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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.

JOVAN JAY SANDERS III,

Defendant and Appellant.

E053586

(Super.Ct.No. FMB1000499)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed.

John D. O’Loughlin, 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, Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Jovan Jay Sanders III of misdemeanor false imprisonment (count 1—Pen. Code §§ 236, 237, subd. (a))¹ as a lesser included offense of the charge of kidnapping (§ 207, subd. (a)); felony attempted criminal threats (count 2—§§ 422, 664) as a lesser included offense of criminal threats (§ 422); misdemeanor battery against a fellow parent (count 3—§ 243, subd. (e)(1)) as a lesser included offense of corporal injury to a cohabitant or child’s parent (§ 273.5, subd. (a)); felony false imprisonment by violence (count 4—§§ 236, 237, subd. (a)); and misdemeanor resisting, delaying, or obstructing a peace officer in the performance of his duties (count 5—§ 148, subd. (a)(1)) as a lesser included offense of resisting an executive officer by force (§ 69).

Thereafter, defendant admitted allegations he had incurred a prior strike conviction (§§ 667, subds. (b)-(i), 117012, subds. (a)-(d)) and served a prior prison term within five years (§ 667.5, subd. (b)). The court sentenced defendant to an aggregate determinate term of seven years’ incarceration consisting of the following: the aggravated term of three years, doubled pursuant to the strike prior, on count 4; the aggravated term of one and a half years, doubled, on count 2 concurrent; one year consecutive on the prior prison term; and 143 days concurrent with credit for time served on counts 1, 3, and 5. On appeal, defendant contends the prosecutor committed prejudicial misconduct during her rebuttal argument, and the court erred in declining to stay imposition of sentence on counts 1, 2, and 3. We affirm the judgment.

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

FACTUAL AND PROCEDURAL HISTORY

On December 17, 2010, a 911 dispatcher received a call from the victim in which she requested the help of police because her ex-boyfriend would not let her go. The connection then went immediately dead. Thereafter, a restaurant employee called 911 to report the victim had come in and requested someone call the police, because there was a man outside trying to hurt her. The caller indicated the victim was “pretty scared.”

San Bernardino County Sheriff’s Deputy Ericson Dominick and Detective Steven Everhart responded to the restaurant where they contacted the victim. The victim appeared to be in distress and fear. The victim told Deputy Dominick that on December 15, 2010, defendant came over to her apartment where they got into an argument; they broke up and defendant removed all the Christmas presents from the victim’s residence. The next day, December 16, 2010, he telephoned to tell her he was coming over to return the Christmas gifts. He came over with the gifts; she opened the front door just enough to retrieve the presents but defendant put his foot in the door and pushed his way into the residence.

Defendant forced the victim into the back room, pushed her down onto the bed, put his hand around her neck and squeezed; he squeezed her neck harder every time she attempted to get off the bed. Later, they got into an argument in which they threw ketchup on one another. The victim attempted to leave, but defendant blocked the doorway. Defendant told her she could not leave because he was going to torture her.

The victim repeatedly asked to and attempted to leave, but defendant kept blocking the door. Eventually she went to sleep in her bed with her daughter and

defendant.² She had attempted to leave several times; however, the last time defendant threatened to slit her throat and cut the baby out of her stomach.³ In the morning, the victim attempted to call 911, but defendant took her cell phone away.

Defendant said they were going over to his mother's house. The victim acquiesced because she saw it as an opportunity to escape. As defendant pulled the car into the driveway of his mother's home, the victim got out of the vehicle while it was still moving and dialed 911. Defendant grabbed the cell phone away from her. He told her she was not going anywhere and grabbed her around her waist. In response, she screamed loudly.

Defendant's sister, Crystal, came out to see what was happening. The victim yelled at defendant to let her go; Crystal told defendant to let the victim go, but defendant told her to go back inside the house. The victim broke free of defendant's grasp and ran across the street to a restaurant, where she asked one of the employees to call 911. The victim waited in the restaurant for the officers to arrive. After interviewing the victim, Deputy Dominick asked if she would be willing to testify in court regarding all she had told him; she replied that she would. Deputy Dominick then transported the victim to a domestic violence shelter for the evening.

Crystal also went into the restaurant; Deputy Dominick interviewed her as well. She said she heard the victim screaming outside her residence; she went outside where

² The victims four-year-old daughter, whose father was not defendant, also lived with her.

³ The victim was pregnant with defendant's child.

she witnessed the victim screaming ““Help. Get him off of me.”” Defendant was holding the victim around the waist while the victim attempted to get away. Crystal told defendant to let the victim go; he refused. The victim then ran across the street to the restaurant. Crystal did not call the police because on former occasions when she had, the victim would lie to the responding officers, telling them that someone other than defendant had hit her.⁴

Deputy Dominick spoke with defendant later that evening. Defendant reported that he and the victim engaged in a dispute the previous day over his taking the Christmas gifts, and the victim’s family’s belief that he was an unemployed “lowlife and a punk.” He said there was no physical altercation between them other than throwing ketchup all over one another. They broke up. Nevertheless, he reported they went to bed together and had sexual intercourse. They drove over to his mother’s house where they showered and dropped off the victim’s daughter. Defendant said he did not know how the victim incurred the scratch to her face but implied that she got it in a fight with her daughter’s father’s girlfriend(s).

Deputy Dominick advised defendant he was placing defendant under arrest; he reached out to grab defendant’s hand. Defendant ran. Detective Everhart reached out to grab him; Deputy Dominick testified defendant pushed Detective Everhart to the ground. Detective Everhart testified that as defendant moved toward him, he attempted to grab

⁴ Crystal testified at trial that she heard defendant and the victim arguing; the victim never yelled for defendant to let her go. She denied telling Deputy Dominick that defendant was holding the victim by the stomach and refused to let her go.

defendant, but his feet became entangled and he fell to the ground with his arm extended. Detective Everhart sustained one or two fractures to his shoulder; at the time of trial he continued to receive physical therapy and remained on limited duty. Defendant was apprehended later that evening.

The victim recanted the version of events she reported to Deputy Dominick. She testified she initially gave defendant's parole officer and the deputy district attorney a letter in which she informed them she wished the charges against defendant to be dropped, because everything she told the police were lies.⁵ She spoke with the public defender investigator on December 29, 2010, who took a recorded statement from her. She told him she had lied to the police regarding the circumstances of that evening. She told him she incurred the scratches to her face from her Chihuahua. The victim testified at trial that she lied about defendant choking her, throwing her on the bed, preventing her from leaving, threatening to torture her, threatening to cut the baby out of her stomach, and making her get into his car.

The victim's testimony was compelled by subpoena; she did not want to testify. She wanted defendant released so he would be there for the birth of their child. She had spoken with defendant many times since his incarceration; they "possibly" discussed proposed attempts by her to avoid service of the subpoena. Recorded conversations between her and defendant while the latter was in jail were played to the jury. In one

⁵ The victim was granted "use immunity" after it was explained to her that her testimony, that she lied to the police, could subject her to prosecution. The court explained to the jury the circumstances of the victim's testimony under use immunity.

conversation recorded on January 17, 2011, defendant told the victim not to answer the door if the police come to her house. He told her to stay out of the house until after the courthouse closed, for the following 60 days, so that she could not be served with a subpoena. In another conversation recorded on January 18, 2011, defendant told the victim that he had informed his attorney she had moved out of state so that any attempt to subpoena her would be unsuccessful.

DISCUSSION

A. PROSECUTORIAL MISCONDUCT

Defendant contends the People committed prejudicial prosecutorial misconduct requiring reversal of his conviction. We disagree.

During the defense's closing, defendant's attorney argued that "when [the victim] came into this courtroom in front of you, she did raise her hand, and she did swear to tell the truth. And some of us didn't believe her, so we offered her—or the district attorney offered her a grant of immunity. [¶] If you just tell the truth, we won't prosecute you for giving a false statement to the police officer at the time of the crime. And the inference is we are not going to prosecute you if you commit perjury in this courtroom today. After that promise, and still under oath from the court clerk, she told you what happened."

During the People's rebuttal, the prosecutor stated, "Immunity was given to the victim because there was a possibility that she could be charged with a crime. And just like everyone in the United States of America, you are not forced to incriminate yourself. The use of immunity for her testimony in this trial was given because the People don't believe that she was lying at the time that she talked to Deputy Dominick, and that's what

we saw at the time that we filed the charges. That’s why the charges were filed.”

Defendant objected that the prosecutor’s remarks amounted to improper summation. The court overruled the objection.

The prosecutor continued: “And so defense counsel wants you to think that she had no reason to lie. But she has all the reasons to lie that we already went over. She just now isn’t going to be charged with them. Now she knows she can commit perjury without any recourse by the People. But the People wanted to put the evidence before you and have you decide what, in fact, happened . . . that night.”

Misconduct by the prosecutor violates the federal Constitution when it “““comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.””””” (*People v. Hill* (1998) 17 Cal.4th 800, 819.) ““Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.””” [Citation.]’ [Citation.]” (*Ibid.*) We review de novo a defendant’s claim of prosecutorial misconduct. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 860)

“A prosecutor may comment upon the credibility of witnesses based on facts contained in the record, and any reasonable inferences that can be drawn from them, but may not vouch for the credibility of a witness based on personal belief or by referring to evidence outside the record. [Citations.]” (*People v. Martinez* (2010) 47 Cal.4th 911, 958.) ““[S]o long as a prosecutor’s assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the “facts of [the] record and the

inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,” her comments cannot be characterized as improper vouching.’ [Citations.]”
(*People v. Bonilla* (2007) 41 Cal.4th 313, 337.)

“Impermissible “vouching” may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness’s veracity or suggests that information not presented to the jury supports the witness’s testimony.’ [Citation.] [I]t is improper for a prosecutor to argue that he has a superior knowledge of sources unavailable to the jury” (*People v. Williams* (1997) 16 Cal.4th 153, 257.)

“Prosecutorial assurances, *based on the record*, regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper “vouching,” which usually involves an attempt to bolster a witness by reference to facts *outside* the record.’ [Citation.] No impermissible ‘vouching’ occurs where ‘the prosecutor properly relie[s] on facts of record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief.’ [Citations.]” (*Ibid.*)

Defendant maintains that by stating the People did not believe the victim was lying when she first spoke with Deputy Dominick, the prosecutor impermissibly vouched for the witness. Moreover, defendant contends by stating that is why they filed the charges against him, the prosecutor additionally impermissibly insinuated that a criminal charge is evidence of guilt. We disagree. The prosecutor’s statements were made in response to defendant’s argument that essentially vouched for the validity of the victim’s testimony at trial. Thus, it was a direct response to defendant’s arguments rather than an illicit attempt to persuade the jury by appeals to outside evidence or the inviolability of

her office. Indeed, the prosecutor's comments involved no mention of evidence outside that presented at trial, and did not involve any invocation of the sanctity of her office. Additionally, the prosecutor's statement regarding the filing of the charges can in no way be accurately construed as conveying the impression that the simple filing of charges constitutes evidence against defendant. The comments were not egregious, reprehensible, and did not undermine the fundamental fairness of defendant's trial. Therefore, the comments were not constitutionally violative misconduct.

Nevertheless, even assuming misconduct, we hold the comments harmless. “[T]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom” [citation]’ [Citation.] When we review a claim of prosecutorial remarks constituting misconduct, we examine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief complained of. [Citation.]’ [Citation.] ‘To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.’ [Citation.]” (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1403.)

To the extent the comments were error, we hold that their minimal nature, the prosecutor's immediate mitigation of the statements, and the trial court's instruction of the jury to determine the credibility of witnesses itself, based solely on facts presented at

trial, rendered any error harmless. (CALCRIM Nos. 105 [“You alone must judge the credibility or believability of the witnesses.”]; 200 [“You must decide what the facts are. It is up to all of you, and you alone to decide what happened based only on the evidence that has been presented to you in this trial.”]; 222 [“You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom.

Evidence is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence. [¶] Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence.”]; 318 [evaluating credibility of a witness’s testimony].) There was no reasonable likelihood that the jury rendered the verdicts it did, based at all upon the prosecutor’s brief remarks during rebuttal argument.

B. SECTION 654

Defendant maintains the court erred in not staying imposition of punishment on counts 1, 2, and 3 pursuant to section 654, because they all derived from one indivisible objective, to stay the victim against her will, for which defendant had already been punished under count 4.⁶ We disagree.

Section 654, subdivision (a) provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” “With respect to punishment

⁶ Defendant did not raise the issue below and did not object when the court imposed sentence.

imposed under statutes that define a *criminal offense*, it is well settled that ‘[s]ection 654 bars multiple punishments for separate offenses arising out of a single occurrence where all of the offenses were incident to one objective.’ [Citation.]” (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507.)

“Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ [Citation.]” (*People v. Rodriguez, supra*, 47 Cal.4th at p. 507, italics omitted.) However, a defendant might also harbor multiple criminal objectives, which are independent of and not merely incidental to one another. Under such circumstances, the defendant “may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’

[Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*)).

“[T]he [forfeiture] doctrine does not apply to questions involving the applicability of section 654. Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court’

[Citation.]” (*People v. Hester* (2000) 22 Cal.4th 290, 295.) ““A trial court’s implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.” [Citation.]’ [Citation.]” (*People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1310.)

Where separate offenses are separated by periods of time during which reflection is possible, section 654 does not mandate that imposition of punishment be stayed. (*People v. Surdi* (1995) 35 Cal.App.4th 685, 689-690 [multiple stabbing episodes over the course of an evening supported imposition of separate sentences on mayhem and kidnapping convictions]; *Harrison, supra*, 48 Cal.3d at p. 335 [imposition of separate sentences upon the defendant's conviction of three counts of forcible sexual penetration appropriate where acts occurred over the course of 10 minutes, but were interrupted by breaks of sufficient duration to permit the defendant to harbor separate intents].)

Here, sufficient evidence supported the trial court's determination that imposition of punishment on counts 1 through 3 was proper. The count 1 offense of false imprisonment, for which the jury found defendant guilty, was based on the charged offense of kidnapping. Thus, defendant's commission of that offense occurred on December 17, 2010, when he drove the victim to his mother's house and held her by the stomach against her will, presumably a day later than the events that led to the false imprisonment by violence conviction. Defendant's attempted criminal threats conviction derived from either his threat to torture the victim or cut the fetus from her stomach. In either event, neither threat was necessary to execute defendant's false imprisonment of the victim and was separated by enough time to permit defendant the opportunity of reflection.

Finally, there was evidence that defendant perpetrated multiple acts of violence against the victim including choking, squeezing, pulling hair, throwing her on the bed, throwing ketchup, and grabbing her around the waist. Not all defendant's acts of

violence were committed contemporaneously with his acts constituting the false imprisonment by violence conviction. Therefore, there was sufficient evidence that defendant had enough time to reflect upon his commission of each offense such that imposition of punishment was appropriate. Although there was sufficient evidence to divine one common objective, the evidence was equally susceptible to an interpretation that defendant merely haphazardly responded to events as they unfolded. Thus, sufficient evidence supported the trial court's implied finding that defendant should not be rewarded for having escalated his criminal behavior during a course of conduct that was repeatedly interrupted by the victim's struggles. (*Harrison, supra*, 48 Cal.3d at p. 338.)

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

McKINSTER
Acting P. J.

RICHLI
J.