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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA BURCHAM,

Defendant and Appellant.

D059952

(Super. Ct. No. SCN270258)

APPEAL from a judgment of the Superior Court of San Diego County, Richard E. Mills, Judge. Affirmed in part, reversed in part and remanded with directions.

A jury convicted Joshua Burcham of attempted murder of Kenneth Eagleton (Pen. Code¹, §§ 664, 187, subd. (a), counts 1 and 2); torture of Jodee Eagleton (Eagleton) (§ 206, count 3); and inflicting corporal injury on Eagleton, a cohabitant (§ 273.5, subd. (a), count 4). The jury found true allegations that in committing each count, Burcham personally inflicted great bodily injury (§ 12022.7, subd. (a)), and personally used a

¹ All statutory references are to the Penal Code unless otherwise stated.

deadly or dangerous weapon (§ 12022, subd. (b)(1)). The court sentenced Burcham to life with the possibility of parole plus 18 years 8 months in state prison, including three years on the count 3 great bodily injury enhancement.

Burcham contends the trial court: (1) violated his rights to due process under the state and federal Constitutions by prejudicially failing to instruct the jury sua sponte that attempted torture is a lesser included offense of torture; and (2) erroneously imposed a great bodily injury enhancement on count 3, despite the fact infliction of great bodily injury is an element of torture. Alternatively, Burcham contends he received ineffective assistance of counsel, who did not object to imposition of that enhancement. We conclude there was no instructional error but the court erred by imposing a great bodily injury enhancement on count 3. Accordingly, we affirm the judgment in part and reverse in part.

BACKGROUND

Eagleton testified that she and Burcham started a sexual relationship when she was 13 and he was 29 years old. She started using methamphetamine at age 10, and later used it with Burcham. They later cohabitated, and in 2008, shortly after she turned 18 years old, Burcham became violent toward her. He butted her head and scratched her face. Subsequently, Burcham became more violent, leaving her with black eyes and "always bruised up." He hit her with a baseball bat. He also cut her hair unevenly. Eagleton testified that in November 2009, Burcham scratched her legs with a metal stick and cut her leg with a knife. They also used more methamphetamine during that period.

On at least one occasion, Burcham tied Eagleton's wrists to a chair with plastic ties, leaving her there possibly overnight and producing scars on her wrists. Eagleton testified Burcham was controlling and did not want her to see her friends. He repeatedly asked her if she was cheating on him, and if her father had sexually molested her. She lied by saying she had been molested.

San Diego Deputy Sheriff Jeffrey Lauhon testified that on December 1, 2009, he responded to an incident involving Burcham. He saw Eagleton's black eye, and her burn and cut marks on both legs. Eagleton said Burcham had inflicted the wounds on her leg by using a metal he had heated with a lighter.

On Eagleton's recross-examination, this exchange took place:

"[Defense counsel:] Ms. Eagleton, now that your memory has been refreshed and you're able to talk about what happened more fully, didn't you burn your legs?"

"[Eagleton:] No.

"[Defense counsel:] Isn't it how most of those scars on your leg got there?"

"[Eagleton] No. I don't think so, no."

Eagleton repeatedly testified she did not remember specifics regarding the harm Burcham inflicted on her, and she described that period as "one big blur." She did not seek medical attention for her injuries.

San Diego County Deputy Medical Examiner Craig Nelson reviewed different photographs taken of Eagleton's many leg wounds and testified: "I would expect these to be very painful, because we do see blistering injuries. We do see injuries that resulted in scarring. And as I mentioned, these are both superficial and deep, and many of these

look like they would through the dermis, [sic] the second layer when burns are reported to be very painful."

DISCUSSION

I.

Burcham contends the trial court erred by not instructing the jury that attempted torture is a lesser included offense of torture. Noting that Eagleton was a chronic drug user who never received medical treatment for her injuries, he argues: "[I]t was reasonable to infer that some of the wounds were inflicted by [Eagleton] herself while under the influence of methamphetamine and that the full extent of her injuries was not wholly attributable to [Burcham's] conduct. The receipt of treatment would only bring to light the fact that she was engaging in self-mutilation and abusing illicit drugs. As a result, a rational jury might have questioned whether [Burcham] was responsible for the more severe injuries and concluded that given this uncertainty, it could only conclude that the wounds inflicted by [Burcham] were no more than moderate in nature such that they did not rise to the level of great bodily injury."

A person is guilty of torture if he "inflicts great bodily injury" "with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or any sadistic purpose." (§ 206.) An offense is "attempted" when there is "a specific intent to commit the crime, and a direct but ineffectual act [is] done towards its commission." (§ 21a.)

"It is the court's duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense

charged and shown by the evidence to have been committed. Conversely, even on request, the court has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction. Substantial evidence is not merely any evidence . . . no matter how weak, but rather evidence from which a jury composed of reasonable [persons] could . . . conclude that the lesser offense, but not the greater, was committed. On appeal, we review independently the question whether the court failed to instruct on a lesser included offense." (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1327-1328, internal citation, emphasis and quotation omitted.) "Speculation is an insufficient basis upon which to require the trial court to give an instruction on a lesser offense." (*People v. Wilson* (1992) 3 Cal.4th 926, 941; see *People v. Duncan* (1991) 53 Cal.3d 955, 970.)

At trial, Burcham presented no evidence that Eagleton's wounds were self-inflicted. As noted, on cross-examination, Eagleton specifically denied that claim. When asked a follow-up question if most of the scars on her legs were self inflicted, she replied, "No, I don't think so, no." Burcham seizes on that latter, somewhat equivocal response to bolster his contention that Eagleton's wounds were self-inflicted, or that the harm he inflicted on Eagleton was "no more than moderate in nature such that [it] did not rise to the level of great bodily injury." But Burcham's claim is mere speculation. Eagleton's statement does not provide any support for either of those contentions. In light of Eagleton's testimony and that of the medical expert, the jury could reasonably conclude Burcham alone committed great bodily injury in torturing Eagleton, and that he did not simply attempt to do so. Accordingly, we conclude there was no evidence to support an instruction regarding attempted torture, and the court did not err in not giving one.

(Accord, *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1454 ["For a sua sponte instruction on attempt to be required, however, there must be 'evidence that a reasonable jury could find persuasive' on the point. [Citation.] The evidence on which defendant relies is not such evidence."].)

II.

The People concede, and we agree, that under section 12022.7 subdivision (g), the trial court erred by imposing the three-year great bodily injury enhancement under section 12022.7 subdivision (a) on count 3, in light of the fact that infliction of great bodily injury is also an element of the underlying torture conviction. Accordingly, the three-year great bodily injury enhancement on count 3 must be stricken.

DISPOSITION

We strike the three-year Penal Code section 12022.7 subdivision (a) great bodily injury enhancement on count 3. In all other respects the judgment is affirmed. The trial court is directed to amend the abstract of judgment accordingly and forward a certified copy to the Department of Corrections and Rehabilitation.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.