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

THE PEOPLE,

Plaintiff and Respondent,

v.

ALAN ALFONSO NOGUEDA,

Defendant and Appellant.

C067538

(Super. Ct. No. 10-3290)

The trial court sentenced defendant Alan Nogueta to a prison term of 26 years and 8 months after a jury convicted him of four counts of assault with a semiautomatic firearm, one count of corporal injury to the parent of his child, one count of false imprisonment, two counts of making criminal threats, one count of endangering the health of a child, and two other misdemeanor violations. The jury found true the allegations that defendant willfully and unlawfully personally used a firearm as to all counts on which he was convicted, except two.

The victims were defendant's four- and one-half-month-old daughter, his daughter's mother, and his own mother.

Defendant argues there was insufficient evidence that he had the present ability to commit an assault because there was no evidence the gun was loaded. He argues the trial court should have sua sponte instructed that there was no present ability to commit an assault if the gun was unloaded, and that his trial counsel was ineffective for not requesting such an instruction.

He claims he received ineffective assistance of trial counsel because his counsel failed to object to certain testimony. He also claims two of his prison sentences should have been stayed pursuant to Penal Code section 654.¹

We shall direct the trial court to stay two of defendant's prison sentences pursuant to section 654, but shall otherwise affirm the judgment. Defendant's aggregate prison term will remain unchanged.

FACTUAL AND PROCEDURAL BACKGROUND

Lorena Aramburo was the mother of defendant's daughter. On the date of the incident in question, July 2, 2010, Aramburo and defendant were no longer in a relationship, because Aramburo ended the relationship when defendant went to jail. However, Laura Rodriguez, defendant's mother, helped Aramburo watch the baby.

On July 2, 2010, the baby was staying with Rodriguez, and Aramburo went there to pick her up around 8:00 p.m. Rodriguez's other son, Marcelino, was also at Rodriguez's house. Defendant arrived at the house, and Aramburo got up to leave. She testified that she saw defendant do something with his hands, but did not see anything in his hands. At trial, she acknowledged that she said defendant came in carrying a gun in her earlier testimony at the preliminary hearing. She testified at trial that she heard a click that sounded like he was loading a gun. She testified she thought he was doing it just to scare her, and that the gun was just a toy.

¹ Further references to an undesignated section are to the Penal Code.

Defendant said he wanted to talk to Aramburo. She did not want to talk to him, so she picked up the baby and started to walk out the door. Defendant followed her as she walked to her truck. He grabbed the baby's car seat, saying all the while that he wanted to talk to her. They began arguing. He accused her of going out with someone else.

Aramburo acknowledged that she had stated at the preliminary hearing that defendant pulled a gun out, but testified at trial she could not say for sure it was a gun. She testified that she was sitting in her truck when defendant began hitting her. She testified he hit her repeatedly with his fists and with the gun, and held the gun against the side of her head and told her he was going to kill her. She no longer thought the gun was a toy. He bit her on her nose, cheek, lip, and ear.

Aramburo slid out of the truck onto the ground, hoping defendant would quit hitting her. He did not stop, however. A neighbor arrived and pleaded with him to stop and calm down. Defendant did not stop, but went on hitting Aramburo, and began kicking her. Defendant's mother and brother, Marcelino, came out to the truck. They tried to stop defendant by grabbing and pulling at him, but he went on as if he was crazy and the only thing he wanted to do was hurt Aramburo.

Finally, defendant calmed down. Then Aramburo's cell phone rang. Defendant answered it. He started arguing with the person on the phone, and said "[s]omething about Sureños or something like that." The person on the phone was an acquaintance of Aramburo's brother. He was calling because he wanted to talk to Aramburo's brother. Defendant threw down the phone and said he was going to kill Aramburo, called her a bitch, then hit her again.

Aramburo tried to run away from defendant, but he grabbed her, threw her on the ground, and tried to hit her again. His mother intervened, but he continued to hit and kick Aramburo. Aramburo was able to get near the neighbors for protection.

Defendant then grabbed the baby. His mother implored him to think of the baby. He said, "Well, what's the big deal? The kid isn't even mine." At this point, one of the neighbor's took Aramburo into her trailer home.

Officer Jerry Watson responded to the scene and interviewed Aramburo. Aramburo was crying and hysterical. She said that defendant held a gun to her head. She also told him that defendant pointed a gun at both Rodriguez and the baby. Officer Renaldo Monterrosa interviewed Rodriguez. Rodriguez told him that defendant had assaulted her when she tried to intervene. Rodriguez told Monterrosa that defendant threatened to kill both of them. He also held the gun while holding the baby, and said he was going to kill it because it was not his. He pointed the gun at Rodriguez at one point as well, and said that if anyone tried to take away the baby, he would kill them.

Officer Jason Fortier also took a statement from Rodriguez. Rodriguez informed him she had seen defendant with a chrome handgun. Fortier searched a nearby gas station because Rodriguez said she saw defendant enter the parking lot of the station and walk toward the rear. Fortier found a gun on the lifting rail of a trash dumpster. The gun was not loaded and the magazine was unloaded. Fortier searched the area, but did not find any ammunition.

Aramburo admitted talking to defendant's mother about the case, and that Rodriguez told her defendant would get 48 years in jail because of the gun. Aramburo admitted she still loved defendant and did not want anything bad to happen.

Rodriguez admitted talking to Aramburo about the case and telling her to testify that there was not a gun involved in the incident. Rodriguez testified she told Aramburo this because at the moment Aramburo claimed defendant had hit her with a gun, Rodriguez had not seen any gun.

Defendant was charged with assault with a semiautomatic firearm (§ 245, subd. (b)) against Aramburo (counts 1 and 2 for aiming the gun and hitting with the gun, respectively), against Rodriguez (count 7), and against the baby (count 9). As to each

count of assault with a semiautomatic firearm, it was alleged that defendant willfully and unlawfully personally used a firearm pursuant to section 12022.5, subdivision (a).

Count 3 charged defendant with false imprisonment with force and violence against Aramburo (§§ 236, 237, subd. (a)) and alleged a section 12022.5, subdivision (a), enhancement.

Count 4 charged defendant with corporal injury to the parent of his child (§ 273.5, subd. (a)), and also alleged a section 12022.5, subdivision (a), enhancement.

Counts 5, 6, and 8 charged defendant with making threats to commit a crime resulting in death or great bodily injury (§ 422) against Aramburo (counts 5 and 6) and Rodriguez (count 8). The information alleged section 12022.5, subdivision (a), enhancements to these charges.

Count 10 alleged that defendant abused or endangered the health of a child. (§ 273a, subd. (a).) The information alleged a section 12022.5, subdivision (a), enhancement to this charge. Counts 11 and 12 alleged misdemeanor violations not pertinent to this appeal.

With the exception of the charge that defendant threatened to commit a crime resulting in death or great bodily injury to his mother, Rodriguez, the jury convicted defendant of all felony charges. The jury found the section 12022.5, subdivision (a), enhancement true as to all counts upon which defendant was convicted, except counts 3 (false imprisonment) and 6 (threats to commit a crime resulting in death or great bodily injury to Aramburo after her cell phone rang).

The trial court sentenced defendant to a total prison term of 26 years 8 months.

DISCUSSION

I

Present Ability to Commit Assault

“An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.) Pointing an unloaded gun without the

threat or effort to use the gun as a bludgeon is not an assault because there is no present ability to commit violent injury. (*People v. Bekele* (1995) 33 Cal.App.4th 1457, 1463, disapproved of on another point in *People v. Rodriguez* (1999) 20 Cal.4th 1, 14.)

Defendant makes three arguments relating to the requirement that he have a present ability to commit an assault with a firearm, as required in counts 1, 7, and 9.² He claims: (1) there was insufficient evidence to show the gun was loaded, (2) the trial court erred by not instructing the jury that an unloaded gun could not support a finding of present ability, and (3) that his trial counsel was ineffective for not requesting such an instruction be given the jury and for not arguing that he had no present ability because the gun was not loaded.

A. Sufficient Evidence of Loaded Gun

In determining whether the evidence was sufficient to support a conviction, we review “ ‘the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.’ ” (*People v. Valdez* (2004) 32 Cal.4th 73, 104.) We presume the existence of every fact that could reasonably be deduced from the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 58.)

Defendant argues there was no evidence the gun was loaded. Not so. Even though the gun retrieved by police sometime after the incident was not loaded, the jury could have drawn an inference that the gun was loaded from Aramburo’s description of

² The prosecutor told the jury that the count 2 assault with a semiautomatic firearm was based on defendant’s hitting Aramburo with the gun, and that this was separate from holding the gun to Aramburo’s head. There was no need to prove the gun was loaded to show defendant had the present ability to commit an assault for count 2.

the sound she recalled defendant making when he first entered his mother's home. She said it sounded like he was loading a gun.

Also, a defendant's own words and conduct may support an inference that the weapon was loaded. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 13.) Thus, a defendant's statement " 'I have got you now,' " and "halt or 'I'll shoot,' " while pointing a gun may constitute sufficient evidence to warrant an inference that the gun was loaded. (*Ibid.*) Here, defendant held the gun to Aramburo's head and told her he was going to kill her. As the jury could have reasonably inferred from defendant's words and actions that the gun was loaded, there was sufficient evidence to support the judgment.

B. *Pinpoint Instruction*

The trial court gave the following instruction on assault with a semiautomatic firearm:

"In Counts 1, 2, 7 and 9, Mr. Nogueta is charged with assault with a semiautomatic firearm in violation of Penal Code Section 245. To prove him guilty of this crime, the People must prove . . .

". . . that the defendant did an act with a semiautomatic firearm that by its nature would directly and probably result in the application of force to a person; two, the defendant did that act willfully; three, 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, four, when he acted, he had a present ability to apply force with a semiautomatic firearm."

Defendant argues the trial court had a sua sponte duty to instruct the jury that if there was no evidence the gun was loaded or was to be used as a bludgeon, then there was no present ability to apply force with the weapon.

However, the trial court had no obligation to give such an instruction absent a request from counsel, and no such request was made. Instructions that relate particular

facts to a legal issue in the case are required to be given upon request, but are not required to be given sua sponte. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) Hence, there was no error.

C. Ineffective Assistance of Counsel

Defendant argues his trial counsel was ineffective for failing to request a pinpoint instruction that present ability required a loaded gun or a threat to use the gun as a bludgeon. Defendant argues there was no tactical reason not to ask for the instruction or to argue that the gun was not loaded, and that it is reasonably probable he would have been acquitted on counts 1, 7, and 9 if his counsel had done either.

It is defendant's burden to prove that his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability the result would have been different but for counsel's errors. (*People v. Kelly* (1992) 1 Cal.4th 495, 519-520.) We look to see if the record contains any explanation for the challenged actions. If the record sheds no light on why counsel acted or failed to act, the claimed error will be rejected unless counsel was asked to provide an explanation and did not, or there simply could be no satisfactory explanation. (*Id.* at p. 520.) However, we will not second-guess trial counsel's reasonable tactical decisions. (*Ibid.*) Moreover, even debatable trial tactics do not constitute ineffective assistance of counsel. (*People v. Weaver* (2001) 26 Cal.4th 876, 928.) Effective assistance is not perfect assistance.

The defense theory was that while defendant may have been carrying a concealed gun on his person, he never used the gun to assault or threaten anyone. Defense counsel may have believed this to be the best argument, since there was some evidence the gun was loaded, as stated previously. Defense counsel may have reasonably concluded that defendant's position (i.e., that he never used the gun) would be made weaker by arguing that *if* he used the gun, it was unloaded, rendering him not presently able to commit an assault. Trial counsel may have reasonably believed that the major thrust of the defense

was to avoid a finding that a gun was used at all, and, if successful, avoid all of the assault charges, rather than just three of the assault charges, and avoid all of the weapons enhancements. This is the type of tactical decision we will not second-guess.

II

Ineffective Assistance of Counsel Claims

Defendant makes two additional ineffective assistance of counsel claims. He claims his trial counsel failed to object to prejudicial testimony and failed to secure a ruling that he should not be shackled during trial. We find no ineffective assistance.

A. *Objection to Testimony*

Defendant claims he received ineffective assistance because his trial counsel failed to object to the following testimony: (1) that defendant had been in jail previously, (2) that Rodriguez previously had called police to report defendant, and (3) that Aramburo heard defendant mention Sureños on the telephone.

As previously indicated, we do not second-guess reasonable tactical decisions, and the decision whether to object “is a matter of trial tactics as to which we will not exercise judicial hindsight.” (*People v. Kelly, supra*, 1 Cal.4th at p. 520.)

The defense theory, that defendant beat up Aramburo, but did not use a gun on her in any fashion, depended on the jury believing that defendant was admitting his only culpability and had nothing further to hide, as demonstrated by his concession that he beat Aramburo. Had defense counsel objected whenever something about defendant’s criminal past been mentioned by a witness, this defense would have been compromised. Instead, defendant’s trial counsel tried to neutralize the evidence of defendant’s past incarceration by getting Aramburo to admit that defendant was not in jail, but in juvenile hall. The decision to neutralize the testimony rather than to object was a reasonable tactical choice.

As for Rodriguez’s testimony that she had called the police before to turn in defendant, defense counsel may have reasonably believed that such evidence would boost

Rodriguez's credibility because it showed she was willing to admit when her son, defendant, had done something wrong. If she could be relied upon to turn him in before when he committed a wrong, she could be relied upon now when she insisted he never had a gun. This was a reasonable tactical decision.

It was also a reasonable tactical decision not to object to Aramburo's testimony that defendant mentioned something about Sureños when he answered her phone. Counsel reasonably could have believed the evidence was less harmful if it was not emphasized by an objection, which may have implied the defense was trying to hide a gang connection. There was no further mention of the word, and no evidence defendant was associated with a gang. Counsel's decision not to object did not amount to ineffective assistance.

B. Ruling on Shackling

Defense counsel made an in limine motion to preclude defendant from being shackled or having a leg brace or stun belt during the trial. The trial court would not rule on the motion because there was no declaration in support of the motion showing a likelihood of defendant being shackled during trial. Defense counsel stated she would supplement the motion "next time." There is no further motion or declaration appearing in the record. There is no evidence in the record that defendant was shackled or restrained in court. However, we may infer the defendant was restrained because of the jury instruction given.

The trial court gave the following instruction:

"The fact that physical restraints have been placed on the defendant is not evidence. . . . [A]nd Mr. Nogueta being in custody is not evidence of anything pertaining to any of the charges in this case. And you must completely disregard this circumstance. Do not speculate about any reason. It cannot pertain in any way to your decision on the issues in the case. Don't consider it for any purpose. Don't even discuss it during your deliberations."

Defendant now claims his trial counsel rendered ineffective assistance when she did not obtain a ruling on her in limine motion to prevent him from being physically restrained in court.

As previously stated, if the record on appeal sheds no light on why counsel acted or failed to act in a certain manner, a claim on appeal of ineffective assistance of counsel will be rejected unless counsel was asked for an explanation and failed to give one, or there simply could be no satisfactory explanation. (*People v. Gray* (2005) 37 Cal.4th 168, 207.) Here, defense counsel may not have insisted on a ruling against restraints for the simple reason that defendant was not physically restrained in court. The record does not show there were any restraints placed on defendant during trial. Defendant has not shown his counsel was ineffective.³

III Section 654

Defendant was convicted in count 2 of assault with a semiautomatic firearm used as a bludgeon to hit Aramburo in the head and face. In count 3 he was convicted of false imprisonment based on Aramburo's testimony that defendant held her hands across her chest with one hand while he hit her in the face with the gun in the other hand. The trial court sentenced defendant to a two-year term for the assault, and a concurrent two-year term for the false imprisonment. Defendant now argues the trial court should have stayed the sentence on count 3 instead of running it concurrently, because the two counts were based on a course of conduct that was incident to a single objective. The People concede that count 3 was committed to facilitate count 2. A stay of the sentence in count 3 will not affect the aggregate prison term. We accept the concession.

³ We reject defendant's claim of cumulative error based on ineffective assistance of counsel, as there is no error to accumulate.

Defendant further argues the concurrent sentence in count 5 should have been stayed. Count 5, criminal threat, was based on defendant threatening to kill Aramburo when he pointed the gun at her. Count 1, assault with a semiautomatic firearm, was also based on defendant's conduct in holding the weapon to Aramburo's head. The People concede count 5 should be stayed. Again, the stay will not affect the aggregate prison term. We accept the concession.

DISPOSITION

The trial court is directed to modify the abstract of judgment to state that the two-year concurrent sentence in count 3 for the conviction of false imprisonment and the two-year concurrent sentence in count 5 for the conviction of threats to commit a crime resulting in death or great bodily injury are stayed pursuant to section 654. The trial court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BLEASE, Acting P. J.

We concur:

HULL, J.

ROBIE, J.