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

THE PEOPLE,

Plaintiff and Respondent,

v.

SOFRONSKI BROOKINS,

Defendant and Appellant.

C076969

(Super. Ct. No. 12F05697)

A jury found defendant Sofronski Brookins guilty of aggravated mayhem, torture, and inflicting corporal injury for pouring hot water over the head of the mother of his children. On appeal, he contends the trial court erred in: (1) instructing the jury on the lesser included offense of simple mayhem; (2) failing to instruct the jury on causation sua sponte; and (3) denying his motion for a new trial on the ground of ineffective assistance of counsel. Finding no merit in defendant's arguments, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and the victim were never married, but he is the father of their three children. In August 2012, all five of them were living with defendant's cousin in Sacramento County. At the time, the eldest daughter, K., was 12 years old.

On August 23, 2012, Sacramento County Probation Officer Carlo Cottengim visited the home as part of his probation supervision of defendant. Defendant was not home, so the officer asked to see the victim. He found the victim on a mattress with a dish towel partially covering her face. When she removed the towel, the officer saw that she had been badly burned from her scalp down to her chest. When asked, she said her injuries had happened that past weekend and she had not seen a doctor or called anyone about the injuries. She also said Jimmy Blackmon (her great uncle) had caused her injuries. The officer called paramedics, who took the victim to the hospital.

That same day, the victim was visited in the hospital by Sacramento Police Detective Sheila Bergquist, who had been investigating an allegation by the victim that Blackmon had engaged in sexual misconduct with her. The victim initially told the detective that Blackmon was responsible for her injuries, but when the detective told her Blackmon was in Oregon and could not have done it, she admitted defendant was the culprit.

Defendant was charged with aggravated mayhem, torture, and inflicting corporal injury on the mother of his children. Before trial, the prosecutor advised the court that the People anticipated calling Blackmon as a witness, and she moved in limine for an order under Evidence Code section 352 precluding defendant from cross-examining Blackmon "on topics related to matters outside the scope of the charged crime, specifically . . . on whether . . . or not [Blackmon was] responsible for molesting the Victim or [K.]"

At the initial hearing on the People's motion, the prosecutor explained that she believed Blackmon's relevance to the case was "limited to his implication in this

particular crime that we have charged, the burning, the mayhem, and the torture of [the victim].” She argued that “to allow the defense to cross-examine Mr. Blackmon on the specifics [of his alleged molestation of the victim and K.] is a classic collateral impeachment issue where we’re creating a trial within a trial.”

In response, defense counsel contended he did not “propose having a trial within a trial to ask Mr. Blackmon if he did or did not commit those acts,” but he did want to bring out evidence relating to the victim’s accusations against Blackmon because those accusations and the surrounding circumstances were relevant to show that the victim and Blackmon were unreliable. He also contended the molest allegations were inextricably intertwined with the incident that formed the basis for the charges against defendant.

The trial court took the matter under submission. Two days later, the court expressed concern that notwithstanding defense counsel’s argument, “for [the molest] evidence to be relevant at all to the underlying issue of whether [the victim] is credible or whether [Blackmon] is credible, the jury would have to first make a finding as to the truth of the underlying molest to give meaning to any conclusion that they would reach.” Defense counsel disagreed, arguing that “[t]he issue is not the underlying conduct . . . ; it’s the change in the reporting. ¶ So when [the victim] reports to law enforcement the sexual misconduct involving her daughter and then adds in sexual misconduct involving herself and stands by that for a period of time and then later changes that position, that’s where her credibility is called in to question.” Defense counsel further asserted that “[t]he relevance for [K.]’s testimony is to show that one party [i.e., the victim] has changed their position, but [K.] has not.” Counsel added that the victim’s accusations that Blackmon molested her and K. also supported “what is arguably a defense theory as to why [Blackmon] could be the person who burned [the victim],” because Blackmon might have “come back [to town] for some retaliation against [the victim] based on the original [molestation] reporting.”

The trial court suggested that it had been prepared to rule that no evidence of the molest accusations could come in, particularly with respect to the accusation that Blackmon molested K. because the victim was not a percipient witness to any such event. Following defense counsel's additional argument, however, the court said it was going to continue to think about the issue further with respect to the accusation that Blackmon molested the victim.

Subsequently, the court issued a written ruling excluding "evidence of the allegation and report that Jimmy Blackmon sexually molested [K.]" but permitting "evidence to be presented regarding [the victim]'s prior allegations and statements that Jimmy Blackmon abused her physically and sexually."

At trial, the victim testified that on the night of August 17, 2012, she and defendant got into an argument. Later, when the victim was sitting on the couch in the living room, defendant came out of the kitchen with a pot. The victim stood and backed up against the wall. Defendant held his arm against her and then stepped back and poured the pot of hot water over her head. She yelled in pain.

Dr. David Greenhalgh, the burn surgeon who initially evaluated the victim at the hospital, testified that the victim suffered burns over approximately 17 percent of her body, many of which were consistent with second-degree burns.

The jury returned its verdict on April 29, finding defendant guilty of all three charges, and sentencing was set for May 30. On May 19, defendant sent a letter to the court complaining that he was found guilty "due to what I feel was a misrepresentation [*sic*] by [my] public defender." Defendant contended that his attorney "failed to bring forth various documents that would prove my innocense [*sic*] in this trial." Defendant then expressed concern for K., who he said Blackmon had molested since she was seven years old, and he referenced attached police reports that he contended "prove with out [*sic*] a doubt my accusations are verry [*sic*] real and not false." Defendant then asserted

that it was Blackmon, and not him, who had committed the crimes of which defendant was found guilty.

Sentencing was continued to July 11 to give defense counsel an opportunity to look at the documents defendant had submitted to the court. On July 11, defense counsel made an oral motion for a new trial based on defendant's submission. Counsel argued that defendant had presented "information or evidence that was withheld or prevented from being presented during the trial that [defendant] feels is critical to his defense." The People opposed the motion, contending "all of that information . . . was brought before the Court in motions in limine and was litigated as a part of this trial and properly . . . excluded by the Court for presentation at the trial." Upon inquiry from the court, defense counsel admitted that the information at issue was known to the parties all along, and the court had examined that information "as a part of its in limine considerations and made a ruling adverse to the defense" despite that information. Defense counsel then argued that the information at issue was "the statements related to [K.]'s allegations of sexual misconduct by [Blackmon]." He contended "[t]hat information would have been relevant in the defense ability to cross-examine K[.] during her testimony and also to support [defendant]'s case as it relates to third party culpability in as far as it would establish a basis or reason for . . . Blackmon to have cause to injure or harm the victim in this case."

The court understood defense counsel to be arguing for a new trial "based upon the fact that evidence was improperly excluded at the trial, evidence that the Court should have admitted that would have offered [defendant] an opportunity to present to the jury information regarding the fact that the child had accused Jimmy Blackmon of the sexual assault or -- or rape of her and to allow the defense, therefore, to explore the issue to which Mr. Blackmon may have a motivation to have committed the underlying crime against [the victim]." Defense counsel responded, "That -- that's correct, Your Honor, that's accurate." The court then ruled that "it was a proper delineation of relevant and irrelevant evidence to exclude from the jury's consideration the allegations that Jimmy

Blackmon had been involved in any type of sexual assault of K[.],” “[s]o the request for a new trial based on the asserted error that the Court made in precluding the defense from being able to elicit the fact that K[.] had accused Jimmy Blackmon of . . . some type of sexual impropriety or assault, the Court does not find that that would be the basis for granting of a new trial in this case.”

The trial court sentenced defendant to life in prison for aggravated mayhem with a stayed life term for torture and a stayed 10-year term for inflicting corporal injury. Defendant timely appealed.

DISCUSSION

I

Instruction On Simple Mayhem

The trial court instructed the jury on aggravated mayhem and the lesser included offense of simple mayhem as follows:

“The defendant is charged in Count One with aggravated mayhem in violation of Penal Code section 205.

“To prove the defendant is guilty of this crime, the [P]eople must prove that, one, the defendant unlawfully and maliciously disabled or disfigured someone permanently.

“Two, when the defendant acted, he intended to permanently disable or disfigure the other person and, three, under the circumstances, the defendant’s act showed extreme indifference to the physical or psychological well-being of another person.

“Someone acts maliciously when he intentionally does a wrongful act or when he acts with the unlawful intent to annoy or injure someone else.

“A disfiguring injury may be permanent even if it can be repaired by medical procedures. The [P]eople do not have to prove that the defendant intended to kill.

“Mayhem is a lesser crime of aggravated mayhem in violation of Penal Code section 203. To prove the defendant is guilty of this crime, the [P]eople must prove the

defendant caused serious bodily injury when he unlawfully and maliciously permanently disfigured someone.

“Someone acts maliciously when he intentionally does a wrongful act or when he acts with the unlawful intent to annoy or injure someone else.

“A serious bodily injury means a serious impairment of physical condition. Such injury may include serious disfigurement.”

Defendant contends the court’s instruction on simple mayhem was erroneous because it included the element of serious bodily injury, which is not part of that crime. He further contends that this error was prejudicial because it “had the effect of making it more difficult for the jury to accept that [he] was guilty of the lesser included offense of simple mayhem, thus potentially impacting [the jury’s] verdict on the greater charged offense of aggravated mayhem.”

Defendant did not object to the simple mayhem instruction. Nevertheless, we review the merits of his claim of error regarding the instruction to determine whether the instruction affected his substantial rights. (See Pen. Code, § 1259.) “ ‘[A] defendant need not assert an objection to preserve a contention of instructional error when the error affects the defendant’s “substantial rights.” [Citation.] In this regard, “[t]he cases equate ‘substantial rights’ with reversible error” under the test stated in *People v. Watson* (1956) 46 Cal.2d 818 [Citation]’ [Citations.] ‘Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim’ ” (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 553, fn. 11.)

The People acknowledge that the simple mayhem instruction was erroneous under *People v. Santana* (2013) 56 Cal.4th 999, but they contend the error was not prejudicial because the erroneous instruction “held the prosecution to a higher burden of proof than ordinarily required” and because the jury ended up finding defendant guilty of the greater

offense of aggravated mayhem anyway, which includes the additional element of intent to cause permanent disfigurement not present in the lesser crime.

The parties are correct that the instruction was erroneous. In *Santana*, the California Supreme Court held that CALCRIM No. 801, which was the basis of the simple mayhem instruction here, “improperly requires proof of a ‘serious bodily injury.’ ”¹ (*People v. Santana, supra*, 56 Cal.4th at p. 1001.) Thus, the question here is whether the giving of this erroneous instruction amounted to reversible error under the *Watson* test for prejudice, i.e., is it reasonably probable defendant would have obtained a more favorable outcome had the error not occurred? (*People v. Breverman* (1998) 19 Cal.4th 142, 178.)

Defendant contends “it is reasonably probable the jury would have found [him] guilty of the lesser-included offense of mayhem instead of the greater charged offense of aggravated mayhem had it been correctly instructed” on the lesser offense. He reasons that the “harder it was for the jury to accept [his] guilt [of] the lesser included offense” -- because the instruction made it harder by erroneously adding the element of “serious bodily injury”-- “the closer [the jury] got to facing the ‘all-or-nothing’ choice described in *People v. Barton* [(1995) 12 Cal.4th 186, 196].”² Stated another way, “[t]he more a

¹ We are at a loss to understand why the simple mayhem instruction that was given here in April 2014 had not been corrected based on *Santana*, which was published almost a year earlier in June 2013.

² In *Barton*, the Supreme Court explained as follows: “ ‘Our courts are not gambling halls but forums for the discovery of truth.’ [Citation.] Truth may lie neither with the defendant’s protestations of innocence nor with the prosecution’s assertion that the defendant is guilty of the offense charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. A trial court’s failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury’s truth-ascertainment function. Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a

lesser included offense is eliminated from the jury's realm of consideration, the greater the danger the jury will choose to convict simply to avoid setting the defendant free." He then reasons essentially as follows: (1) it is reasonably probable the jury found he was not guilty of aggravated mayhem because he did not harbor the specific intent to disfigure the victim "because he tried to help treat her wounds after the fact"; (2) proceeding to the lesser included offense of mayhem, "it is reasonably probable that they did not believe that [he] was guilty of that crime either" because although the victim's scars qualified as permanent disfigurement, they did not rise "to the level of 'serious' disfigurement"; and (3) "faced with the 'all-or-nothing' decision that the *Barton* court warned of, . . . it is reasonably probable the jurors chose to convict him of aggravated mayhem rather than acquit him altogether."

Defendant's reasoning suffers from at least two flaws. First, defendant's argument that the jury found itself "faced with the 'all-or-nothing' decision that the *Barton* court warned of" because it is reasonably probable the jury, at least initially, determined that defendant was not guilty of either aggravated mayhem or simple mayhem ignores the fact that in addition to the charge of mayhem, defendant also faced charges of torture and infliction of corporal injury on the parent of his child based on the very same incident, and the jury found him guilty of both of those charges in addition to finding him guilty of aggravated mayhem. Thus, contrary to defendant's argument, the jury did *not* face the choice between finding defendant guilty of one of the mayhem offenses or letting him go free.

lesser offense included in the crime charged. To permit this would force the jury to make an 'all or nothing' choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence." (*People v. Barton, supra*, 12 Cal.4th at p. 196.)

Second, even if the jury had been faced with that choice, defendant fails to explain why the jury would have settled on finding defendant guilty of the *greater* offense rather than the lesser, when, under defendant's reasoning, both offenses were equally unsupported by the evidence. Recall that in defendant's view, it is reasonably probable the jury found (1) he was not guilty of aggravated mayhem because he did not intend to permanently disfigure the victim and (2) he was not guilty of simple mayhem because he did not cause the victim serious bodily injury. Assuming this was so, defendant does not explain why the jury would have chosen to convict him of the greater offense rather than the lesser. Thus, he fails to show how the instruction's erroneous addition of "serious bodily injury" to the crime of simple mayhem led to his conviction of aggravated mayhem. It is just as likely, if not more so, that if the jury felt compelled to find defendant guilty of one of the mayhem offenses even though the evidence did not support a conviction for either of them, the jury would have chosen to find him guilty of simple mayhem, rather than *aggravated* mayhem. Of course, the jury did not do that.

The far more reasonable conclusion here is that the jury found defendant guilty of aggravated mayhem, on which the jury was properly instructed, because the jury found that all of the elements of that crime were proven beyond a reasonable doubt, and thus the jury never even reached the question of whether defendant was guilty of simple mayhem under the erroneous instruction the court gave on that lesser offense. Because defendant has not shown a reasonable probability that this did not occur and that he probably would have obtained a better result if the element of "serious bodily injury" had been omitted from the simple mayhem instruction, he has not shown that the erroneous instruction affected his substantial rights, and the error in the instruction provides no basis for relief on appeal.

II

Sua Sponte Instruction On Causation

Defendant next contends the trial court prejudicially erred in failing to instruct the jury sua sponte on the principles of causation in accordance with CALCRIM No. 240. We find no error.

Defendant's argument goes like this: To be guilty of aggravated mayhem, he must have caused the victim permanent disfigurement. Here, the People contended the victim was permanently disfigured by the scars left on her body 20 months later from the burns defendant inflicted on her. According to defendant, however, there was evidence from which a reasonable juror could have determined that the permanence of the victim's scars was actually caused by the victim's failure to seek prompt medical treatment for her burns. In his view, "the jurors could have concluded that [the victim's] failure to seek more prompt treatment qualified as . . . an unusual intervening cause [that] broke the chain of causation . . . between [defendant's] actions and the permanence of the scarring and discoloration that resulted from the burns." Under these circumstances, defendant argues, the trial court had a sua sponte duty to instruct the jury on the principles of causation in accordance with CALCRIM No. 240 and its failure to do so was reversible error.

This argument need not detain us long, because for the argument to have merit, defendant must be able to point to evidence in the record that at the very least could have given rise to a reasonable doubt as to whether the permanence of the victim's injuries was caused by her failure to seek prompt medical treatment for her burns, thereby justifying a sua sponte instruction on causation. (See *People v. Berhardt* (1963) 222 Cal.App.2d 567,

590-591 [sua sponte instruction on causation required in manslaughter case where evidence raised factual issue as to whether death was caused by act of defendants].) Defendant points to no such evidence.

The evidence on which defendant relies is testimony by Dr. Greenhalgh that “[t]he goal for second degree burn[s] is to try to get the -- is to resurface with new epithelium³ within . . . two weeks or so” and “if it doesn’t heal within two weeks, there is an increased risk of scar formation.” According to defendant, “[t]he suggestion behind [the doctor’s] testimony is that one who has suffered second-degree burns reduces the risk of permanent scarring and disfigurement if she seeks early treatment and conversely increases the risk if she waits to seek treatment.” In defendant’s view, this “suggestion” was sufficient for a reasonable juror to conclude that the victim was the one who caused her scars to be permanent because she waited too long to seek “professional medical attention,” and if she had sought such attention sooner her scars would not have been permanent.

We disagree with defendant’s interpretation of Dr. Greenhalgh’s testimony. While he certainly did testify that there is an increased risk of scarring from second degree burns like those the victim had if the burns do not heal within two weeks by resurfacing with new epithelium/epidermis, he did not offer any testimony about how “professional medical attention” may facilitate the healing of second degree burns within that two-week period or how the lack of such attention may prevent them from healing within that timeframe. Indeed, his testimony did not even “suggest,” as defendant contends it did, that the lack of “professional medical attention” can increase the risk of permanent

³ During cross-examination, Dr. Greenhalgh explained that “the epithelium is the same as the epidermis” -- that is, the “outer layer of skin.” Dr. Greenhalgh had previously testified that “[t]he epidermis keeps the water . . . in the body and the bugs out.”

scarring. In the testimony on which defendant relies, the doctor simply testified that the risk of scarring is increased if healing does not occur within two weeks, period -- nothing more, nothing less.

Moreover, when the prosecutor later asked Dr. Greenhalgh “what are the risks associated with” leaving burns “untreated,” the doctor replied, “Well, you lose the barrier to the outside, so you have increased exposure to bacteria, which can increase infection in a wound, especially if you don’t wash them.” He did *not* testify that one of the risks of leaving burns untreated was an increased risk of scarring, permanent or otherwise.

Under these circumstances, there was no substantial evidence here that the permanence of the victim’s scars was caused by her failure to seek prompt medical attention. Accordingly, the trial court did not err in failing to give an instruction on causation sua sponte.

III

New Trial Motion

Defendant contends “the trial court erred in denying [his] motion for new trial on the ground that his attorney was ineffective in failing to present the evidence of K[.]’s accusations as contained in the police reports that [defendant] submitted” to the court before his sentencing. Defendant contends “[t]he trial court treated [his] letter and attached police reports as a motion for new trial,” but “[t]he court did not analyze the issue through the prism of a challenge to the effectiveness of [defendant]’s trial defense counsel, but rather as an attack on the court’s pretrial evidentiary ruling.” According to defendant, “had the court been aware of K[.]’s statements [in the police reports] regarding the extent of Blackmon’s abuse [of her] and the extent to which she feared Blackmon” when the parties were arguing the in limine motion, “the trial court would have allowed the jurors to learn of K[.]’s accusations against Blackmon and [the jurors] would have seen how scared she was of him” and “probably would have concluded that

Blackmon was the one to pour the boiling water on [the victim] and that she decided to falsely blame [defendant] instead because she too was so fearful of Blackmon.”

Defendant’s argument is fatally flawed. First, the trial court did not *treat* defendant’s submission as a new trial motion. Rather, as we have explained, defense counsel *made an oral motion for a new trial* based on defendant’s submission. Moreover, when the court asked for clarification, defense counsel expressly acknowledged that he was arguing for a new trial “based upon the fact that evidence was improperly excluded at the trial, evidence that the Court should have admitted that would have offered [defendant] an opportunity to present to the jury information regarding the fact that the child had accused Jimmy Blackmon of the sexual assault or -- or rape of her and to allow the defense, therefore, to explore the issue to which Mr. Blackmon may have a motivation to have committed the underlying crime against [the victim].” Although in his letter to the court defendant had complained that his public defender misrepresented him, defense counsel *did not move for a new trial on the ground of ineffective assistance of counsel*. Thus, defendant’s entire argument on appeal is directed at a motion that was never made (i.e., a new trial motion based on ineffective assistance of counsel) and on which, therefore, the court never had an opportunity to rule.

“A trial court’s ruling on a motion for new trial is so completely within that court’s discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.” (*People v. Hayes* (1999) 21 Cal.4th 1211, 1260-1261.) We cannot find a manifest and unmistakable abuse of discretion because the trial court did not rule on a motion defendant never made. Accordingly, defendant has shown no error in the denial of his new trial motion.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

RAYE, P. J.

HULL, J.