

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

DARYL WAYNE BUCKNER,

Defendant and Appellant.

E054170

(Super.Ct.No. INF067313)

OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey L. Gunther, Judge. (Retired judge of the Sacramento Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Gerald J. Miller, 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, Alana Cohen Butler, and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

## I

### INTRODUCTION<sup>1</sup>

Defendant Daryl Wayne Buckner attacked and threatened Jane Doe, his former wife with whom he had been living. A jury convicted defendant of four criminal counts: torture; infliction of traumatic injury on a former spouse; making criminal threats; and false imprisonment. (§§ 206, 236, 273.5, 422.) The jury also made true findings on the enhancements on counts 1 and 2 for personal infliction of great bodily injury and domestic violence. (§ 1022.7, subd. (e).) The court found true a prior strike allegation. The trial court sentenced defendant to 14 years to life on count 1 and stayed the sentences on counts 2, 3, and 4.

On appeal, defendant argues there is insufficient evidence to support his conviction on count 1 for torture. Defendant also urges the court abused its discretion in refusing to strike his prior conviction. We reject defendant's two contentions and affirm the judgment.

## II

### FACTUAL BACKGROUND

Defendant had been married to Jane Doe many years before the subject incidents. They are the parents of two adult children. In 2009, defendant began living with Jane Doe in Desert Hot Springs to help care for her mother. After the mother's death in March 2009, defendant continued to live with Jane Doe.

---

<sup>1</sup> All statutory references are to the Penal Code unless stated otherwise.

*A. The Prior Domestic Violence Incident*

In September or October 2009, Jane Doe had been asleep in the spare bedroom of her home when defendant broke down the locked door and hit her numerous times. After some time, she went to the hospital emergency room because she was dizzy and her head hurt. Defendant instructed her to tell the hospital staff she had fallen from a ladder while washing windows. Jane Doe complied because she was scared. She was diagnosed with a subdural hematoma. She was prescribed seizure medicine.

*B. The Incident of November 2009*

On November 22, 2009, defendant, Jane Doe, and two other men, Randy and Stretch, were watching television. Everyone was drinking. In the afternoon, after defendant left with the two guests, Jane Doe fell asleep in her bedroom. She woke up when she heard defendant return. Defendant was angry and yelling and his face was bloody. Defendant said Randy had hit him with a bat or a stick. Jane Doe obtained ice from the freezer. Defendant refused the ice in an angry tone and told her to sit down. Defendant was ranting and raving when he grabbed Jane Doe and began hitting her repeatedly in the face. He also kicked her in the back, shoulders, ribs, and head. He refused to let her use the bathroom, causing her to “go[] in my pants.” Her nose and tongue were bleeding. When she tried to get away, he knocked her down. When she yelled for help, he stuffed a wash rag in her mouth. He poured water from a dog dish on her.

At some point, defendant retrieved a block of knives from the kitchen and lined them up by Jane Doe’s head. He told Jane Doe he was going to kill her and her dog,

Charlie, and put them in the car trunk. Jane Doe was finally able to persuade defendant to lie down. When she tried to go into her bedroom, he confronted her. Again, she persuaded him to lie down in the master bedroom. As Jane Doe was bleeding, defendant told her to lie down and shut up.

Jane Doe was in pain. She could not move her arms. Her head was throbbing and her eye was closed. After defendant and Jane Doe fell asleep, she awoke about 4:00 a.m. She saw the knives had been moved. She left and drove to her brother's home, where she found refuge with one of his neighbors, Maria. Jane Doe was treated at the hospital overnight.

The injuries Jane Doe sustained included bruises, sore ribs, back, and head, swollen face and cheeks, and dizziness. She has ongoing back problems, head pain, dizziness, and abdominal swelling. She also suffered ruptured breast implants. She took seizure medication for her injuries.

After November 2009, Jane Doe developed problems with her short-term memory. Jane Doe testified she could not remember what she had told the officer who interviewed her. In particular, she did not remember saying that defendant had dragged her out of bed. She insisted she had walked out of the bedroom to get ice.

### *C. Jane Doe's Recorded Statements to the Police*

During cross-examination, the defense played a recording of Jane Doe's statement to the police, describing what had occurred on November 22 2009: "[A]round 10:00 o'clock Daryl came home and, he just went off the edge and just started beating me, he beat me for three hours. And then he made me sit in the chair. I had to pee my pants he

wouldn't let me go the bathroom. . . . [¶] . . . [¶] . . . he told me to stay in the chair and don't move. . . . I made it out quickly around 4:00 o'clock this morning." Jane Doe also said defendant had dragged her out of the bedroom. During the attack, he threatened her with kitchen knives. Because Jane Doe was bleeding, defendant splashed her with water from a dog bowl.

A second recorded interview was conducted in January 2010. Jane Doe described how, during the prior incident, defendant, who was drunk, broke open the door and beat her up in bed. When she finally went to the hospital, she said she had fallen from a ladder.

#### *D. Defense Evidence*

Medical witnesses testified that Jane Doe had been treated for back and neck pain in 2007 and for depression in 2008, causing her to begin drinking again in 2009. In October 2009, Jane Doe was prescribed Percocet, a pain killer. She told a doctor she had fallen from a ladder. Jane Doe's symptoms after the prior incident included dizziness, nausea, and vomiting, as well as depression arising from her mother's death. In December 2009, she claimed she was thrown or pushed off a balcony and received a refill of Percocet.

Between January and July 2010, Jane Doe was treated for dizziness, neck and back pain, depression, skin lesions, anxiety, and leakage involving her breast implants. In June 2010, she had three kinds of prescriptions—Percocet, Oxycodone, and Xanax—which she had been taking with alcohol. In July 2010, she was prescribed an increased dosage of Vicodin. In October 2010, she was diagnosed with spinal stenosis, a narrowing

of the vertebrae.

A person who has suffered a subdural hematoma can be prone to seizures. A post-concussive syndrome with symptoms of chronic headaches and dizziness can become permanent. In April 2010, Jane Doe still had a hematoma with the symptoms of headaches and dizziness.

### III

#### SUFFICIENCY OF EVIDENCE FOR TORTURE

Defendant contends the evidence is not sufficient to support his conviction for torture, which involves the infliction of great bodily injury upon the person of another “with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose,” and the actual infliction of great bodily injury upon the victim. (§ 206.) Defendant relies upon a reversal of a conviction for murder by torture by the California Supreme Court in *People v. Tubby* (1949) 34 Cal.2d 72, 77-78, in which the intoxicated defendant beat his stepfather to death. The court found no evidence the defendant acted with the intent to cause suffering. Instead, the defendant acted like any “crazy drunk” (*id.* at p. 77) and “the unprovoked assault was an act of animal fury produced when inhibitions were removed by alcohol.” (*Id.* at p. 78.)

More recent cases have articulated that torture includes “the “Act or process of inflicting severe pain, esp. as a punishment in order to extort confession, or in revenge.” (Webster’s New Int. Dict. (2d ed.).)” (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1563.) As addressed in *People v. Healey* (1993) 14 Cal.App.4th 1137, 1142: “Sadism

has been defined as ‘[a] form of satisfaction, commonly sexual, derived from inflicting harm on another.’ (Black’s Law Dict. (5th ed. 1979) p. 1198.)” The courts distinguish between crimes involving severe injuries caused by heated passion and crimes displaying a calculated intent to torture. (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) An act of calculated violence, as opposed to an indiscriminate attack, may establish the intent to torture. (*People v. Burton* (2006) 143 Cal.App.4th 447, 452; *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1163.) Defendant cites a litany of cases involving acts held to constitute torture, which he contends were far more egregious than in this case, in which defendant’s acts were “largely indistinguishable from other, common instances of domestic violence or assault.”

We review the record in the light most favorable to the judgment. (*People v. Towler* (1982) 31 Cal.3d 105, 117-188; *People v. Pre* (2004) 117 Cal.App.4th 413, 421; *People v. Massie* (2006) 142 Cal.App.4th 365, 373.) We reject defendant’s arguments because we conclude sufficient evidence shows defendant had a specific intent to cause cruel or extreme pain and suffering to Jane Doe for the purpose of persuasion or a sadistic purpose. (§ 206.) The totality of the circumstances and defendant’s prior assault on Jane Doe establish defendant’s intent.

In *People v. Jung* (1999) 71 Cal.App.4th 1036, 1042, the appellants also argued the nature of the acts inflicted on the victim were not comparable to the nature of the acts involved in other reported torture cases. The appellate court explained: “The emphasis is rightfully placed on the perpetrator, one who for revenge or other prohibited purpose, inflicts great bodily injury on the victim and intends to cause the victim severe pain and

suffering. That other victims of torture may have suffered more than the victim in this case sheds no light on the sufficiency of the evidence of defendants' intent to cause [the victim] severe pain and suffering." (*Id.* at pp. 1042-1043.)

Here, the circumstances of the offense involved defendant, over a period of about six hours, confining Jane Doe until she became incontinent, hitting her in the face repeatedly, kicking her, knocking her down, threatening her with an array of knives and announcing he would kill her and her dog, gagging her with a wash cloth, and denying her medical care. Jane Doe's injuries included pain, bruising, swelling, fractured ribs, and punctured breast implants. She suffered permanent memory loss, back pain, and dizziness. All of these factors are sufficient evidence of torture exceeding "common" domestic violence, as the court recognized when it characterized defendant's "unrestrained" conduct as "despicable."

Additionally, "[t]he intent of the perpetrator can be established not only by the circumstances of the offense, but also from other circumstantial evidence." (*People v. Jung, supra*, 71 Cal.App.4th at p. 1043.) Here the circumstances showed, as argued by the prosecutor, that defendant intended to control and dominate Jane Doe by terrorizing her with hours of violence after previously subjecting her to threats and beatings. (*People v. Healy, supra*, 14 Cal.App.4th at p. 1141; *People v. Hale* (1999) 75 Cal.App.4th 94, 107.) Defendant's conduct also could properly be viewed as sadistic. (*People v. Pre, supra*, 117 Cal.App.4th at p. 420.)

Defendant's hours-long reign of terror over Jane Doe was sufficient evidence to uphold the jury's conviction for torture either on a theory of persuasion or sadistic

purpose. (*People v. Assad* (2010) 189 Cal.App.4th 187, 191-192, 194.)

#### IV

#### PRIOR CONVICTION

The trial court denied defendant's motion to strike his 1978 conviction for robbery (§ 211) with the use of a firearm, committed in 1977. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) Defendant contends the trial court abused its discretion because it did not give proper consideration to the factors of defendant's drug and alcohol use, the conviction's remoteness in time, and other mitigating factors.

In his motion, defendant asserted that the present offenses were committed after Jane Doe attacked him because she was jealous that he had been fighting about another woman. Defendant disputed causing most of Jane Doe's injuries and he maintained the episode had occurred for only a few minutes, not hours.

Defendant was raised in a violent family and had a long history of drug and alcohol use. The 1977 robbery was related to his addiction. After he was released from prison in 1983, he pleaded guilty to weapons possession in 1984. (§ 12020, subd. (a).) In 1985, he pleaded guilty to misdemeanor child molestation. (§ 647, subd. (a).) In 1988, he received probation for a felony grand theft conviction. (§ 487.1.) In 2008, he received probation for an assault against Jane Doe's nephew. (§ 245, subd. (a)(1).) He received a drunk driving conviction in March 2009. Before the November 2009 incident, he was held under Welfare and Institutions Code section 5150. Defendant was diagnosed with bipolar disorder and major depression with manic episodes and suicidal ideation.

Defendant argues below and on appeal that Jane Doe was the aggressor and

defendant had an unblemished 20-year history between 1988 and 2008. His rehabilitation for an interim period of 20 years and his mental issues, as well as the remoteness of his offense were the principal mitigating factors that justified striking his prior conviction.

The abuse of discretion standard permits reversal only if the trial court's decision was irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 373-378.) Furthermore, "in ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The trial court gave due consideration to the relevant factors. As to the remoteness issue, the trial court recognized that there had been a hiatus in defendant's criminal conduct for 20 years but it resumed in 2008 and 2009, before the present crimes were committed. Where defendant has an intermittent criminal history culminating in crimes of increased violence, it is not an abuse of discretion to disregard the remoteness of the prior conviction. (*People v. Williams, supra*, 17 Cal.4th at pp. 162-165.) In fact, it would be a manifest abuse of discretion to dismiss a strike. (*People v. Strong* (2001) 87

Cal.App.4th 328, 347.) The trial court also considered defendant's drug use and alcoholism but quite reasonably concluded that defendant's addictions did not excuse his violence against Jane Doe.

Finally, the particulars of defendant's background, character, and prospects do not offer reasons to deem him outside the spirit of the Three Strikes scheme. Defendant is 57 years old without steady employment or family or community support. His mental health is poor and he exercises little or no self-control. His expressions of remorse are belied by his blaming Jane Doe for inciting him to attack her. The trial court found that defendant constitutes a continuing danger to society.

Under these circumstances, the trial court did not abuse its discretion in denying defendant's motion to strike his prior conviction. (*People v. Strong, supra*, 87 Cal.App.4th at p. 332.)

V

DISPOSITION

Sufficient evidence supports defendant's torture conviction. The trial court did not abuse its discretion by denying defendant's motion to strike. We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON  
J.

We concur:

McKINSTER  
Acting P. J.

RICHLI  
J.