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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Glenn)

THE PEOPLE,

Plaintiff and Respondent,

v.

NOAH RYAN COATS,

Defendant and Appellant.

C068964

(Super. Ct. No. 11NCR08547)

In this domestic violence case, defendant Noah Ryan Coats was charged by information with committing six offenses on three different dates: assault with a deadly weapon (count I; Pen. Code, § 245, subd. (a)(1))¹ and assault by means of force likely to produce great bodily injury (count II; § 245, subd. (a)(1)) on or about October 21, 2010; battery with serious bodily injury (count III; § 243, subd. (d)) and assault by means of force likely to produce great bodily injury (count IV; § 245, subd. (a)(1)) on or about October 22, 2010; and false imprisonment (count V; § 236) and obstructing peace officers engaged in the performance of their duties (count VI; § 148, subd. (a)(1)), a misdemeanor, on or about February 21, 2011. As to count IV, it was alleged that

¹ Further undesignated statutory references are to the Penal Code.

defendant personally inflicted great bodily injury, a broken jaw, under circumstances involving domestic violence. (§ 12022.7, subd. (e).) As to counts I through V, it was alleged that defendant had suffered four prior felony convictions and served four prior prison terms. (§ 667.5, subd. (b).) The victim on counts I through V was Crystal Rothgery.

On the first day of the jury trial, defendant admitted the prior felony convictions and the trial court found that defendant had served three prior prison terms.²

The jury convicted defendant on counts III, IV, and VI, and found the enhancement on count IV true. The jury acquitted defendant on counts I and II and deadlocked on count V, as to which the trial court declared a mistrial. The prosecutor declined to retry defendant on count V.

The trial court sentenced defendant to an aggregate state prison term of 10 years, consisting of three years (the middle term) on count III; four years, to be served consecutively, for the great bodily injury enhancement on count IV; and three consecutive one-year terms for three prior prison commitments; with the sentences on counts IV and VI to run concurrently to count III.

On appeal, defendant contends only that the trial court prejudicially abused its discretion by denying him a midtrial continuance to locate Crystal Rothgery, whom he wished to call as his sole witness in the defense case. Rothgery had given testimony in the prosecution's case-in-chief.

We conclude defendant failed to make the showing required to obtain a continuance. We further conclude that defendant suffered no prejudice because Rothgery had already testified favorably to defendant as a prosecution witness; defendant made no offer of proof as to what further testimony Rothgery would give

² Defendant served a prison term for two of the four alleged prior prison commitments at the same time.

if recalled; and, based on the record before us, it is not reasonably probable that defendant would have obtained a more favorable result had there been further testimony by Rothgery. Therefore, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Before trial, Rothgery executed a declaration in which she recanted her prior statements to the police and exculpating defendant. According to the declaration, defendant had never assaulted her, and her broken jaw had been inflicted by another woman with whom she had caught defendant. As to counts V and VI, Rothgery also declared that defendant did not hold her against her will or try to stop the police from entering the residence.

Called by the People as their first witness, Rothgery testified consistently with her declaration.

As to counts I and II, in which defendant was accused of biting Rothgery on the leg on October 21, 2010, she denied telling anyone that defendant bit her. She stated that she did not really know how she had gotten the bruise on her leg, which was depicted in a photograph the prosecutor showed her. She also testified at different points that she was “anemic” and “bruise[d] very easily.”³

As to counts III and IV, in which defendant was accused of breaking Rothgery’s jaw on October 22, 2010, she testified that she found defendant at home that night with a woman whom he called Sara. After defendant left, Rothgery and Sara fought, and

³ Orland Police Officer Kyle Cessna testified that when he went to the hospital to investigate the alleged incident of October 22, 2010, Rothgery told him that on the previous day defendant bit her on the leg during an altercation. He took the photograph the prosecutor offered as an exhibit.

On cross-examination, Officer Cessna admitted he did not show the photograph to a forensic odontologist or a “bruise expert,” did not examine defendant’s teeth, and was not familiar with the scientific properties of bruising.

Rothgery's jaw was broken. She admitted that her mother took her to the hospital, but denied telling her mother or her sister that defendant broke her jaw. She said she "didn't speak too much" to a police officer at the hospital, but admitted that after hearing her mother blame the injury on defendant, she said, "Yeah, that's right." She denied telling a doctor and a nurse that defendant punched her and she said she had no idea why they wrote that in their reports.

As to counts V and VI, in which defendant was accused of false imprisonment and obstructing peace officers in the performance of their duties on February 21, 2011, Rothgery testified that on that night she and defendant were having a loud verbal argument, but he was not hitting her or holding her against her will in the apartment and she did not tell him to stop hitting her or to leave the apartment. The police banged on the door without identifying themselves, demanding that defendant come out. Not knowing who it might be, she (not defendant) moved a couch in front of the door. The police entered by breaking a window.

The prosecutor asked Rothgery about a conversation with defendant on March 8, 2011, while he was in custody at the jail, during which defendant told her how to testify. The prosecutor asked whether she had said, "Well, we got to get some chick's name" and defendant had replied, "Well, we're going to think of one right now" -- "just the first name." The prosecutor asked whether defendant had suggested "Cara" or "Sara," and had said, "Well, if this is going to be a girl I had an affair with, where'd I meet her?" The prosecutor asked whether defendant then had said, "Well, where did this incident happen," Rothgery had replied, "Well, the incident didn't happen," and defendant had answered, "Oh. That's right. You're going to say you fought with her[.]" Lastly, the prosecutor asked Rothgery whether defendant had pressed her as to where the fight had taken place and had finally said, "Well, you're going to have to make that part up because I don't know about that[.]" Rothgery testified that she did not recall any of this. The prosecutor then played a digital recording that was authenticated by Glenn County

Sheriff's Detective Greg Felton as a recording of a conversation between defendant and Rothgery at the county jail on March 8, 2011. On subsequent cross-examination by defense counsel, Rothgery testified that even after hearing the recording played back she did not remember the conversation and did not remember defendant ever telling her to fabricate a story about a fight.

Following Rothgery's testimony, the prosecutor indicated he wanted her reserved for possible future callback.⁴ The court told her she was excused as a witness, but should remain outside the door and not leave the courthouse until the court told her she could do so. Rothgery responded, "Okay."

Marsha Schouten, a victim witness advocate, testified as an expert on the "cycle of violence and battered women's syndrome." Schouten opined that it was typical for battered women to recant charges against their abusers, to claim that all of their altercations with them were verbal rather than physical, and to attempt to avoid subpoenas to testify against them.

Officer Cessna testified that in an interview at the hospital on October 22, 2010, Rothgery told him defendant struck her in the face with both fists, and then squeezed her on the jaw.

Colleen Benzler, Rothgery's mother, testified that on the evening of October 22, 2010, Benzler's oldest daughter Stephanie called to tell her that Rothgery had to go to the hospital because defendant had broken Rothgery's jaw. Benzler went to Stephanie's apartment. Rothgery was there. Stephanie told Benzler that defendant had broken

⁴ As will be seen, the prosecutor impeached Rothgery's trial testimony through testimony about prior inconsistent statements she made. Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or deny the statement; or [¶] (b) *The witness has not been excused from giving further testimony in the action.*" (Italics added.)

Rothgery's jaw and Rothgery did not respond. Benzler took Rothgery to the hospital. Benzler heard Rothgery tell the police and the medical staff that defendant had broken her jaw. Later, Rothgery told Benzler that she got into a fight with someone else and asked Benzler to corroborate that story, but Benzler refused to do so.

Margaret Jones and Cory Payer, the upstairs neighbors of defendant and Rothgery, also testified. Jones stated that, around midnight one day in February 2011, she heard screaming from downstairs. Jones testified that the noise woke her, her son and her boyfriend. Jones heard Rothgery screaming at defendant, telling him to stop hitting her, to leave her alone, and to get out of her house. Jones also heard banging against the wall that sounded like things being thrown at the wall or Rothgery being thrown against the wall. Jones also heard a man's voice saying "shut up," but was unable to understand the other words he said. Jones heard Rothgery say "stop hitting me" seven to eight times and heard her say "get out" at least five times; the screaming went on for 15 or 20 minutes, at which point Jones called 911. When police officers arrived, she could hear them trying to get Rothgery to open the door. She heard Rothgery tell them "[Defendant's] not home. I'm fine. You can leave."

Payer testified that he woke up after Jones. He woke up to loud "banging, yelling, screaming." He heard a woman's voice that sounded like Rothgery's shout "Stop. Get off me. Get out of my house." After the police arrived, Jones heard them knock, identify themselves as police officers, and ask Rothgery to open the door. The officers asked for defendant by name. He heard Rothgery tell them, "Go away. You have no right to come into my house."

Orland Police Officers Ian Ayres and Zachary Lopeteguy testified that they responded to the call on February 21, 2011. Officer Ayres testified that he knocked, announced himself as the police, and requested that the occupants come to the door. After several more attempts, he announced his intent to kick the door in but still got no response. He then tried to kick in the door, but it would not budge. After the first initial

kicks, a female he believed was Rothgery told him from inside that she was fine and to go away. Officer Lopeteguy arrived and he tried to kick the door in without success. Lopeteguy then broke in through the window. Lopeteguy told Rothgery to move the couch and she complied. She then opened the door and Ayers entered. Defendant appeared and despite Ayers's command to come to the officers, defendant walked toward one of the bedrooms, "just trying to almost evade." Ayers commanded him to stay put, turn around and put his hands in the air, but he did not comply until the commands were repeated. When defendant finally turned, he dipped his shoulder down as if to charge at Officer Ayres, but straightened up when he saw Ayers's gun pointing at him. At that point, defendant complied by getting on his knees, and the officers arrested him. The apartment was in a state of disarray, a coffee table was on its side and there was "stuff everywhere."

Rothgery initially told Lopeteguy that there had been no argument and nobody had been hit, but she also said she was in fear of retaliation. Later she told Lopeteguy there had been an argument during which defendant called her a liar, begged her not to open the door, and pushed the couch in front of the door. She indicated defendant had broken her jaw in the past and she was afraid of him.

All but one of the prosecution's witnesses testified on the first day of trial. On the second day of trial, after the People rested, defense counsel requested a brief recess to check if Rothgery was still there so he could call her as his witness. The bailiff reported that she was not outside in the hall. The trial court noted, "[s]he was ordered to remain as a witness, and *she was released yesterday afternoon.*" (Italics added.) The court stated it had Rothgery's phone number and directed the clerk to call and tell her to return to court immediately. The court then informed the jury that there would be a 20-minute recess.⁵

⁵ The minute order states that this sequence of events occurred from 9:22 a.m. to 9:23 a.m.

After more than 20 minutes had elapsed, the trial court reconvened the proceedings, saying that the case was with the defense.⁶ The court observed that Rothgery was not there and asked defense counsel if he had another witness. Counsel said he did not but added, “I would ask the court’s indulgence for a brief continuance so I can locate the witness, but I understand the court’s going to go forward. For the record I’d like to have a continuance so we can locate the witness. *She was told to be available for recall*, and I would like to put that on the record. At this point I have no further witnesses or no further evidence. The defense would rest with that note for the record.” (Italics added.) The trial court summarily denied the request for a continuance and proceeded to instruct the jury.⁷

DISCUSSION

Defendant contends the trial court’s denial of a continuance was not only an abuse of discretion, but structural error reversible per se because it deprived the defense of the opportunity to put on the only witness it wanted to call. We disagree.

“Continuances shall be granted only upon a showing of good cause.” (§ 1050, subd. (e).) To show good cause for a continuance to obtain a witness, a defendant must show “ ‘that he had exercised due diligence to secure the witness’s attendance, that the witness’s expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify

⁶ The minute order states that this occurred at 9:49 a.m.

⁷ According to the minute order, shortly after 11:31 a.m., Rothgery appeared before the trial court outside the jury’s presence, having been arrested for failing to appear as a subpoenaed witness. The court warned her that if she failed to appear again as a witness, she would be arrested and charged with contempt of court, and then released her. The record does not show where Rothgery was found and arrested or whether she gave any explanation for her failure to appear.

could not otherwise be proven.’ [Citation.]” (*People v. Howard* (1992) 1 Cal.4th 1132, 1171; accord, *People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

“ ‘The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion. In the lack of a showing of an abuse of discretion or of prejudice to the defendant, a denial of his motion for a continuance cannot result in a reversal of a judgment of conviction. [Citations.]’ ” (*People v. Zapien* (1993) 4 Cal.4th 929, 972; accord, *People v. Beeler* (1995) 9 Cal.4th 953, 1003; *People v. Fudge* (1994) 7 Cal.4th 1075, 1105.)

Here, so far as the record shows, defendant did not satisfy any part of the test to show good cause for a continuance. First, as we have noted, the court stated on the record that while Rothgery had been ordered to remain after her testimony, she had been “released” the prior afternoon. Neither the trial transcript nor the clerk’s minutes reflect that Rothgery had been “released,” but neither counsel contradicted the court’s statement. Defense counsel stated that Rothgery had been “told to be available for recall,” but did not state when this occurred, by whom she was told, or whether she specifically had been told to return the following day. The record is silent as to what, if anything, defense counsel did to ensure that Rothgery would continue to make herself available as a witness, and it does not establish that counsel exercised due diligence to obtain her testimony in his case.

Second, because Rothgery's whereabouts were unknown when the trial court denied counsel's continuance request, the record does not show that her testimony (even if she had been willing to give it) could have been obtained in a reasonable time.⁸

Third, because counsel did not make an offer of proof as to the testimony he expected Rothgery to give, he failed to show that it would have been material and not merely cumulative to her prior testimony or other evidence already before the court, or that any facts to which she might testify in his case could not otherwise be proven.

Furthermore, defendant cannot show prejudice from the denial of his continuance request. Rothgery had already testified as to all counts in the People's case. As to counts I and II, Rothgery's denial of defendant's guilt, combined with the paucity of corroboration for her original story, that defendant bit her in the leg, sufficed to win acquittal for defendant. As to counts V and VI, defendant obtained a mistrial on the felony charge of false imprisonment and was convicted only of misdemeanor obstructing law enforcement. And on counts III and IV, the most serious charges against defendant,

⁸ Defendant asserts, "the court did not even wait long enough to determine whether the witness Rothgery was in the courthouse, which was the most likely state of affairs." This is pure speculation. There is nothing in the record to support such a claim. The record shows, as we have explained, that the court waited over 20 minutes before determining that Rothgery could not be located, and defense counsel did not explain on the record what more could have been done to locate her, inside or outside the courthouse, within a reasonable time.

Defendant asserts further that because the trial took place in a small city, "[u]ndoubtedly Rothgery could have been located and brought to the courtroom *within an hour or less.*" (Italics added.) Appellate counsel cites no evidence to support this contention either. Given Rothgery's recantation and her performance on the witness stand the day before, it would have been more reasonable at the time the continuance was denied to assume she had gone into hiding.

Moreover, appellate counsel's "hour or less estimate" is disproved by the record. Rothgery was brought to court unwillingly, approximately *two hours* after the denial of the requested continuance, having been arrested for failure to appear. (See fn. 8, *ante.*)

Rothgery's testimony was impeached not only by her prior statements to other people, but by her own recorded conversation with defendant, which proved that the story she told on the witness stand was manufactured out of whole cloth by the two of them. After the credibility of her trial testimony on those counts had been so utterly devastated, we do not see how testimony from her could have rehabilitated it.

Arguing to the contrary, defendant asserts: "Counsel undoubtedly wished to have Rothgery elaborate on the details of the incidents, particularly the one that supported the count 6 charge of interfering with the police officers. This was the one count of conviction as to which there was no corroborating evidence against [defendant], at all, and the jurors were called upon to decide without any circumstantial assistance whether it had been [defendant] or Rothgery herself who pushed the couch against the inside of the door, and thus violated Penal Code section 148. [¶] Additionally, what Rothgery might have had to say about the October fight incident, in which she suffered a broken jaw, might have raised a reasonable doubt in the mind(s) of one or more jurors, such that the jury might not have convicted [defendant] on these felony charges." We are not persuaded.

To show good cause for a continuance, trial counsel had the burden to make an offer of proof as to Rothgery's expected testimony. Appellate counsel's speculation about unspecified "details of the incidents" as to which Rothgery might testify for the first time as a defense witness does not make up for trial counsel's failing in this regard.⁹ Furthermore, if Rothgery had suddenly recalled exculpatory "details" as a defense

⁹ Appellate counsel does not assert that trial counsel's failure to make an offer of proof was ineffective assistance of counsel. If such an assertion had been made, we would reject it because the record does not show what offer of proof counsel could have made that would have established Rothgery could give further material and noncumulative testimony.

witness that she had neglected to mention as a prosecution witness, it would not have bolstered the credibility of her trial testimony.

As to count VI, Officer Ayres testified that defendant failed to respond to his demand that the occupants come to the door after he knocked and gave notice. Officer Ayres also testified that after he entered, defendant walked away from him despite Ayers's commands to do the opposite. And when defendant turned toward Ayers after multiple commands, defendant appeared ready to use force until he saw that Officer Ayres had drawn his gun. This was enough to support defendant's conviction for obstructing peace officers, regardless of who put the couch against the apartment door.

For all the reasons we find no prejudice as to counts III, IV and VI, we see no reasonable probability that further testimony by Rothgery would have obtained a better result for defendant.

Defendant relies on *People v. Buckey* (1972) 23 Cal.App.3d 740. His reliance is misplaced. There, trial counsel made an offer of proof as to the witness's expected testimony. The testimony would have been material and not cumulative because the trial court had previously barred the defendant testifying on the same issue, which was critical to his theory of defense. (*Buckey, supra*, at p. 743.) Defendant here, on the other hand, did nothing of the sort.

DISPOSITION

The judgment is affirmed.

MURRAY, J.

We concur:

NICHOLSON, Acting P. J.

HULL, J.