counsel was deficient in failing to oppose the prosecution's motion to exclude evidence of third party culpability (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1080 [failure to make a meritless objection does not constitute deficient performance], and therefore, his ineffective assistance of counsel claim fails (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d

674, 693] [first prong of an ineffective assistance claim is deficient performance]).

II

The Imposition Of A Court Facilities Assessment For Defendant's Battery Conviction Was Not Only Authorized, It Was Required

Defendant also contends the imposition of a \$30 court facilities assessment for his battery conviction was unauthorized because his sentence for that conviction was stayed. Again, he is mistaken.

Government Code section 70373, subdivision (a) provides for the imposition of a \$30 court facilities assessment "on every conviction for a criminal offense"

Section 654, which prohibits multiple punishment for the same act or course of conduct and generally bars the use of a conviction for "any punitive purpose" if the sentence on that conviction is stayed, does not apply to a court facilities assessment because that assessment is not punishment. (See *People v. Fleury* (2010) 182 Cal.App.4th 1486, 1488 ["the Legislature did not intend for the assessment to constitute punishment, and . . . the assessment is not so punitive as to override the Legislature's intent"]; see also *People v. Crittle* (2007) 154 Cal.App.4th 368, 369 [\$20 court security fee (§ 1465.8) must be imposed based on a conviction for which punishment has been stayed pursuant to section 654].)

Accordingly, even though the trial court stayed the punishment for defendant's battery conviction, it was required

to impose a \$30 court facilities assessment based upon that conviction.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

ROBIE, J.

HOCH, J.