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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CYRUS SHERIF,

Defendant and Appellant.

D061445

(Super. Ct. No. SCD232717)

APPEAL from a judgment of the Superior Court of San Diego County, Laura W. Halgren, Judge. Affirmed.

A jury convicted Cyrus Sherif of two counts of assault with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1) (all statutory references are to the Penal Code). The jury acquitted Sherif of rape of an unconscious person (§ 261, subd. (a)(4)), making a criminal threat (§ 422) and intimidating a witness (§ 136.1, subd. (b)). The trial court sentenced Sherif to the upper term of four years on the first assault count and a concurrent three-year term on the second assault count.

## FACTS

On March 1, 2011, Theresa E. went to "U-31," a nightclub, where she joined her friend, Kelly Jones, who also was the girlfriend of Sherif and shared an apartment with him. They were drinking beer and Kamikaze shots. Later, Sherif and his friend Tim joined the two women to watch a comedy show at the club. Theresa and Jones left before the show was over because Jones was getting heckled by the comedian.

Theresa went home and changed into a sweatsuit. Theresa and her boyfriend argued, and she decided to leave their residence and visit Jones. After watching television with Jones, Theresa fell asleep on a chaise lounge in the living room.

Sometime after 2:00 a.m., Theresa awoke and found Sherif on top of her; he was thrusting his penis into her vagina. Theresa began to scream, and Sherif told her to be quiet. Sherif also threatened to kill Theresa. Theresa jumped off the chaise lounge, picked up her sweatpants from the floor and put them on. She grabbed her purse and tried to run out of the apartment, but Sherif grabbed her by the throat, threw her against the door and started choking her. Theresa could not breathe or yell; it felt like Sherif was crushing her throat. Sherif repeated his threats to kill Theresa.

Jones, who had been asleep in a bedroom, heard Theresa yelling "your boyfriend is raping me," and ran into the living room. Jones told Sherif to take his hands off Theresa, leave her alone and not hurt her. While Sherif was momentarily distracted, Theresa attempted to leave, but Sherif grabbed her and pushed her against the door. He started choking her again. Theresa was able to extract herself and ran out of the apartment, yelling "call the police." Neighbors gave Theresa a phone and she called the

police. Jones told police she had seen Sherif choking Theresa. However, at trial Jones testified she only saw Sherif holding Theresa's arms. Sherif told police he had just returned home after a night drinking with friends and he did not know what had happened.

The jury was shown photographs of Theresa with bruises on her arms, chin and along her jaw line.

A criminalist who performed DNA analysis on Theresa's vaginal swab testified Theresa's boyfriend was a major contributor of DNA on the swab and Theresa and Sherif were minor contributors. The criminalist said Theresa's boyfriend and Sherif were major DNA contributors to an external genital swab of Theresa, who was a minor DNA contributor. Theresa was a major DNA contributor and Sherif was a significant minor DNA contributor on an oral swab of Theresa. Theresa's boyfriend's DNA was not present on the oral swab.

Sherif testified he was intoxicated when he arrived home at about 2:00 a.m. When he entered the apartment, Sherif thought Jones was sleeping on the chaise lounge and lay down next to her. Sherif then realized that it was Theresa—not Jones—on the chaise lounge. Sherif asked Theresa to orally copulate him and she did so. According to Sherif, they next agreed to engage in sexual intercourse, but Theresa became upset when he attempted to do so and called him names. Theresa stood up, accused Sherif of being a rapist and started hitting him in the chest. Sherif told Theresa to calm down, but she continued to yell and hit him. Sherif put his hands on Theresa's clavicle and throat area to restrain her. He also grabbed Theresa's hands and told her to stop hitting him.

## DISCUSSION

Appointed appellate counsel has filed a brief setting forth evidence in the superior court. Counsel presents no argument for reversal, but asks that this court review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel refers to as possible, but not arguable, issues: (1) whether sufficient evidence support's Sherif's convictions of two counts of section 245, subdivision (a)(1); (2) whether the trial court prejudicially abused its discretion by allowing the prosecution, over the defense's "cumulative" objection, to play a tape of Jones telling a detective about how Sherif choked Theresa, despite already eliciting the same testimony from the detective; (3) whether the court prejudicially erred by denying Sherif's posttrial motion to relieve his appointed counsel and appoint new counsel to represent him in pursuing a motion for a new trial; (4) whether the court abused its discretion by imposing the upper term on the first assault count; (5) whether the court erred by not staying the second assault count pursuant to section 654; and (6) whether the court correctly addressed, in a special jury instruction, the prejudicial effect of the detective's erroneous testimony that Jones had told her that Sherif had done the same thing to her.

We granted Sherif permission to file a brief on his own behalf. He has not responded.

A review of the record pursuant to *People v. Wende, supra*, 25 Cal.3d 436 and *Anders v. California, supra*, 386 U.S. 738 has disclosed no reasonably arguable appellate issues. Competent counsel has represented Sherif on this appeal.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

AARON, J.