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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO BARAJAS SALGADO,

Defendant and Appellant.

F062280

(Super. Ct. No. SF015790A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Judith D. Dulcich, Judge.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Kelly E. LeBel, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Dawson, J., and Kane, J.

A jury convicted appellant, Mario Barajas Salgado, of misdemeanor battery (Pen. Code, § 423, subd. (e)(1)),¹ a lesser included offense of the inflicting corporal injury on a cohabitant offense alleged in count 1, and felony false imprisonment by force or violence (count 2/§ 236).

On April 5, 2011, the court sentenced Salgado to a two-year term on his false imprisonment conviction and a concurrent 180-day term on his battery conviction.

On appeal, Salgado contends: 1) the court committed instructional error; and 2) his abstract of judgment contains certain errors. We will find partial merit to the latter contention. In all other respects, we affirm.

FACTS

M.R. testified that she lived with Salgado and their three children in Wasco. On August 14, 2010, at approximately 2:00 a.m., Salgado arrived home and wanted to have sex with her. M.R. refused and Salgado forcibly removed her pants and underwear. When she continued to refuse, Salgado became angry and started yelling and accusing her of seeing someone else. Salgado then hit his head against hers and began hitting her on the face and body with a closed fist. M.R. got out of the bed and told Salgado to calm down. Salgado gave M.R. a cellular phone and told her to call the police and that he was not afraid of them or her. M.R. was trembling and attempted to dial but Salgado took the phone away and threw it at her striking M.R. near her right armpit. Salgado then got a lamp and threw it at M.R. striking her on the right side of her chest. M.R. told Salgado to calm down and attempted to leave the room but Salgado grabbed her by her clothes and threw her against the bed. She fell off the bed and Salgado began hitting her in the stomach and head with a closed fist and he bit her on the left side of her torso. Salgado told M.R. if she did not call the police, he was going to throw the television at her. M.R.

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

got up and Salgado gave her a cell phone. However, he continued hitting M.R. and she screamed for her 16-year-old daughter. After telling M.R. she was “so brave,” Salgado grabbed her by her hair, forcibly threw her in the restroom, and closed the door with him inside. Salgado told M.R. that no one would be able to hear her in there and hit her with a can of air freshener. Salgado kept M.R. in the restroom for five to seven minutes until she told him to let her out because she could not feel her head and felt bad.

M.R. ran to her daughter’s room and knocked hard on the door. Salgado followed and attempted to pull her by the hair to their bedroom but M.R. dropped to the floor. Their daughter came out of her bedroom and asked Salgado, “You are hitting her again?” The daughter attempted to call the police but Salgado took the phone away from her. After the altercation ended, the daughter took M.R. to M.R.’s sister’s home and the police were called from there. At no time did M.R. strike Salgado. M.R.’s injuries included a bite mark, a broken tooth, a swollen eye, and a blood spot in one eye.

M.R.’s daughter testified that she was half asleep when she heard her mother call out for help and heard her being dragged down the hall. She left her room and saw M.R. on the floor holding her head saying that it really hurt and asking to be taken to the hospital. Salgado was leaning over her saying that it was going to be alright and that he would take her to the hospital.

The daughter went in her room and as she dialed 911 on her cell phone, Salgado ran at her and took the phone away. The daughter eventually drove M.R. to M.R.’s sister’s home.

Kern County Sheriff’s Deputy Patrick Basquez testified that he spoke to Salgado after the altercation. Salgado stated that when he came home about 1:30 a.m., M.R. got upset at him because he had been drinking and after they began arguing, he grabbed M.R. by the arm. M.R. began telling Salgado to hit her and he eventually slapped her three times on the face. Salgado said he may have bitten M.R. but he was so angry that he did

not remember. He also stated that he needed medication for his anger. Salgado told the deputy that M.R. never hit him. Salgado denied kicking M.R., throwing her, or pulling her by the hair. Salgado also told Basquez that his wrist hurt because he had punched a wall. Salgado did not have any visible injuries.

Salgado testified that he drank two beers prior to arriving home at approximately 2:30 a.m. to 3:00 a.m. on the night in question. M.R. was sitting on the bed and immediately began complaining that he had not let her go out with some friends a few days earlier. Salgado went into the restroom as M.R. continued to argue with him. When he came out, he sat next to M.R. on the bed. M.R. pushed him and he grabbed her by her arms. When Salgado got close to M.R. again, she started swinging her arms at him. M.R. then stood up and started telling Salgado to get out because she no longer wanted him in the house. Salgado started taking his shoes off and M.R. began hitting him from behind. Salgado grabbed her by the arms and pushed her on the bed. Their heads collided when Salgado attempted to prevent M.R. from standing up.

M.R. got mad and unsuccessfully tried to hit him again. Salgado threw her on the bed and she fell to the floor. Salgado leaned down to help M.R. up and she got him in a head lock and began choking him. Salgado slapped M.R. on the face a few times. Salgado then bit M.R. which caused her to release him. The couple continued arguing and M.R. began complaining that her head hurt. Salgado offered to take her to the doctor but M.R. yelled loudly for their daughter. Salgado told M.R. not to yell because she was going to wake the children and scare them but M.R. continued to yell out to their daughter. After again warning M.R. that she was going to scare the children, Salgado grabbed M.R. and pulled her into the restroom. Salgado held M.R. in the restroom for five to eight minutes until she calmed down because he did not want the children to hear her screams.

Once M.R. calmed down, Salgado let her out of the restroom so he could take her to the doctor. However, when M.R. walked past their daughter's bedroom she began banging loudly on the door and yelling for their daughter. Salgado grabbed M.R. and pulled her toward the garage but she broke free and again began banging on their daughter's bedroom door and yelling out for her. The daughter came to the door and M.R. dropped to the ground. When their daughter attempted to call the police on a cell phone, Salgado told her not to because he was taking M.R. to the doctor and she was going to get them in trouble. Salgado took the phone away from their daughter but he did not push her. Eventually, their daughter drove M.R. to M.R.'s sister's home.

DISCUSSION

The Court did not Commit Instructional Error

The court did not instruct the jury on self-defense with respect to the false imprisonment charged in count 2. Salgado contends that he held M.R. in the restroom "because M.R. was pushing and hitting him, and he kept her in the bathroom only until she calmed down." Thus, according to Salgado, since the record contained evidence supportive of self-defense with respect to the false imprisonment offense charged in count 2, the court prejudicially erred by its failure to instruct the jury sua sponte on self-defense with respect to count 2. We will reject Salgado's claim of instructional error.

““It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.” [Citation.]” (*People v. Middleton* (1997) 52 Cal.App.4th 19, 30.) The court has a sua sponte duty to instruct on defenses when “it appears that the defendant is relying on such a defense, or if there is substantial

evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (*Ibid.*)

A person acts in lawful self-defense if: 1) he reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully; 2) he reasonably believed that the immediate use of force was necessary to defend against that danger; and 3) *he used no more force than was reasonably necessary to defend against that danger. The person must believe there is imminent danger of violence to himself, that belief must be reasonable, and he must act only because of that belief.* The person is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the person used more force than was reasonable, he did not act in lawful self-defense. (See CALCRIM No. 3470.)

Salgado's assertion that he kept M.R. in the restroom because she was hitting and pushing him is factually incorrect. Salgado claimed that M.R. hit him several times and choked him for up to eight seconds until he slapped her several times. However, he did not claim that M.R. continued to attempt to hit him from that point until he forced her into the restroom. Nor did he testify that he confined M.R. in the restroom because he believed it was necessary to prevent her from assaulting him. Instead, Salgado unequivocally testified that he forcibly kept M.R. in the restroom so that her yelling would not wake up their children. Thus, the record is devoid of evidence that when Salgado confined M.R. in the restroom, he believed he was in imminent danger of violence from M.R., that he confined her in the restroom because of such a belief, or that his forcible confinement of M.R. was reasonably necessary to defend himself from her. Accordingly, since the record does not contain any evidence that supported a self-defense instruction with respect to count 2, we reject Salgado's claim of instructional error.²

² Salgado contends that if this court finds that the failure to instruct on self-defense as to count 2 resulted from invited error (see, e.g., *People v. McKinnon* (2011) 52 Cal.4th

The Errors in the Abstract of Judgment

Salgado contends that his abstract of judgment must be corrected to show the following: 1) the sentence in count 1 was imposed concurrent to the sentence in count 2; 2) the \$80 assessment imposed pursuant to section 1465.8 was actually two \$40 assessments, one for each count; and 3) the \$60 assessment imposed pursuant to Government Code section 70373 was actually two \$30 assessments, one for each count. We will find that these issues are moot.

“All fines and fees must be set forth in the abstract of judgment. [Citations.] The abstract of judgment form ... provides a number of lines for ‘other’ financial obligations in addition to those delineated with statutory references on the preprinted form. If the abstract does not specify the amount of each fine, the Department of Corrections cannot fulfill its statutory duty to collect and forward deductions from prisoner wages to the appropriate agency. [Citation.] At a minimum, the inclusion of all fines and fees in the abstract may assist state and local agencies in their collection efforts. [Citation.] Thus, even where the Department of Corrections has no statutory obligation to collect a particular fee, ... the fee must be included in the abstract of judgment. [Citation.] ... [¶] ‘Courts may correct clerical errors at any time, and appellate courts ... that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts.’ [Citation.]” (*People v. High* (2004) 119 Cal.App.4th 1192, 1200.)

On July 27, 2011, in response to a motion by appellate counsel, the trial court issued an amended abstract of judgment that in sections 5 and 8 lists the separate assessments of \$40 imposed in each count pursuant to section 1465.8, and the separate assessments of \$30 imposed in each count pursuant to Government Code section 70373. The abstract also states that the term imposed in count 2 was imposed concurrent to the term imposed in count 1. It does not, however, show that the concurrent term imposed in

610, 675), then he was denied the effective assistance of counsel by defense counsel’s failure to seek a self-defense instruction as to that count. This contention is moot in light of our conclusion that the record did not support a self-defense instruction with respect to count 2.

that count consisted of 180 days. Although the errors Salgado complains of are moot in light of the trial court's issuance of an amended abstract of judgment, in the interest of clarity we will direct the trial court to issue a new amended abstract of judgment that shows that the concurrent term imposed in count 1 consisted of 180 days.

DISPOSITION

The trial court is directed to issue an amended abstract of judgment which shows that it imposed a concurrent term of 180 days in count 1, and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.