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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GAMALIER REYES RIVERA,

Defendant and Appellant.

D059464

(Super. Ct. No. SCN264236)

APPEAL from a judgment of the Superior Court of San Diego County,

Runston G. Maino, Judge. Affirmed.

A jury convicted Gamalier Reyes Rivera of two counts of attempted murder (Pen. Code,¹ §§ 664, 187, subd. (a); counts 1 & 2), two counts of aggravated mayhem (§ 205, counts 5 & 8), burglary (§ 459, count 9), and two counts of assault with a deadly weapon and with force likely to produce great bodily injury (§ 245, subd. (a); counts 10 & 11.)²

¹ Statutory references are to the Penal Code unless otherwise specified.

² At the end of the trial, the court granted Rivera's motion for a judgment of acquittal (§ 1118.1) as to two additional counts of attempted murder (§§ 664, 187; counts 3 & 6). In addition, the jury found Rivera not guilty of two counts of torture (§206; counts 4 & 7).

The jury found true that Rivera personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a) as to counts 10 and 11. The jury also found true that Rivera personally used a deadly weapon (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)) as to counts 5, 8, 10, and 11 and acted willfully, with deliberation and premeditation, within the meaning of section 189 as to counts 1 and 2.

The court sentenced Rivera to prison for four consecutive life terms for counts 1, 2, 5, and 8, plus two consecutive one-year terms for the deadly weapon enhancements relating to counts 5 and 8. The court further sentenced Rivera to the maximum determinate terms for the remaining convictions and enhancements, but stayed those sentences per section 654.

Rivera appeals, contending the trial court abused its discretion by admitting evidence of Rivera's four-year-old "To Do List" that detailed Rivera's plan to kill his wife. He also asserts the court erred in failing to instruct the jury on simple mayhem as a lesser included offense of aggravated mayhem. We affirm.

FACTS

Prosecution

Rivera married Erika Von Der Heyde in 2002. They had a daughter and lived together in San Ysidro until they divorced in 2006. They remarried in 2007 and lived together in Imperial Beach, but separated again in December 2008, and began divorce proceedings for a second time. They both started dating other people. However, the divorce was contentious. They argued over custody and support issues. Eventually, Von Der Heyde restricted communication with Rivera through her attorney only.

On or about July 5, 2009, Von Der Heyde, along with her daughter, moved into her boyfriend's home in Escondido. Von Der Heyde decided to move to Escondido from Imperial Beach because she was afraid Rivera was going to take their daughter and flee to Puerto Rico. Von Der Heyde slept in a bedroom with Jesus Vinas, her boyfriend, and her daughter slept in a separate room. Two other couples also lived in the house. One of those couples was Chris Anguiano and Samantha Shaffer, who shared a bedroom in the house as well.

On the night of July 8, 2009, sometime around midnight, Rivera hired a taxi to drive him from Imperial Beach to Escondido, a distance of about 45 to 50 miles. He hired a taxi despite the fact that he owned a vehicle he could have driven that night. He left the vehicle in its parking space at his apartment and called a taxi from a 7-Eleven that was between a half-mile to a mile away from his residence. He left his television on and the front door to his apartment unlocked. Rivera also did not bring his cell phone with him. Although he did not recall why he left it, he did admit the cell phone could have been used to track his position.

After arriving at Vinas's house, Rivera entered it, armed with two hatchets, and walked into a bedroom where Anguiano and Shaffer lay sleeping. A dog in the bedroom started barking, which caused Anguiano to wake up. Anguiano reached across Shaffer to grab his glasses from a window sill. At that moment, Rivera started hitting Anguiano with a hatchet. He hit him first in the chest, causing Anguiano to fall on top of Shaffer who was lying in the bed. Rivera continued his attack on Anguiano, striking his back with a hatchet several times. When Anguiano was finally able to stand up, Rivera struck

him in the face with a hatchet. Anguiano attempted to defend himself, was able to throw Rivera to the ground, but Rivera struck him again in the face with the hatchet. Anguiano eventually passed out on the bedroom floor. At one point during the struggle, Rivera moved toward Shaffer.

During the attack, Shaffer was screaming, which woke up Vinas, and he went to her bedroom. He pulled Rivera away from Anguiano and dragged him out of the room. Vinas struggled with Rivera, and Rivera eventually dropped the one hatchet he still possessed (the other hatchet was found in the house, apparently dropped by Rivera earlier). At that point, Rivera fled from the house, but was arrested a short time later at a nearby 7-Eleven.

Anguiano suffered life threatening injuries from the attack, including a deep laceration to his face and one to his lower neck, which cut across the trachea, through the clavicle and down into the deltoid muscle. He also suffered lacerations to his arms and back. Due to his blood loss, Anguiano went into full cardiac arrest about 20 minutes after arriving at a hospital. Anguiano underwent surgery, and remained in a coma for about two months. As a result of his injuries, Anguiano suffers from a host of significant problems. He has a grossly abnormal gait, has problems with balance and coordination, and is blind. He also suffers symptoms of posttraumatic stress disorder (PTSD), including insomnia, depression, nightmares, and flashbacks.

Shaffer suffered injuries to her thighs, knees and a toe from Rivera's hatchet attack. She has scars on her legs and endures chronic pain in her legs. She is unable to work because she cannot stand for long periods of time and suffers from PTSD.

Defense

Rivera testified on his own behalf. He admitted entering Vinas's house armed with two hatchets and using the hatchets to inflict the injuries suffered by Anguiano and Shaffer. However, he testified he did not intend to hurt anyone when he entered the house, and he inflicted the injuries only in self-defense after Anguiano attacked him. Rivera explained that his plan was to enter the house and only scare Von Der Heyde with the hatchets. Although he had a service firearm from his job as a border patrol agent, he decided to bring hatchets, not his gun, because he believed hatchets were "the scariest thing." His purported purpose for this plan was to motivate Von Der Heyde to become more cooperative regarding the custody of their daughter. He testified that his plan went awry when the first room he entered happened to be occupied by Anguiano and Shaffer instead of Von Der Heyde.

DISCUSSION

There is no question as to Rivera's guilt. He does not argue that substantial evidence does not support the judgment. Indeed, he could not credibly do so. The evidence of his guilt is mountainous. He entered the bedroom of the two victims in the middle of the night while they were sleeping and brutally attacked them with hatchets, leaving them both disfigured and broken.

Against this grizzly canvas, Rivera raises two issues. First, he argues the court abused its discretion by admitting his "To Do List" that described his plan to kill Von Der Heyde about four years prior to the trial. Second, he insists the court committed

reversible error in failing to instruct the jury on the crime of simple mayhem as a lesser included offense of aggravated mayhem. We reject both contentions.

I

THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE LIST

A. Rivera's Contentions

Rivera contends the trial court abused its discretion by allowing the prosecutor to introduce evidence of a "To Do List" Rivera wrote in 2005 toward the end of his first marriage to Von Der Heyde. Specifically, he argues the list was highly prejudicial and had little probative value. He also asserts the admission of the list "took up an enormous amount of time during the trial."

B. The List

On April 24, 2005, while Rivera and Von Der Heyde appeared headed for their first divorce, Von Der Heyde found a piece of paper in Rivera's bedroom (they were living in separate rooms at that time). Written on the paper, in Rivera's handwriting, was the following:

"Getting rid of the wasted . . .

1. Tools, Gloves, Big & Dark, [Zip-Ties], Weights, Boots
Bag for Boots & Gloves
2. Surveillance on area. (Late hours), Find a spot for
vehicle away from road view. Learn best path from vehicle to
mint.
3. Snap it, rope it, bag it, dump it. Leave no prints.
4. Throw away gloves & boots separately, wash vehicle &
vacuum. (Not in station)
5. In the morning: Daycare while calling Keila, Nelly (mad) where
is she.
*Bag her purse & cell phone, clothes (make it look like
she walked out. Call my cell phone. (Help). (No answer).

6. (Work time) Go to work explain the situation (Try to work) Make frequent calls to Erika
7. Next day Emergency family leave. Ask for advice.
(Don't know)
*Throw away receipts for bag and weights."

Von Der Heyde believed the writing was a list of things for Rivera to do to kill her and avoid being caught for the crime, and thus, she called the police. The police obtained the list and questioned Rivera about it. Rivera admitted creating it, but denied purchasing or collecting any of the items on the list, explaining that he already had access to the items where he worked.

During proceedings in limine, the prosecutor asked for permission to introduce evidence of the list at trial. The prosecutor offered two theories of admissibility: (1) the evidence was a hearsay statement that was admissible under Evidence Code section 1220 as an admission of a party; and (2) the evidence was admissible under Evidence Code section 1101, subdivision (b) as a prior bad act. Rivera objected to the admission of the evidence on the basis that it did not satisfy the requirements for admission set forth in Evidence Code section 1101, subdivision (b), and that its probative value was outweighed by its potential for undue prejudice within the meaning of Evidence Code section 352.

After hearing argument on the matter, the court ruled that the evidence was admissible under Evidence Code sections 1101, subdivision (b) (to prove intent) and 1109.

The prosecution introduced the list through Von Der Heyde's testimony and then proceeded to cross-examine Rivera about it, amounting to 14 pages of testimony in the

reporter's transcript. The prosecutor also began his closing argument by referring to the list and ended his rebuttal with a reference to the list.

C. Analysis

Rivera contends the list should have been excluded because it is remote, discusses a process to avoid being charged with Von Der Heyde's would-be murder markedly different from the facts of the charged crimes, is extremely inflammatory, and is of little probative value. He further contends the list should have been excluded under both Evidence Code sections 1101, subdivision (a) and 352.

Evidence Code section 1101, subdivision (a) generally prohibits the admission of evidence of a prior criminal act against a criminal defendant "when offered to prove his or her conduct on a specified occasion." Subdivision (b) of that section, however, provides that such evidence is admissible when relevant to prove some fact in issue, such as motive, intent, knowledge, identity, or the existence of a common design or plan. "The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence." (*People v. Carpenter* (1997) 15 Cal.4th 312, 378-379, superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.) Evidence may be excluded under Evidence Code section 352 if its probative value is "substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Harrison* (2005) 35 Cal.4th 208, 229.) "Because substantial prejudice is inherent in the case of uncharged

offenses, such evidence is admissible only if it has substantial probative value." (*People v. Kelly* (2007) 42 Cal.4th 763, 783 (*Kelly*).

Our high court has considered specific circumstances under which evidence of uncharged crimes may be admitted under subdivision (b) of Evidence Code section 1101. When the prosecution seeks to prove the defendant's identity as the perpetrator of the charged offense with evidence he had committed uncharged offenses, the admissibility of evidence of the uncharged offenses turns on proof that the charged and uncharged offenses share sufficient distinctive common features to raise an inference of identity. A lesser degree of similarity is required to establish the existence of a common plan or scheme and still less similarity is required to establish intent. (*People v. Roldan* (2005) 35 Cal.4th 646, 705, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.) To be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense to support the inference that the defendant probably acted with the same intent in each instance. (*Kelly, supra*, 42 Cal.4th at p. 783; *Ewoldt, supra*, 7 Cal.4th at p. 402.)

The decision whether to admit other crimes evidence rests within the discretion of the trial court. (*Kelly, supra*, 42 Cal.4th at p. 783.) Further, it is well established the trial court has broad discretion in determining both the relevance of the objected-to evidence and in weighing its prejudicial effect against its probative value. (*People v. Sanders* (1995) 11 Cal.4th 475, 512; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) As such, we will not reverse the trial court's ruling " 'except on a showing the court exercised its

discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice.' " (*Ibid.*, italics omitted.)

At trial, Rivera claimed that he was entering Vinas's house, armed with hatchets, merely to scare Von Der Heyde. He claimed he had no intention of hurting anyone and only used the hatchets in self-defense. Thus, Rivera's intent was a material fact that the prosecution had to prove. Accordingly, we examine whether the court abused its discretion in admitting the list under Evidence Code section 1101, subdivision (b).

We agree with Rivera that the list is remote. It was created more than four years prior to the crimes committed here. In addition, Rivera is correct that the list discusses steps Rivera was to take to avoid blame after he killed his wife, and Rivera did not follow any of the steps on the list in committing the crimes here. Rivera's argument, however, ignores the similarities between his response to the end of his first marriage with Von Der Heyde and the end of his second marriage to her.

Rivera testified that he created the list when he was angry and frustrated with Von Der Heyde. Although they were married at the time, they were living in separate bedrooms and their relationship was deteriorating. Rivera admitted that, around the time the list was created, he did not think he and Von Der Heyde would "get back together" because of "too many problems" and "irreconcilable differences." The list clearly includes steps Rivera was to take to avoid being caught after he killed Von Der Heyde. Although they divorced, Rivera and Von Der Heyde eventually reconciled and remarried, and Rivera made no attempt on Von Der Heyde's life at that time.

Like the creation of the list, the genesis of Rivera's decision to enter Vinas's house armed with hatchets appears to be the end of his relationship with Von Der Heyde and his anger with her. Von Der Heyde had moved in with her boyfriend. Rivera admittedly was angry with Von Der Heyde again and frustrated about custody issues regarding their daughter. Because of his anger and frustration, he decided to enter Vinas's home armed with hatchets.

In summary, while the list describes a plan that is different than what occurred on July 8, 2009, the list and Rivera's July 8 crimes have a tendency to show that Rivera responded to the end of his relationship with Von Der Heyde and his accompanying anger by contemplating killing Von Der Heyde. He detailed his thought process in the list and took concrete steps toward killing Von Der Heyde on July 8.

Moreover, the list and the July 8 crimes both evidence Rivera's plans to avoid being charged for Von Der Heyde's would-be murder. The list included steps to avoid leaving evidence that Rivera had killed Von Der Heyde, including wearing gloves, calling his mother-in-law to create the impression Von Der Heyde had left him, and disposing of the body and Von Der Heyde's personal effects. Similarly, Rivera's July 8 crimes show his attempt to create an alibi and make his whereabouts more difficult to track. He left his television on in his apartment, did not bring his cell phone with him to Vinas's house, left his vehicle parked in its parking space at his apartment, and walked at least a half mile from his house to a 7-Eleven where he called a taxi to take him to Vinas's house.

Because of the similarities between the list and the July 8 crimes, we are satisfied the list was relevant under Evidence Code section 1101, subdivision (b) to prove Rivera's intent in entering Vinas's house, armed with hatchets.

In addition, we determine that Evidence Code section 352 does not bar the admission of the list. Although the list was inflammatory, we are satisfied it was less inflammatory than the gruesome facts of Rivera's hatchet attacks of Anguiano and Shaffer. Moreover, on the record before us, we cannot conclude the prejudice of the admission of the list substantially outweighs its probative value as discussed above. Nor are we troubled by the amount of time the prosecution spent cross-examining Rivera about the list.

Although we view this issue as a close call, largely because of the remoteness of the list, we cannot say, based on the record before us, the trial court's decision to admit the list was arbitrary, capricious, or patently absurd that resulted in a miscarriage of justice. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 23-26.)

II

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY ON SIMPLE MAYHEM AS A LESSER INCLUDED OFFENSE OF AGGRAVATED MAYHEM

Rivera asserts the trial court erred by refusing to give an instruction on simple mayhem as a lesser included offense of aggravated mayhem. We disagree.

Rivera contends his trial counsel asked for an instruction on simple mayhem. Our review of the record indicates he did not do so. During a conversation about jury instructions, the trial court asked counsel whether simple mayhem was a lesser included

offense of aggravated mayhem. The prosecutor said he did not think it was, and Rivera's counsel did not offer an answer to that question. Rivera's counsel said he was requesting instructions on all lesser included offenses, but was not requesting an instruction on simple mayhem if it was not a lesser included offense. The court followed up by asking Rivera's counsel whether he was specifically requesting an instruction on simple mayhem. Rivera's counsel answered that he was not. The court concluded, "Then I won't give it."

The law governing a trial court's duty to instruct the jury on lesser included offenses, and the standard of review that this court applies in reviewing a trial court's decision regarding whether to give such an instruction, are well established:

"Instructions on lesser included offenses must be given when there is substantial evidence for a jury to conclude the defendant is guilty of the lesser offense but not the charged offense. [Citations.] Substantial evidence is defined for this purpose as 'evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' [Citation.] 'In deciding whether evidence is "substantial" in this context, a court determines only its bare legal sufficiency, not its weight.' [Citation.] The trial court's decision whether or not the substantial evidence test was met is reviewed on appeal under an independent or de novo standard of review. [Citations.]" (*People v. Garcia* (2008) 162 Cal.App.4th 18, 24-25.)

Rivera acknowledges that no California court has specifically addressed whether simple mayhem is a lesser included offense of aggravated mayhem; nevertheless, he urges us to conclude it is. The People suggest that simple mayhem appears to be a lesser

included offense under the elements test,³ but the court did not err in failing to give the instruction for simple mayhem because substantial evidence did not support such an instruction. We agree with the People's argument. Although simple mayhem seems to be a lesser included offense of aggravated mayhem, we need not reach this legal issue because substantial evidence does not support an instruction for simple mayhem on the record before us.

Section 203 defines simple mayhem: "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem." Section 205 provides in part: "A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body." "The difference between the two sections [203 and 205], justifying an enhanced sentence for aggravated mayhem, is the requisite criminal intent, i.e., specific intent to cause the disfiguring injury." (*People v. Newby* (2007) 167 Cal.App.4th 1341, 1347-1348.)

A defendant may intend "both to kill his or her victim and to disable or disfigure that individual if the attempt to kill is unsuccessful." (*People v. Ferrell* (1990) 218

³ "Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.)

Cal.App.3d 828, 833-834.) Here, the prosecutor proceeded on this theory. Further, Anguiano and Shaffer testified that Rivera entered their room in the middle of the night while they were sleeping and attacked them with hatchets.

Rivera's defense at trial was that he used the hatchets in self-defense after Anguiano attacked him. He did not present evidence or even offer an argument at trial that would have supported a conviction of simple mayhem.

In short, the choice presented to the jury was between convicting Rivera of aggravated mayhem or finding him not guilty based on evidence of self-defense. The jury believed the prosecution's evidence, finding the prosecutor's desired inference true beyond a reasonable doubt: "You cannot possibly think, or reasonably believe, that you can hit somebody anywhere on their body with one of these [the hatchets] and not cause disfiguring injuries." Indeed, Rivera's own testimony strongly supported this inference when he testified he chose to bring hatchets because he believed them to be "scary" based on "horror movies" and the fact they can do a lot of damage. Accordingly, the trial court properly declined to instruct the jury on simple mayhem.

In addition, even if we determined the court should have instructed the jury on simple mayhem, such error would be harmless. "[W]hen a trial court violates state law by failing to properly instruct the jury on a lesser included offense, this test applies: '[I]n a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offense and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836 [299 P.2d 243]]. A conviction of the charged offense may be reversed in consequence of

this form of error only if, "after an examination of the entire cause, including the evidence" (Cal. Const., art. VI, § 13), it appears "reasonably probable" the defendant would have obtained a more favorable outcome had the error not occurred. [Citation.]' "*People v. Lasko* (2000) 23 Cal.4th 101, 111.)

In applying the *Watson* standard of prejudice, we follow our high court's guidance in *People v. Breverman* (1998) 19 Cal.4th 142 at page 177:

"Appellate review under *Watson* . . . focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result."

Based on our review of the record, if the trial court erred by failing to provide a simple mayhem instruction, we determine the trial court's error was harmless under the *Watson* standard. Here, the evidence overwhelmingly supports Rivera's conviction for aggravated mayhem. He struck the two victims repeatedly with hatchets.

We conclude there is not a "reasonable probability" that Rivera would have obtained a more favorable outcome if the court had instructed the jury on simple mayhem. (See *People v. Lasko, supra*, 23 Cal.4th at p. 111.) We are convinced that any reasonable jury would have convicted Rivera of aggravated mayhem on the record before us. Even without a simple mayhem instruction, we do not lack confidence in the outcome. (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.