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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.

JONATHAN ALEXANDER CURRY,

Defendant and Appellant.

In re JONATHAN ALEXANDER CURRY

on Habeas Corpus.

G045060

(Super. Ct. No. 10NF1973)

O P I N I O N

G046775

Appeal consolidated from a judgment of the Superior Court of Orange County, Dan McNerney, Judge, and a petition for writ of habeas corpus. Judgment reversed. Petition granted.

John N. Aquilina, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Garrett Beaumont and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

Jonathan Alexander Curry appeals from a judgment after a jury convicted him of domestic battery with corporal injury and found true he inflicted great bodily injury. Curry argues the trial court erroneously instructed the jury and he received ineffective assistance of counsel from his defense counsel, Joseph P. Smith. Curry also filed a petition for writ of habeas corpus arguing he received ineffective assistance of counsel. Concluding the petition stated a prima facie case for relief, we issued an order to show cause and granted his motion to consolidate the petition with the appeal.

As we explain below, we conclude Curry received ineffective assistance of counsel.¹ We reverse the judgment and grant the petition.

FACTS

In April 2010, Curry went to a concert with his ex-girlfriend, Deena H. They had ended their six-year relationship but continued to have sexual relations. Deena gave Curry, who was intoxicated, a ride home, and she spent the night at his apartment. When Deena woke up the next morning, she was upset because she had spent the night with Curry. When Curry would not stop mocking Deena, she slapped him.

Curry punched a wall and shoved Deena. Deena pushed Curry, and he pushed her against a wall and grabbed her neck. They fought for a couple hours, arguing and pushing each other around the apartment. Curry prepared for battle—he removed his shirt, pants, and prosthetic eye. Curry asked Deena, “Do you really want to fight?” At one point during the fight, Curry head-butted Deena. At another point, he was sitting on her back and was kneeing her in the hamstring as she tried to kick him with her shoe heel. When Curry would restrain Deena, she would initially surrender but eventually start fighting again. Sometime after Deena broke free, she started grabbing items from around

¹ Because we conclude defense counsel’s performance was deficient, we need not address Curry’s other claim the trial court erred in failing to instruct the jury sua sponte on cohabitation.

the apartment and stated she was taking her things. When Deena took some DVD movies, Curry approached her from behind and wrapped his arm around her neck. Deena told him that she could not breathe, but he continued to choke her. Deena lost consciousness and later awoke on the floor. She went into the bathroom and saw a large bruise forming under her left eye. She vomited and had a headache.

A couple of hours later, Curry drove Deena's car home, and Deena drove herself home. Deena spent the night at a girlfriend's house because she did not want her mother to see her injuries. When Deena went home the next morning, her mother took her to the hospital. Deena had a left orbital floor fracture and required surgery. Deena went to the police station, reported the incident, and obtained a protective order.

An information charged Curry with domestic battery with corporal injury (Pen. Code, § 273.5, subd. (a))² (count 1) and alleged he inflicted great bodily injury (§ 12022.7, subd. (e)).

At trial in March 2011, 25-year-old Deena testified for the prosecution as explained above. Deena testified she had dated Curry sporadically for about six years. Deena stated that at the time of the offense, they were not dating but they did have sexual relations. Deena said the last thing she remembered was Curry strangling her. Deena admitted she hit Curry twice, once with her purse about two years before the incident here, and another time with a fist about two months before trial. Two witnesses testified that shortly after the incident, Deena told them Curry choked her and she was unsure how her eye was injured.

The prosecutor also offered the testimony of Dr. Barbara Ryan. Ryan, who performed the surgery, testified Deena's orbital floor (the very strong bone below the eyeball), was blown out. She stated that Deena's eyeball would sink into her skull if not repaired and this would affect her vision. Ryan explained there were tiny bone fragments

² All further statutory references are to the Penal Code, unless otherwise indicated.

in her sinus and Deena had a concussion. When the prosecutor asked Ryan the force required to cause such an injury, she responded, “So it’s a significant force. It’s not usually caused from just a fall, but it’s usually caused from a traumatic compression and usually caused by an object that’s larger than the orbit itself.” Ryan stated most of these injuries are caused by “a punch to the face.” Ryan explained that when she asked Deena how she was injured, Deena replied the last thing she remembered was Curry strangling her. Ryan testified Deena told her that Curry told Deena she fell and hit her head on the table. As to Curry’s explanation, Ryan opined, “It won’t happen.” Finally, when the prosecutor presented its domestic violence expert with a hypothetical mirroring the facts of this case, the expert opined the woman was a domestic violence victim.

The prosecutor rested subject to the admission of exhibits. Defense counsel did not make a section 1118.1 motion.

Curry testified on his own behalf. Near the beginning of direct examination, defense counsel asked Curry whether he “eventually” moved in with Deena or Deena moved in with him. After defense counsel asked whether they “eventually live[d] together,” Curry explained they lived together for a short period of time, about two months, in 2009. Curry stated Deena hit him numerous times, including the occasions discussed above. Curry said Deena threatened him with garden shears. Curry explained that after she slapped him, he told her to leave and she grabbed a pair of scissors and condiment packages and tried to vandalize his apartment but he restrained her by sitting on her. Curry claimed that after he disrobed and pulled out his prosthetic eye, he tried to prevent Deena from leaving with his property. Curry claimed he grabbed underneath her arms and as she tried to break free, she fell. Curry denied punching or kicking Deena.

During a discussion of the jury instructions, the following colloquy occurred:

“[Trial court]: Let me ask you, there’s a bunch of language in this instruction, it’s bracketed, that talks about what constitutes a cohabitant. It doesn’t sound like that is in dispute and I’m also in favor of giving less language than more.

“[Defense counsel]: Yes, the defense was going to ask since that was not in dispute that we eliminate a lot of that language that tends to give a definitional context to cohabitation.”

“[Trial court]: So is it fair to modify element number one, ‘The defendant willfully and unlawfully inflicted a physical injury on his former cohabitant.’?”

“[Defense counsel]: Yes, your honor.

“[Prosecutor]: Yes.”

Near the end of defense counsel’s closing argument, counsel stated:

“Here’s the instruction that the prosecution needs to establish all three elements of or you can’t find the defendant guilty of [*sic*]. They have to prove three things, the defendant willfully and unlawfully inflicted physical injury on a former cohabitant. She is a former cohabitant. We are not splitting hairs, we are focusing on the meat, not the peas. They have to prove he inflicted a physical injury, which it’s our position he didn’t inflict that injury. He wasn’t the one who inflicted that injury. And it resulted in traumatic condition. That’s the one that’s not an issue, but look at number three. The defendant did not act in self-defense or did not act in defense of real or personal property.”

The trial court instructed the jury with CALCRIM No. 840 as follows:

“The defendant is charged with inflicting injury on his former cohabitant that resulted in a traumatic condition. To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant willfully and unlawfully inflicted a physical injury on his former cohabitant; [¶] 2. The injury inflicted by the defendant resulted in a traumatic condition[;] and [¶] 3. The defendant did not act in self-defense or in defense [of] property. [¶] Someone commits an act willfully when he does it willingly or on purpose. [¶] A traumatic condition is a wound or other bodily injury, whether minor or serious,

caused by the direct application of physical force. [¶] A traumatic condition is the result of an injury if: [¶] 1. The traumatic condition was the natural and probable consequence of the injury; [¶] 2. The injury was a direct and substantial factor in causing the condition; [¶] and [¶] 3. The condition would not have happened without the injury. [¶] A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that resulted in the traumatic condition.”

The trial court did not instruct the jury with the following bracketed language from CALCRIM No. 840: “The term *cohabitants* means two unrelated persons living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties’ holding themselves out as (husband and wife/domestic partners), (5) the continuity of the relationship, and (6) the length of the relationship.”

Without Curry filing a motion for acquittal, the jury convicted Curry of count 1 and found true the enhancement. Without Curry filing a new trial motion, the trial court sentenced Curry to three years formal probation and ordered him to serve 180 days in jail. Curry appealed.

In his opening brief, Curry argues the trial court erroneously failed to instruct the jury on cohabitation and his trial attorney provided ineffective assistance of counsel. The Attorney General filed a respondent’s brief in which it argued defense counsel invited the error, his defense counsel was not deficient, and alternatively Curry was not prejudiced. On the same day Curry filed his reply brief, he filed a petition for writ of habeas corpus arguing his trial counsel provided ineffective assistance of counsel.

In his petition, Curry included declarations from himself, his father, his defense counsel, and an attorney who is a certified criminal law specialist.

In his affidavit, executed under penalty of perjury, defense counsel stated the following: “That, in the course of [Curry’s] trial, due to an oversight, I inadvertently failed to realize that the prosecution did not present any evidence as to the element of ‘cohabitation’ of petitioner and [Deena], as required to prove a violation of . . . section 273.5, and at no time, was it my intent to concede any of the elements of the charged offense or [Curry’s] guilt. [¶] . . . That, in the course of [Curry’s] trial, I had no tactical or strategic reason for failing to acknowledge the prosecution’s lack of proof of the necessary ‘cohabitation’ element pursuant to . . . section 1118.1 at the close of the prosecution’s case or at the close of evidence. [¶] . . . That, in the course of [Curry’s] trial, my failure to challenge the lack of evidence as to the ‘cohabitation’ element was not based on my attempt to avoid a verdict of guilt as to any lesser included offense. [¶] That, the only reason for having presented [Curry’s] testimony as to the length and former nature of his relationship with [Deena] was to introduce a foundation for his further testimony that on prior occasions she had been the aggressor in attacking him. [¶] That, in the course of [Curry’s] trial, I had no tactical or strategic reason for acceding to the court’s suggestion to delete the definition of ‘cohabitation’ from the instructions provided to the jury. [¶] That, in the course of [Curry’s] trial . . . , I had no tactical or strategic reason for conceding that the ‘cohabitation’ element of the offense had been proven by the prosecution.”

A certified criminal law specialist, Peter J. Morreale, filed an affidavit on Curry’s behalf. In the affidavit, counsel opined that based on the circumstances of the case, defense counsel’s performance was deficient. After we issued an order to show cause, the Attorney General filed an answer and Curry filed a traverse.

DISCUSSION

Ineffective Assistance of Counsel

“The legal principles relevant to petitioner’s claim are well settled. ‘To establish ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel’s representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the petitioner. [Citations.] “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” [Citation.]’ [Citation.] [¶] Our review of counsel’s performance is a deferential one. [Citation.] ‘It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.” [Citation.]’ [Citation.] ‘However, “deferential scrutiny of counsel’s performance is limited in extent and indeed in certain cases may be altogether unjustified. ‘[D]eference is not abdication’ [citation]; it must never be used to insulate counsel’s performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions.’” [Citations.] ‘Otherwise, the constitutional right to the effective assistance of counsel

would be reduced to form without substance.’ [Citation.]” (*In re Jones* (1996) 13 Cal.4th 552, 561-562.)

Deficient Performance

Curry argues his defense counsel’s performance was deficient for the following reasons: (1) counsel failed to recognize the prosecutor did not offer evidence of cohabitation; (2) counsel erred in presenting Curry’s testimony that in 2009 he and Deena lived together for approximately two months; (3) counsel erred in agreeing the court need not instruct the jury on the elements to prove cohabitation; (4) counsel erred in conceding the cohabitation element in closing argument; and (5) counsel erred in failing to file a new trial motion based on insufficient evidence of cohabitation. As we explain below, defense counsel’s performance was marked by numerous deficiencies and the cumulative impact of counsel’s shortcomings was prejudicial.

Although we defer to defense counsel’s reasonable tactical decisions, here we cannot discern any reasonable tactical basis for counsel’s actions. Counsel admits his inadvertence and concedes he had no tactical or strategic reason for his apparent lapses. Curry was charged with just one offense, domestic battery with corporal injury, which required the prosecutor establish the following three elements: Curry willfully and unlawfully inflicted a physical injury on his former cohabitant; the injury inflicted resulted in a traumatic condition; and Curry did not act in self-defense. The issues at trial were not complex, the necessary element of cohabitation, the cause of Deena’s injury, and the extent of the injury. Yet, counsel failed in his core duties.

In his declaration, counsel admitted he failed to recognize the prosecutor did not offer any evidence on the cohabitation element during the prosecutor’s case-in-chief. Counsel’s failure to recognize the dearth of evidence on this element was fatal. Although in his declaration counsel states his purpose for offering Curry’s testimony about the length of their relationship was to show Deena had previously attacked Curry, it was unnecessary to establish they lived together during those incidents.

In his declaration, counsel admits he had no intention of conceding any of the elements of the charged offense. But that is exactly what counsel did. Counsel's failure to recognize the prosecutor offered no evidence Deena and Curry lived together resulted in counsel offering evidence on that very element and later acquiescing in a jury instruction that removed the issue from the jury. Not only that, during closing argument counsel conceded Deena lived with Curry. In his declaration, counsel states his failure to challenge the cohabitation element "was not based on my attempt to avoid a verdict of guilt as to any lesser included offense" and he had no tactical decision for agreeing to the omission of the definition of cohabitation from the jury instruction.

The Attorney General focuses on defense counsel's declaration where counsel states he had no tactical reason for failing to file a section 1118.1 motion. We agree counsel's decision not to file a section 1118.1 motion was a tactical decision.³ If that were defense counsel's only deficiency, Curry may not have been able to carry his burden on appeal. But that was not counsel's only deficient act. Defense counsel admitted he failed to recognize the prosecutor did not carry its burden of proof, offered evidence establishing the missing element, agreed to a jury instruction that established the element, and conceded the element to the jury. In making this series of errors, defense counsel effectively abdicated his role of advocate for the accused in the adversarial process. His core function is to recognize when the prosecutor does not satisfy his burden and proceed accordingly. In this case, defense counsel failed in his core function. We must now determine whether Curry was prejudiced by the error. We conclude he was.

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After the prosecutor rested, defense counsel could have made a motion for acquittal or rested and argued to the jury the prosecutor failed in its burden of proof and the jury must acquit Curry. Although the Attorney General characterizes the latter as a "risky" strategy, trials are fraught with risks.

Prejudice

The Attorney General argues Curry was not prejudiced because there is not a reasonable probability the result of the proceeding would have been different. We disagree.

“The cases addressing the cohabitation element of section 273.5 ‘have interpreted it broadly, refusing to impose any requirement of a “quasi-marital relationship.”’ [Citation.] For purposes of section 273.5, the term ‘cohabitant’ ‘requires something more than a platonic, rooming-house arrangement.’ [Citation.] It refers to an unrelated couple ‘living together in a substantial relationship—one manifested, minimally, by permanence and sexual or amorous intimacy.’ [Citation.] A permanent address is not necessary to establish cohabitation, as cohabitation can be found even in ‘unstable and transitory’ living conditions. [Citation.]” (*People v. Belton* (2008) 168 Cal.App.4th 432, 437-438.)

Although the evidence offered during the prosecutor’s case-in-chief established Curry and Deena were previously in a six-year relationship, the record contains no evidence Curry and Deena shared expenses, held themselves out as husband and wife or domestic partners, or jointly used or owned property. The evidence offered to establish Curry and Deena were cohabitants or former cohabitants was elicited through defense counsel’s questioning of Curry after the prosecutor had rested its case-in-chief. Had Curry not testified he and Deena lived together for two months in 2009 there was no other evidence from which the jury could conclude Curry and Deena ever cohabitated. The Attorney General does not point to any evidence, other than Curry’s testimony, to establish the cohabitation element. Thus, we conclude defense counsel’s deficient actions prejudiced Curry.

DISPOSITION

The judgment is reversed. The petition is granted.

The clerk of this court is ordered, pursuant to Business and Professions Code section 6086.7, subdivision (a)(2), to forward a copy of this opinion to the State Bar of California upon return of the remittitur, and to notify Attorney Joseph P. Smith the matter has been referred to the State Bar.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.