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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ARTHUR EDWARDS,

Defendant and Appellant.

E053186

(Super.Ct.No. FSB1002902)

OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Affirmed.

Helen S. Irza, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry J.T. Carlton, Anthony DaSilva and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant James Arthur Edwards guilty of forcible kidnapping (Pen. Code, § 207, subd. (a))¹ and fleeing a pursuing peace officer with a wanton disregard for the safety of people or property (Veh. Code, § 2800.2, subd. (a)). The trial court found true the allegations that defendant suffered four prior convictions, which constituted (1) one prior strike (Pen. Code, § 1170.12); (2) one prior serious felony conviction (Pen. Code, § 667, subd. (a)(1)); and (3) three prior convictions resulting in prison terms (Pen. Code, § 667.5, subd. (b)). The trial court sentenced defendant to prison for a term of 25 years, 4 months.

Defendant raises two issues on appeal. First, defendant contends the trial court erred by not instructing the jury that if the victim was intoxicated, such that she was incapable of giving legal consent, then a defendant could only be guilty of kidnapping if the taking or carrying away was for an illegal purpose. (CALCRIM No. 1201.) Second, defendant asserts he must be resentenced because the trial court mistakenly believed it was required to impose consecutive sentences, when it had discretion to impose concurrent terms. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. PROSECUTION’S CASE

The victim met defendant through her sister’s boyfriend. On the afternoon of July 11, 2010, the victim was at home drinking alcohol with her nephew. The victim drank three or four 40-ounce malt beverages—the brand name of the beverage was King Cobra. “At some point,” while it was still light outside, the victim and her nephew

¹ All subsequent statutory references will be to the Penal Code unless indicated.

decided to walk to the San Manuel casino. The victim stopped drinking prior to walking to the casino. The walk from the victim's house to the casino was approximately 45 minutes; she arrived at the casino around dusk. The victim drank sodas at the casino, but she did not drink alcohol. The victim stayed there for a "couple hours."

The victim played at the slot machines while at the casino. While the victim was playing a game, defendant approached the victim. Defendant "kept telling" the victim, "Let's go." The victim told defendant she "wasn't ready to go" and instructed him to "[g]o away." Defendant did not relent, and he was "causing a scene." The victim had previously been banned from the casino, so she stopped playing her game in order to avoid drawing attention to her presence. Around midnight, the victim walked out of the casino. The victim left without her nephew. The victim did not ask for help from casino security because she had been banned from the casino and was afraid of getting into trouble.

The victim walked on a sidewalk, but then defendant stopped his car near where the victim was walking and yelled at her to get into the car; the victim refused. Defendant parked his car and exited the vehicle. The victim then began walking in the middle of the street, in an attempt to stop cars. While in the street, the victim was saying, "Please stop. Help. Does someone have a phone?" The victim was trying to stop cars so she could "get away" from defendant; the victim believed defendant was "crazy" and would be following her. The victim saw a truck at an intersection and tried to get the driver's attention.

Troy Lopez (Lopez) was leaving the casino, driving a truck, around 11:30 p.m. on July 11. Lopez saw the victim walking in the middle of a traffic lane—the road had two lanes going each direction (four total lanes). Lopez slowed down to about five miles per hour, because the victim was walking in the lane in which he was traveling. Lopez asked the victim “if she was okay, if she needed a ride,” but the victim did not respond and looked at him as though he was not there. There was traffic and car horns making noise, so it was possible the victim did not hear him. The victim’s clothes and hair “were messed up” and it appeared she had been crying. Lopez thought the victim might have been under the influence of alcohol or drugs.

Lopez continued driving, but then stopped his car along the street where the victim was walking so that he could again ask her if she was okay. Lopez stopped his car at a signal, and waited for the victim to approach. The victim saw the truck stopped at the intersection. After seeing the truck, the victim felt a strike on the back of her head, and she was pulled by her neck into the backseat of defendant’s car. The victim saw defendant “jump[] in the front seat,” and then the car “took off.”

Defendant said to the victim, “Shut up, bitch. Fuck you, bitch. You’re going to die tonight. If I can’t have you, no one can have you.” The victim recognized the car as defendant’s vehicle, a white Nissan Maxima. The victim did not want to get in the car with defendant. Defendant continued pushing the victim while inside the car. The victim yelled at defendant, “[W]hy [are] you doing this? Stop. Let me out.”

Lopez, in his rearview mirror, had been watching the victim walk. Lopez observed a white car stop alongside the victim, and saw defendant grab the victim.

Lopez saw the victim try to break away from defendant, but defendant began hitting the victim with a closed fist. Lopez saw the victim “using all her limbs to try to keep herself from going inside the vehicle.” Defendant placed the victim in the car and closed the door. When defendant walked to the driver’s side of the car, the victim exited the car. Defendant then exited the car, grabbed the victim, punched her “some more with a closed fist,” and placed her back in the car.

Lopez called 911. Lopez followed defendant’s white car as it went through a red light and stop signs without stopping; at times they were traveling 80 to 100 miles per hour; they were swerving in and out of traffic. Lopez followed defendant for seven to eight minutes. Eventually, Lopez saw law enforcement following defendant, so he stopped following defendant.

The victim saw lights and heard sirens coming from outside the car. San Bernardino Police Officer Bryce Hanes followed defendant’s car. Officer Hanes and another officer, in a separate police car with sirens and lights activated, followed defendant at a high rate of speed. When the car stopped, the victim heard law enforcement officers instructing them to exit the car. The victim exited the car and saw she was in front of the house she shared with her mother and sister. The victim did not recall defendant ever saying he was taking her home. The victim suffered scratches on her neck from being grabbed, and a bump on the back of her head from being struck.

Officer Hanes spoke to the victim and saw the scratches on her neck. The victim told Officer Hanes that defendant was “nothing to [her],” but then said defendant was a “stalker” and the two had dated. The victim told the officer defendant punched her

head repeatedly and dragged her into the car. Officer Hanes did not ask the victim if she had been drinking that night, but it did not appear to the officer that the victim was under the influence. Officer Hanes did not recall smelling alcohol on the victim's breath. A bottle of King Cobra was found on the floorboard of defendant's car. The victim explained defendant drank King Cobra as well, and it was not her bottle. The victim did not have identification with her to purchase alcohol that night, and the casino does not permit people to "walk around with bottles."

B. DEFENSE CASE

Defendant testified at trial. The following is the defense's version of the events. The victim was defendant's girlfriend. The two met in September 2009 and lived together from September to December 2009. In March 2010 defendant and the victim began talking to one another again.

On July 11, 2010, at approximately 8:00 p.m., the victim called defendant on the telephone. As a result of the call, defendant left to pick up the victim at a park. The victim was with her two daughters, her nephew, and another girl. Everyone entered defendant's car, and they went to a liquor store. Defendant bought the victim a 40-ounce King Cobra. Defendant then drove everyone to the victim's house. The victim drank the King Cobra while defendant drove, which is why the bottle was on the floorboard of his car.

Defendant decided to go home. The victim asked defendant to take her to the liquor store and the casino, and defendant agreed. Defendant, the victim and her nephew went to the liquor store. After leaving the liquor store, the victim drank a Four

Loko, which is a strong alcohol; it causes the victim to stagger when she drinks it.

Defendant drove the victim and her nephew to the casino. Defendant planned to drop the victim off at the casino, but the victim asked defendant to walk her into the casino, rather than drop her off, since she had been banned from the casino.

Once inside the casino, the victim sat down at a slot machine, but then fell off her stool. Defendant believed the victim fell off her stool because she was intoxicated. Defendant went to his car in the casino's parking area. As defendant drove out of his parking place, the victim was next to his car. Defendant stopped the car, and the victim entered. Defendant began driving down the street. The victim asked defendant to stop and buy her another beer. Defendant refused and told the victim she "had too much to drink already."

The victim opened the car door, which caused defendant to pull over and stop the car. The victim exited the car and began walking in the middle of the street. Defendant followed the victim on foot, and promised to buy her another beer. Defendant saw they were walking far away from his car, so he walked back to his car in order to drive to the victim. When defendant stopped his car near the victim, he spoke to her. Defendant told the victim to get in the car, because she would be in trouble if the police came, due to defendant having a restraining order against the victim.

Defendant noticed Lopez's truck, which was stopped, so he walked toward the truck. Defendant thought the person in the truck might want to harm the victim. Before defendant reached the truck, he turned around and walked back toward the victim.

Defendant told the victim about his concerns for her safety; she entered defendant's car.

Defendant then went to the driver's side and also entered the car. The victim then exited the car, walked towards the back of the car, and then reentered the car, but in the backseat. The victim closed the car door. Once the victim was in the backseat, defendant "took off." Defendant saw Lopez following him, which concerned him. Defendant thought Lopez was going to hurt him or the victim. Defendant drove as fast as he could, approximately 60 miles per hour, because he thought Lopez was "after" them.

Defendant did not stop when he saw the police because the victim told him not to stop and to "just get her home." Defendant drove to the victim's home. Defendant denied ever punching, pushing, or grabbing the victim that night. Defendant believed the victim's injuries might have been self-inflicted. Defendant admitted suffering five prior felony convictions.

C. PROSECUTION'S REBUTTAL CASE

San Bernardino Police Officer Erik Campos interviewed defendant following the incident at issue in this case. Defendant told Officer Campos he was concerned for the victim's safety so he physically grabbed her and placed her in the car. Defendant told the officer he ran red lights because "he wanted to get home and have no other problems." Defendant also told Officer Campos he believed the victim was drunk.

D. JURY INSTRUCTIONS

The trial attorneys and the trial court discussed jury instructions off the record. Upon going back on the record, the trial court asked if there was anything the trial

attorneys wanted to say on the record. Both attorneys said there was nothing to state on the record.

E. DEFENSE’S CLOSING ARGUMENT

During closing argument, defendant’s trial attorney argued the victim was drunk on July 11 and defendant acted out of necessity “to protect” the victim. Defense counsel showed the jury the necessity instruction during closing arguments. Counsel argued defendant believed the victim was in danger from Lopez, and he needed to “get her out of there, whether she wanted to go or not.” Counsel asserted, “[N]ecessity was at work that night, necessity is what caused all of these things to happen that night. Nothing more. Nothing less.”

DISCUSSION

A. JURY INSTRUCTION

Defendant contends the trial court erred by not instructing the jury that if the victim was intoxicated, such that she was incapable of giving legal consent, then a defendant could only be guilty of kidnapping if the taking or carrying away was for an illegal purpose. (CALCRIM No. 1201.) We disagree.

“A trial court must instruct the jury on every theory that is supported by substantial evidence, that is, evidence that would allow a reasonable jury to make a determination in accordance with the theory presented under the proper standard of proof. [Citation.] We review the trial court’s decision de novo. In so doing, we must determine whether there was indeed sufficient evidence to support the giving of” the

kidnapping/incapacity instruction (CALCRIM No. 1201). (*People v. Cole* (2004) 33 Cal.4th 1158, 1206.)

CALCRIM No. 1201 provides, in relevant part: “The defendant is charged [in Count ____] with kidnapping (a child/ [or] a person with a mental impairment who was not capable of giving legal consent to the movement) [in violation of Penal Code section 207].

“To prove that the defendant is guilty of this crime, the People must prove that:

“1. The defendant used (physical force/deception) to take and carry away an unresisting (child/ [or] person with a mental impairment)[.]”

The prosecution’s evidence reflects the victim struggled to not be placed in defendant’s vehicle. Lopez testified the victim used “all her limbs to try to keep herself from going inside the vehicle.” Thus, the prosecution’s evidence reflected the victim actively resisted defendant’s efforts to take and carry her away. By contrast, defendant testified the victim willingly entered his car. Specifically, defendant stated he told the victim about his concerns for her safety “and then she got in the car.” Defendant explained the victim then exited the car, but only to move to the backseat. Defendant said, “She got back in the car and closed the door.”

Thus, under either party’s evidence—prosecution or defense—there was no evidence defendant used physical force to take and carry away an unresisting victim. Rather, the evidence reflected (1) the victim actively resisted, or (2) the victim willingly went with defendant. Given that the evidence does not reflect defendant taking and

carrying away an unresisting victim, we conclude the trial court did not err by not instructing the jury with CALCRIM No. 1201.

Defendant asserts the instruction should have been given because the victim was so intoxicated at the time she entered defendant's car that she was unable to provide legal consent. Defendant's argument is derived from the idea that the Legislature did not intend to criminalize a person who moves an unconscious person out of a roadway to a place of safety, but the Legislature did want to criminalize the activity of moving an unconscious person for an illegal purpose. (*People v. Daniels* (2009) 176 Cal.App.4th 304, 328.) The general rule being that if a person forcibly moves another, who by reason of immaturity or mental condition is unable to give consent, then the person will only be guilty of kidnapping if the taking and carrying away is done for an illegal purpose or with an illegal intent. (*Ibid.*) Defendant contends the jury should have been informed of this rule, via "CALCRIM [No.] 1201 or its equivalent."

Defendant's argument is not persuasive, because the trial court instructed the jury on the defense of necessity. The trial court explained that if defendant acted with the intent of preventing harm to the victim, then defendant was not guilty of kidnapping. (CALCRIM No. 3403.) Thus, to the extent the evidence reflected defendant acted with a legal intent, the jury was instructed on this point. (See *People v. Riley* (2010) 185 Cal.App.4th 754, 767 [Instructions must be considered "as a whole."].)

B. SENTENCING

1. *FACTS*

Defendant's probation report reflects the following:

“Criteria Affecting Concurrent or Consecutive Sentences ([California Rules of Court,] Rule 4.425):

“Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

“(a) Facts relating to the crime include:

“(1) The crimes and their objectives were predominately independent of each other.

“(2) The crimes did involve separate acts of violence or threats of violence.

“(3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.”

The probation officer recommended defendant’s sentences be served consecutively. At the sentencing hearing, the trial court stated it “reviewed carefully the probation report in this case.”

The trial court made the following statements when pronouncing defendant’s sentence: “Pursuant to the strikes law, Count 3 will be run consecutive in that that is a separate crime, separate offenses, and the potential on the evading charged to harm innocent parties other than the victim as to Count 1; therefore, as to Count 3 . . . a sentence . . . of 16 months to be run consecutive to Count 1. [¶] Consecutive to those sentences will be the priors allegation”

2. DISCUSSION

Defendant contends he must be resentenced because the trial court mistakenly believed it was required to impose a consecutive sentence, when it had discretion to impose a concurrent term. We disagree.²

“Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to ‘sentencing decisions made in the exercise of the “informed discretion” of the sentencing court,’ and a court that is unaware of its discretionary authority cannot exercise its informed discretion. [Citation.]” (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

California Rules of Court, rule 4.425(a) lists factors for a trial court to consider when deciding to “impose consecutive rather than concurrent sentences.” The factors are: “(1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.”

When the trial court imposed a consecutive sentence for count 3 it relied on the factors listed in California Rules of Court, rule 4.425(a). The trial court explained the

² The People assert defendant forfeited this contention by failing to object at the trial court. We address the merits of the issue because it is easily resolved.

evasion offense was predominately independent of the kidnapping and risked harm to people other than the victim. The trial court's act of giving a reason for the consecutive sentence suggests that it was aware a consecutive sentence was not mandatory, because there would have been no need for an explanation if the consecutive term were required. Moreover, the trial court stated it read the probation report, and the probation report provided that concurrent terms could have been imposed. Thus, we conclude the record reflects the trial court was aware it had the discretion to impose consecutive or concurrent terms. In sum, we find no error.

Defendant cites the law from section 667, subdivision (c)(6): "If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e)." Defendant contends the kidnapping and evasion were committed at the same time, so the foregoing rule requiring consecutive sentences was misapplied in this case. Contrary to defendant's position, the record does not reflect the trial court imposed consecutive sentences because the crimes were committed on separate occasions, per section 667; rather, it found the crimes were independent of one another and involved separate threats of harm, per California Rules of Court, rule 4.425(a). Accordingly, we find defendant's argument to be unpersuasive.

In a second argument, defendant contends his trial counsel was ineffective for failing to (1) inform the trial court it had discretion to impose concurrent sentences, and (2) argue in favor of concurrent sentences. As to the issue of informing the trial court,

the record reflects the trial court exercised informed discretion when imposing consecutive sentences. Thus, counsel was not ineffective for not informing the trial court it had the option to impose concurrent terms—the record reflects the trial court was already aware of this information.

Second, in regard to the issue of arguing in favor of concurrent sentences, the record reflects that, at sentencing, defendant’s trial counsel asserted defendant was “a productive member of society,” with a fulltime job. Defendant’s trial counsel asked the trial court “for mercy and leniency.” Given that the trial court was informed of its discretion to impose concurrent terms, counsel’s request for mercy and leniency can be construed as a request for concurrent terms and/or low or mid-terms. Accordingly, we are not persuaded counsel was ineffective for failing to argue for concurrent sentences.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.