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

THE PEOPLE,

Plaintiff and Appellant,

v.

PATRICK GITTHENS,

Defendant and Appellant.

C069166

(Super. Ct. No. SF116785A)

Defendant Patrick Gitthens savagely attacked his roommate, 65-year-old Charsey Gray. After he was finished, defendant had his part pit bull dog attack Gray. Gray suffered lacerations to the back of her scalp, arms, and legs, a fractured bone in her hand, and swelling and bruising to her cheeks.

A jury found defendant guilty of: (1) assault by means of force likely to produce great bodily injury or with a deadly weapon; and (2) allowing a vicious animal at large. Additionally, the jury found two great bodily injury enhancements true as to each of these charges. The court found defendant had two strike priors. After dismissing one of his strikes, the court sentenced defendant to 15 years and 4 months in prison.

The court calculated defendant's sentence as follows: four years for the assault charge, doubled for the prior strike conviction, one-third the middle term of two years for the vicious animal charge, doubled for the prior strike conviction, and a consecutive three year term for each of the great bodily injury enhancements.

Defendant appeals, contending the trial court erred in: (1) admitting two statements made by defendant; (2) imposing a full middle term for the enhancement attached to the vicious animal charge; (3) allowing for multiple punishments for the same objective; and (4) failing to impose concurrent sentences.

The People cross-appeal, contending that the trial court erred in imposing the full middle term for the enhancement and erred in granting defendant's motion to dismiss one of his prior strikes.

We affirm, but direct the trial court to reduce the sentence for defendant's enhancement to one-third the enhancement term, or one year, pursuant to Penal Code section 1170.1, subdivision (a).

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and Gray lived together, where Gray rented a room from defendant for \$200 per month. Defendant owned two dogs: a black Labrador and a pit bull mix. Gray got along with the dogs, but she knew that they were not supposed to be fed together because they fought over the food.

In January 2011, Gray was in her room when she heard a loud crash in the kitchen. When she went to inspect, she noticed the telephone was on the floor and no longer worked. Gray said to defendant: "Now, look what you did, stupid. You broke the house phone. Now what are we gonna do?" Gray then returned to her bedroom.

Defendant entered Gray's room holding a butcher's knife in one hand and a pipe or broomstick in the other, and said to her: "Call me stupid. You God damn bitch." Defendant then said: "I already killed one person this afternoon. One more isn't gonna matter." Defendant pushed Gray into the wall and kicked her on her side. Defendant

poked at Gray with the knife, although he never touched her with it. Defendant hit Gray in the back of the head with the pole or broomstick, punched Gray in the face multiple times, then left the room. Gray shut her door and grabbed the pole, which defendant had dropped in her closet.

While she was in the closet, Gray heard a crash, then noticed that her bedroom door was gone. Defendant entered and kicked Gray, knocking her to the ground, and kicked her while she was down. While on the ground, Gray felt the back of her head and realized she was bleeding. Defendant then called the pit bull and told him to attack Gray.

During the dog's attack, Gray covered her face. The dog grabbed Gray's arms and legs, tore off her sweatshirt, and continued to bite Gray for one to two minutes. All the while, defendant urged the dog on, saying: "Kane, kill. Kane, attack." Gray did not think she was going to leave the house alive.

Gray tried to escape, but defendant dragged her into the living room, pushed her into an antique mirror, and hit her. Defendant said something to the dog in another language and then told Gray that he told the dog to kill her if she moved. Gray pet the dog until she realized defendant had left the house. At that point, Gray left the house. Defendant came around the corner as Gray got to the gate in front of the house.

At that time, Fane Davis was walking by the house. She heard defendant say: "Is that your nigger friend?" Davis heard Gray yelling and saw her running out of the house, where defendant was trying to put her in a headlock. Gray spun away and ran to Davis, asking for help. Gray told Davis that defendant had stabbed and "sicked the dog" on her, and was trying to kill her. Gray was wearing only a bra, jeans, and socks, and was covered in blood.

Defendant's version of the facts were substantially different. He testified at trial that he heard a commotion and the dogs barking. He assumed Gray was feeding them together, which he had warned her not to do. Defendant went to where he heard the commotion and saw the pit bull biting Gray's arm and Gray flinging a stick at the dog.

Defendant eventually split up the dog and Gray and took the dog outside. He told Gray to wait in the living room while he went to a neighbor's house to call an ambulance, but before he got there, Gray ran past him and jumped the fence.

DISCUSSION

I

The Court Properly Admitted

Defendant's Two Statements

Defendant contends the trial court erred in admitting two of his statements on the grounds that they were inadmissible hearsay, not relevant, and unduly prejudicial. The two statements were: (1) "I already killed one person this afternoon. One more isn't gonna matter"; and (2) "Is that your nigger friend?" He is wrong.

A

Defendant's Statements Were Not Hearsay

An out-of-court statement "offered to prove the truth of the matter stated" is inadmissible hearsay (Evid. Code, § 1200, subs. (a), (b)) unless it falls within one of the statutory exceptions.

As to defendant's first statement, the court overruled defendant's hearsay exception, stating: "Obviously it's not being offered for the purpose of proving that he killed anyone that afternoon. This is to explain what was going through this witness's mind at the time."

As the court correctly observed, the prosecutor was not offering defendant's statement to prove the truth of the matter stated, and the statement is not hearsay.

As to defendant's second statement, the court overruled defendant's hearsay objection, stating: "It's not being offered for the truth of the matter asserted, but I think to explain why her attention was drawn to the person nearby. And for that limited purpose I will accept it." Defendant contends admitting this testimony was error.

This statement was not being offered for the truth of the matter stated. Rather, as the court indicated, the prosecutor was offering this statement to show why Davis's attention was drawn to defendant -- not to show that Davis and Gray were friends or that Davis is an African-American. The statement is clearly not hearsay.

B

Defendant's Statements Were Relevant

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Defendant contends that neither of his statements were relevant.

Defendant's first statement, where he claimed he had already killed one person that afternoon, was relevant in light of defendant's arguments that Gray acted paranoid and misperceived the incident. Defendant's statement was clearly relevant to show that Gray believed defendant "sicked" the dog on her.

Defendant's second statement, where he yelled, "Is that your nigger friend," was relevant because it showed why Davis's attention was drawn to the altercation between defendant and Gray, which was relevant to her credibility as a witness.

C

Defendant's Statements Were Not Unduly Prejudicial

Defendant contends the trial court abused its discretion in not excluding the statements under Evidence Code section 352. We disagree.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8

Cal.4th 1060, 1124.) A court's exercise of its discretion under Evidence Code section 352 is not a ground for reversal unless the court acted in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438.)

Defendant contends the court erred in admitting his statement that he had already killed one person that afternoon because its probative value was substantially outweighed by the risk of undue prejudice. On one hand, defendant's statement was probative in showing that Gray was not paranoid and that her actions were consistent with someone who had just been threatened and attacked. Considering defendant's argument that she was misperceiving the entire incident, defendant's statement is probative. On the other hand, defendant's statement was not very prejudicial. There is no indication here that the jury might have believed that he actually had killed someone earlier that day. The statement was not unduly prejudicial.

Defendant also contends the court erred in admitting his statement: "Is that your nigger friend?" On one hand, defendant's statement is probative to illustrate why Davis's attention was drawn to the altercation between defendant and Gray, and therefore explain why her perception of what she saw was accurate. On the other hand, the use of the word "nigger" is an offensive racial slur. Admitting this statement into evidence was undoubtedly prejudicial to the defendant. But a statement will only be excluded if its probative value is substantially outweighed by the risk of undue prejudice.

Here, without defendant's statement, the jury would have been left wondering how accurately Davis perceived the event because it would not have known why her attention was drawn to the altercation. While the racial slur could have been excised, it would have taken away the prominence of the statement, and therefore lessened the impact of why Davis's attention was drawn to the altercation. Considering Davis's testimony was crucial in establishing the accuracy of Gray's testimony, admitting the statement was necessary to appreciate the probative value of defendant's statement.

It is the trial court's job to balance the statement's probative value against its prejudicial effect. It is our job to determine if the court abused its discretion. Here, the court acted within its discretion to admit the statement.

II

The Court Erred In Imposing A Full Middle Term For The Enhancement In The Subordinate Term

Defendant contends, and the People concede, the imposition of the full middle term for the enhancement attached to the vicious dog charge violated Penal Code section 1170.1, subdivision (a). We agree.

Penal Code Section 1170.1, subdivision (a) provides: “[W]hen any person is convicted of two or more felonies . . . the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and *shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses.*” (Italics added.)

The court should not have imposed a full three year term for the enhancement, but rather, one-third the enhancement term, or one year. Therefore, defendant's total prison term must be reduced to a total of 13 years and 4 months.

III

*Defendant's Actions Were Committed With Different Objectives,
And Thus The Court Did Not Err In Imposing Multiple Sentences*

Defendant contends that his actions were committed with the same objective, and therefore the court violated Penal Code section 654 in imposing multiple sentences. He is wrong.

“ ‘Section 654 prohibits multiple punishment for an indivisible course of conduct’ [Citation.] But multiple crimes are not one transaction where the defendant had a chance to reflect between offenses and each offense created a new risk of harm.” (*People v. Felix* (2001) 92 Cal.App.4th 905, 915.) The question whether the defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.)

Here, there is substantial evidence to support the trial court's finding that defendant had more than one objective in this case. After defendant finished his own attack on Gray, he left the room long enough for her to get up, close the door, and go to the closet. While defendant was outside the room, it is reasonable to infer he had an opportunity to reflect on his actions before returning to the room to have the pit bull attack Gray.

Further, the harm that resulted from defendant's personal attack was distinct from the harm that Gray suffered as a result of the dog's attack. Initially, Gray suffered injuries to her face and head from defendant's beating. Gray later suffered distinct dog bite injuries on her arms, some requiring stitches, which were the result of the dog's attack. In this instance, each time defendant entered the room he created a new risk of harm and his actions may be punished separately. The court did not err.

IV

The Trial Court Did Not Err By Imposing Consecutive Sentences For The Assault And Vicious Dog Charges

Penal Code section 669 imposes an affirmative duty on a sentencing court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. (See *In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) The sentencing court is required to state reasons for its sentencing choices, including a decision to impose consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.)

Here, the court stated, “The attack on the victim here with both an attack dog and the knife seems to me to be particularly callous. This isn’t a record that generates much sympathy. At some point, public safety trumps rehabilitation and to me that point has been reached.” The court continued, “I do find the objectives in sentencing as enumerated in the People’s brief is appropriate and I will adopt that.” In their brief, the People noted that the court should consider the violent nature of the crimes for which defendant was convicted.

The court’s decision to impose consecutive sentences was well within its discretion. The trial court twice emphasized the particularly callous or violent nature of the crimes defendant committed. This is an appropriate factor in aggravation to consider in sentencing defendant. (Cal. Rules of Court, rule 4.421(a)(1).) We find no abuse of discretion.

V

The Trial Court Did Not Err By Striking One Of Defendant’s Strikes

The People contend the trial court erred in striking one of defendant’s strikes. We disagree.

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, our Supreme Court held that trial courts have the discretion under Penal Code section 1385 to dismiss prior conviction allegations or findings in the furtherance of justice. But that discretion “is limited. Its exercise must proceed in strict compliance with section 1385(a), and is subject to review for abuse.” (*Romero*, at p. 530.) In determining whether to dismiss a prior conviction allegation or finding, the court must consider “whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

“In passing on the trial court’s reasons for dismissing a strike, the appellate court must determine whether the trial court’s ruling was an abuse of discretion. ‘This standard is deferential. [Citations.] But it is not empty. Although variously phrased in various decisions [citation], it asks in substance whether the ruling in question “falls outside the bounds of reason” under the applicable law and the relevant facts. [Citations.]’ ” (*People v. Strong* (2001) 87 Cal.App.4th 328, 336, fns. omitted.)

At sentencing, defendant asked the court to be lenient and consider that he had a good heart, tried to help people, and had medical issues. Defendant stated, “I only have, like, maybe ten years of my life left and I’d like to do something with it and to prove it to Stockton and to myself that I can be somebody and I can help other people.” Defendant also volunteered to donate his house to the City of Stockton to help younger people.

The court struck one of defendant’s strikes, stating, “And the criteria for striking the strike appears to me to be the defendant’s health, his capacity which, based on my observations, while he is not certainly subject to . . . any other diminished capacity defense, it appears to me that there is some doubt as to . . . his capacity to reason through all this.

“I also accept the recommendation of the victim in this, who has indicated that he would prefer to go to Delancey Street. While I disagree with that particularly, I place great weight on the victim’s idea of what justice should be here.”

Based on the record at sentencing, there was evidence to support the court’s conclusion that defendant lacked the capacity to reason through this ordeal. Defendant’s thoughts appear to be fleeting, unorganized, and somewhat incoherent. His comments did not flow logically. For example, defendant stated: “If Sherri Adams really knew me, she would -- she would consider, but she only sees that things that I never had a chance to do. I mean, I just always thrown in prison, take a deal, thrown in prison. I don’t know anything else. And prison never did anything for me. It -- young people -- excuse me. They got young kids from Stockton and teen-agers that are just being locked up that -- there’s no more trades there.”

Based on our review of the record, we cannot say the trial court was unjustified in finding some issues with defendant’s mental capacity and therefore was within its discretion in using this factor as weighing in favor of striking one strike.

The trial court was also in a unique position to evaluate the sincerity of defendant’s claims that he desired to help the youth of Stockton. The trial court apparently believed in the sincerity of defendant’s desire to be of service to the community when released from prison, and the trial court was in a unique position to credit this testimony. That testimony supported the court’s finding that defendant was “outside the scheme’s spirit.” (*People v. Williams, supra*, 17 Cal.4th at p. 161.) We cannot say the court abused its discretion in crediting this testimony.

Further, it was permissible for the trial court to consider the victim’s feelings. The trial court’s decision in this case does not fall outside the bounds of reason.

DISPOSITION

The trial court is directed to reduce the term for the enhancement attached to the vicious dog charge to one third the enhancement term, or one year. Defendant’s

aggregate prison sentence is thus 13 years and 4 months. As modified, the judgment is affirmed.

_____ ROBIE _____, Acting P. J.

We concur:

_____ BUTZ _____, J.

_____ HOCH _____, J.