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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERTO CRUZ SILVA,

Defendant and Appellant.

G044863

(Super. Ct. No. 09CF2351)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed in part and remanded.

Gregory L. Cannon, 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, and Heidi T. Salerno, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant Gilberto Cruz Silva of forcible rape of V.G. (Pen. Code, § 261, subd. (a)(2); all subsequent statutory references are to this code unless otherwise stated; count 1), assault with the intent to commit rape of T.P. (§ 220, subd. (a)(2); count 2), and making criminal threats to T.P. (§ 422; count 3). The jury also found true defendant used a knife in the commission of count 1 (§§ 667.61, subds. (b), (e)(4), 12022.3, subd. (a)) and inflicted great bodily injury to T.P. in the commission of counts 2 and 3 (§§ 12022.7, 12022.8, subd. (a), 1192.7, 667.5). The trial court sentenced defendant to a determinate term of 24 years and a consecutive indeterminate term of 15 years to life.

Defendant contends (1) the trial court erred by permitting the introduction of the statements he made before he was advised of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*), (2) the sentence imposed on count 3 (making criminal threats) must be stayed as it was an integral part of the assault with intent to commit rape, and (3) the trial court erred by failing to conduct an adequate inquiry into defendant's allegation of ineffective assistance of counsel. We agree with the latter contention. The court should have held a hearing under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) and we remand the case to the trial court to conduct such a hearing to determine whether new counsel should be appointed and, if so, to consider any motions new counsel might make. We disagree with the first two contentions and affirm the judgment, subject to the *Marsden* hearing and the trial court's ruling on any subsequent motions should the court appoint new counsel for defendant.

## FACTS

The charges involved two separate incidents on the same night; both victims were prostitutes soliciting on or near Harbor Boulevard in Santa Ana.

Between 2:00 and 3:00 a.m. defendant drove into a parking lot, V.G. walked over to defendant's van and agreed with him to engage in oral and vaginal sex for \$150. Defendant then opened the door, grabbed V.G., and pressed a 12-to 18-inch long butcher knife to her throat. He forced V.G. into the van and drove into a mobile home park where he told her to behave and if she did not, he would kill her. Defendant put the knife down and pulled V.G.'s dress down and started to kiss and suck her breasts. He asked V.G. to perform oral sex; she did not remember whether she did. Defendant next put his penis inside V.G.'s vagina and ejaculated.

V.G. testified she was scared and did not immediately leave the van after these events because of that. Eventually, she obtained defendant's consent to go outside his van to urinate. Once outside the van she ran away leaving her purse, cell phone, and underwear in the van. An examination of V.G. later that day showed an eight- to nine-centimeter cut on her neck; her genitalia were red and abraded.

An hour or two after these events, defendant solicited sex from T.P.; she agreed in exchange for cash and got into his van. They drove to a mobile home park and T.P. moved from the passenger seat to the back seat. Defendant then sat down next to her. When T.P. asked for the money, defendant told her he did not have any money but he was going to have sex with her anyway. At that time he displayed a butcher knife in his hands, which he then placed against her neck. T.P. had a switchblade knife tucked in her bra. She removed the knife and placed it under her thigh and asked defendant to remove the knife from her neck so she could get a condom. As soon as defendant removed the knife from her neck, T.P. tried to break for the door of the van.

Defendant then slammed her between the door and seat so that she could not reach the door handle. T.P. used her knife to stab defendant in the face. She grabbed the knife defendant had been holding and placed it under her leg. At this time T.P. was on her back with defendant on top of her, holding her arms. After she stabbed him, defendant told her she would have to die; he was going to kill her. As the two struggled,

T.P. also wounded defendant's arm and stabbed him in the back. During this struggle, defendant tried to choke T.P., head-butted her and repeated that she was really going to die. She eventually got out of the van, ran into the street, and blacked out. She regained consciousness after she had been placed in an ambulance.

T.P. suffered face and head injuries and a cut on her left hand. She testified that one of her fingers was nearly severed. She had scars on her neck and arm and rug burns on her face, which were visible at the time of the trial.

Around 7:00 a.m., the police received a call about a disturbance at a residence in Corona. Officer Waldon responded; he saw a damaged van in front of the residence and a trail of blood from the van into the house. On the back patio he found defendant who was bleeding profusely. In answering to the officer's question, defendant stated he had picked up two prostitutes, one of whom had stabbed him.

Defendant was taken by ambulance to the hospital where Officer Romero spoke with him in the emergency room. Officer Romero had previously interviewed T.P. who had told him about having been attacked by defendant. After Romero talked to defendant, he placed him under arrest.

The next day, Officer Judson interviewed defendant; the interview was videotaped. Judson advised defendant of his *Miranda* rights and defendant agreed to talk to him. Defendant admitted that he intended to use a knife to obtain the services of a prostitute because he did not have any money. He described how he picked up the first prostitute and drove her to a mobile home park, had sex with her, and let her go. He stated "it was easy." Immediately thereafter, he picked up another prostitute; she agreed to have sex for money and he again drove to the mobile home park. He showed her his knife after she asked for money. Then, while he was getting out of his pants, she stabbed him and they fought. He admitted hitting her with his head. She kept cutting him and he let go of her. She ran out of the van and he drove away.

## DISCUSSION

### *1. The court did not err in admitting defendant's pre-Miranda statements.*

The court conducted a hearing under Evidence Code section 402 to determine whether the pre-*Miranda* statements should be admitted.

Romero testified the interview took place in the emergency room area of the hospital where defendant was on a bed. Romero was accompanied by his partner, Sandy Kim; both were in uniform. Romero testified that when he interviewed defendant in the hospital, he did not know whether defendant was a suspect or a victim. Romero told defendant he was not under arrest and he did not have to answer any questions. Defendant responded he would like to speak to Romero. Defendant was not handcuffed. Defendant did not appear to be under the influence of drugs or alcohol and willingly talked to Romero. The interview related to the incident involving T.P., who had previously been interviewed by Romero.

A Corona police officer was standing in the emergency room doorway when Romero and Kim arrived.

Advisement of *Miranda* rights is only required when a defendant is in custody. (*People v. Mickey* (1991) 54 Cal.3d 612, 648.) “The question whether defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation] ‘Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is . . . reconstructed, the court must apply an objective test to resolve “the ultimate inquiry”: “[was] there a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” [Citations.] The first inquiry . . . is distinctly factual. . . . The second inquiry, however, calls for application of the controlling legal standard to the historical facts. This ultimate

determination . . . presents a “mixed question of law and fact” . . . .’ (*Ibid.*, fn. omitted.) Accordingly, we apply a deferential substantial evidence standard [citation] to the trial court’s conclusions regarding ““basic, primary, or historical facts: facts ‘in the sense of recital of external events and the credibility of their narrators . . . .’” [Citation.] Having determined the propriety of the court’s findings under that standard, we independently decide whether ‘a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.’ [Citation.]” (*People v. Ochoa* (1998) 19 Cal.4th 353, 401-402.)

Given that Romero made it clear to defendant that he was not under arrest and did not have to answer any questions, the mere fact that defendant’s movements were limited because of his being in a hospital bed does not turn the interrogation into a custodial one. And in light of defendant’s injuries and Romero’s earlier interrogation of T.P., the former’s testimony that he did not know whether defendant was a suspect or a victim acquires additional credibility. There was no formal arrest and there was no evidence the police restrained defendant’s movements. There was substantial evidence supporting the trial court’s determination that the pre-*Miranda* interrogation was non-custodial. And a reasonable person would have felt defendant was at liberty to terminate the interrogation.

2. *The sentence imposed for defendant’s criminal threat is not required to be stayed.*

Defendant argues his threat to kill T.P. was an integral part of his assault with intent to commit rape and that, therefore, section 654 commands that the sentence for this crime be stayed. We disagree.

Section 654 applies where the same act results in more than one crime, even though the crimes are distinct in their elements and proof. (*Neal v. California* (1960) 55 Cal.2d 11, 18; *People v. Siko* (1988) 45 Cal.3d 820, 823.) The issue is whether defendant’s course of conduct is a divisible transaction and this, in turn, depends on the

intent and objective of defendant. Whether defendant harbored more than one objective raises a factual issue. (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) This factual issue is determined by the trial court and when we review that determination, we review using the substantial evidence standard. (*People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1289.) Thus, the question for us is whether there was substantial evidence to support the conclusion defendant harbored more than one objective when he threatened to kill T.P. And there was such evidence.

Defendant argues the death threat was an integral part of his assault with the intent to commit the rape of T.P. But his assault was well under way and the death threat only came after his victim had stabbed him. It appears the threat clearly came in response to T.P.'s efforts to defend herself rather than merely as part and parcel of the assault. And "if a defendant entertains multiple criminal objectives, he may be punished for each violation even though the violations are part of an otherwise indivisible course of conduct. [Citation.]" (*People v. Manning* (1982) 133 Cal.App.3d 159, 169.)

### *3. Remand is required for the court to conduct a Marsden hearing.*

Appellant contends and the Attorney General agrees that the trial court erred in failing to conduct a hearing under *Marsden*. Defendant wrote a letter dated January 3, 2011, to the trial judge. In it he stated that, when his court-appointed lawyer answered ready for trial, the lawyer was unprepared and the lawyer's representation was so defective as to deprive defendant of receiving a fair trial. He requested the court allow him to fire his lawyer and have new counsel appointed to represent him on a motion for a new trial. He stated the following reasons: his court appointed lawyer (1) only visited him once during the 10 months preceding his trial, during which there was little discussion about the case; (2) failed to call crucial witnesses, i.e., medical personnel who could have testified, based on the wounds defendant sustained, he was protecting himself from the attack; (3) failed to use pictures that would have impeached T.P.'s credibility; (4)

failed to have a medical expert appointed who would have contradicted T.P.'s claim defendant cut her on the neck; and (5) failed to raise a defense and failed to adequately represent him during the trial. The court received the letter on January 11, 2011. The clerk contacted defendant's lawyer concerning the letter and the latter stated he would address the matter at the time of sentencing, then scheduled for January 21. The sentencing hearing took place on February 18; there was no reference to defendant's letter. No hearing was conducted nor was new counsel appointed. We agree the letter required the court to conduct a *Marsden* hearing.

“[A] trial court is obligated to conduct a *Marsden* hearing on whether to discharge counsel for all purposes and appoint new counsel when a criminal defendant indicates after conviction . . . that his current counsel provided ineffective assistance . . . when there is ‘at least some clear indication by defendant,’ either personally or through his current counsel, that defendant ‘wants a substitute attorney.’ [Citation.]” (*People v. Sanchez* (2011) 53 Cal.4th 80, 89-90.) These requirements were met here. *Sanchez* provides us with the procedure to be employed under these circumstances: “(1) the court shall hold a hearing on [defendant]’s *Marsden* motion concerning his representation by the public defender’s office; (2) if the court finds that [defendant] has shown that a failure to replace his appointed attorney would substantially impair his right to assistance of counsel, the court shall appoint new counsel to represent him and shall entertain such applications as newly appointed counsel may make; and (3) if newly appointed counsel makes no motions, any motions made are denied, or [defendant]’s *Marsden* motion is denied, the court shall reinstate the judgment.” (*Id.* at pp. 92-93.)

## DISPOSITION

The matter is remanded to the trial court. The court shall conduct a *Marsden* hearing. If the court finds that defendant has shown that a failure to replace his

appointed attorney would substantially impair his right to assistance of counsel, the court shall appoint new counsel to represent him and shall hear any motion new counsel makes. If new counsel makes no motions, any motions made are denied, or if the defendant's *Marsden* motion is denied, the court shall reinstate the judgment.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.