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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.

AARON SILVA,

Defendant and Appellant.

G046987

(Super. Ct. No. 11WF1350)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed in part and reversed in part.

James M. Crawford, 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, Melissa Mandel and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Aaron Silva of assault with intent to commit rape or sodomy (count 1, Pen. Code, § 220);¹ found true he personally used a deadly weapon (§ 12022, subd. (b)(1)); and personally inflicted great bodily injury (§ 12022.7, subd. (a)).² The jury also convicted him of attempted forcible oral copulation (count 2, §§ 664, subd. (a), 288a, subd. (c)(2)); found true he personally used a deadly weapon during a sex offense (§ 12022.3, subd. (a)); and personally inflicted great bodily injury to a sexual assault victim (§ 12022.8). The court sentenced defendant to 12 years in prison for count 2 and its enhancements. The court also imposed a concurrent prison term of eight years for count 1 and its enhancements.

On appeal defendant contends insufficient evidence supported the great bodily injury enhancements, and that the court erred by admitting evidence of uncharged conduct under Evidence Code sections 1101 and 1108, instructing the jury on flight after commission of a crime, and failing to stay execution of sentence on count 1 and its enhancements under section 654. We agree the court should have stayed execution of sentence on count 1 and its enhancements. In all other respects, we affirm the judgment.

FACTS

Charged Offenses

Shortly before midnight on September 3, 2003, the victim, S.P., was working as a prostitute on Harbor Boulevard. She was standing near a Wienerschnitzel when defendant drove up in a white van. S.P. told him the price for oral sex and defendant agreed to it. S.P. got in the front passenger seat of defendant's van.

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

² On the People's motion, the court dismissed an additional allegation that defendant, during the commission of count 1, intentionally and personally inflicted great bodily injury on the victim.

Defendant drove to a cul de sac in an industrial building complex. He said he wanted oral sex, regular sex, and anal sex without a condom. This last request made S.P. suspicious because it was “nasty for someone to ask [her] that.” S. P. told him nothing happens without a condom.

Once defendant parked, S.P. opened a condom wrapper, while defendant moved to the back of the van. S.P. then moved to the back. Defendant was very mellow and quiet. He had not paid S.P. and no sexual acts had been performed.

S.P. reached in her purse. When she looked up, defendant had a knife in his hand and was moving it toward her, saying, “You stupid bitch,” many times. S.P. thought he was going to kill her. She “pretty much attacked him and grabbed the blade.” They struggled in the back seat. S.P. slightly overpowered defendant, so he opened the van’s door. When the door opened, the two fell out and landed on their feet; both still held the knife. They struggled for a long time. While still holding the knife, defendant punched S.P. in the head with his fist three times. S.P. released the knife and ran. She left a number of items in the van, including her shoes, cell phone, and purse.

As S.P. ran away, she saw defendant make a U-turn. She squeezed through a gate into a bus terminal. Her hands were “sliced open,” “all cut up,” and dripping blood. She was in excruciating pain. It was around midnight. A bus terminal employee called 911. Paramedics transported S.P. to the hospital, where she received 20 stitches on each hand. The stitches remained in her hands for three months.

Two officers followed the blood trail from the bus terminal to a parking stall in an industrial complex. There, they found a baseball cap, an opened condom wrapper, and a Wienerschnitzel napkin. Defendant’s DNA was recovered from the interior headband of the baseball cap.

At the hospital, S.P. told officers that she planned to just “hand-job” defendant, and she was not “even going to try to have sex with him.” At trial S.P. testified the “deal was for a blow job,” not for regular sex.

Uncharged Conduct

Two weeks later, on September 17, 2003, at about 11:30 p.m., K.W., then a prostitute, was waiting at a bus stop on Harbor Boulevard when she noticed defendant eyeing her as he drove by in his white van. Defendant made a U-turn, drove up to K.W., and asked her if she needed a ride. K.W. replied she did not and asked defendant if he was a police officer. He said he was not. K.W. got in the van's front passenger seat. Defendant and K.W. agreed she would give him a "blow job" for \$75.

Defendant drove to a parking lot in an empty industrial complex. Once defendant parked, he asked K.W. to move to the back of the van with him and she agreed. Defendant had not paid K.W. any money yet. When K.W. got in the back of the van, defendant pulled out a knife and put it to her neck.

Defendant told K.W. to do as he said. At his command, she took off her clothes, and gave him oral sex and sexual intercourse. While having sexual intercourse, defendant ejaculated inside of K.W. K.W. complied because she feared for her life.

Meanwhile, a police officer had observed defendant's van turn into and park at the industrial complex. The officer suspected a burglary and asked for backup. Another officer arrived. The two officers then approached the van, shined a flashlight on the back seat, opened the sliding door, and ordered defendant and K.W. out.

The officers separated the two. K.W. said she had agreed to give defendant oral sex for \$75. She said that at some point he held a knife to her neck, she gave him oral sex, and he had sexual intercourse with her with the knife in his hand.

An officer found a knife in defendant's pocket, which K.W. identified as the knife defendant held to her neck. At first, defendant said he had never taken the knife out of his pocket. He then said he took it out and showed it to K.W., unopened, because she had touched his leg and felt the knife. When confronted with the fact that K.W. described the knife, defendant said "maybe" he had forced her to perform oral sex on him.

Defendant was arrested and taken to the station, where officers found S.P.'s identification card in his wallet. In a police interview, defendant admitted putting the knife to K.W.'s neck.

Defense

A sexual assault nurse examined K.W. at 2:49 a.m., on September 18, 2003. The nurse did not notice any marks on K.W.'s neck.

Defendant testified in his own defense. In September 2003, he was working as a porter for a car dealership, a job which required him to use a knife. At about 10:00 p.m., on September 4, 2003, he was at a Wienerschnitzel getting something to eat. While eating in his van, he was approached by S.P., who asked if he was looking for a date. She got in the van and told him what she charged. The two agreed they would engage in sexual intercourse and S.P. would be paid \$100. S.P. directed defendant to the location. Defendant parked and paid S.P. \$100. The two went to the back of the van. S.P. told defendant she only wanted to give him a hand job. Defendant insisted she return his money, but S.P. refused and said she was just going to give him a hand job or else he could let her keep some of the money for her time. Defendant pulled out the knife "just to get [his] money back." S.P. grabbed it by the blade (which was about four-inches long) and the two struggled. S.P. was a little bigger than defendant. He held onto the knife because he did not want her to take it from him and use it against him. Eventually S.P. released the knife and ran away. Defendant ran to his van and took off. He "choked it up as a loss to money." He did not see any blood so he was not worried that he might have injured S.P.

On September 17, 2003, defendant was driving from his parents' house when he saw K.W. (who he thought was good looking) at a bus stop. He stopped and asked if she needed a ride. She said she was going to her home in Anaheim, and got in his van. As they drove, she touched his shoulders and legs. She felt something in his

pants pocket and asked what it was, so he pulled out his folding knife, showed it to her, and put it back in his pocket. Defendant realized she was a prostitute when she asked if he was a police officer. He did not have any money. Defendant led K.W. to believe he would pay her \$75 for oral sex. The two parked and went to the back seat. K.W. asked for the money and defendant told her he did not have any money; K.W. became irritated. However, K.W. agreed to perform a sexual service in exchange for a ride. She gave him “a little bit” of oral sex. They also had sexual intercourse. Defendant never pulled out his knife and held it to her neck. If they had not been caught by the police, defendant would have given her a ride “back to where she wanted.”

DISCUSSION

The Court Did Not Abuse Its Discretion by Admitting Evidence of Defendant’s Sexual Assault on K.W.

Defendant contends the uncharged conduct with K.W. was not similar enough to the incident with S.P. to be admissible to prove identity or any other factor under Evidence Code section 1101, subdivision (b). Defendant further contends the court abused its discretion under Evidence Code section 352 by admitting the evidence under Evidence Code section 1108.

Prior to trial, defendant moved to exclude, and the People moved to admit, evidence of the incident with K.W. and a 2005 incident in Santa Ana concerning defendant and a different prostitute. The court admitted evidence of the incident with K.W., finding it was “extremely” similar to the charged offenses and more probative than prejudicial for purposes of showing intent under Evidence Code section 1101, subdivision (b), so as to be admissible under Evidence Code section 1108. The court excluded evidence of the 2005 incident in Santa Ana as being more prejudicial than probative.

Under Evidence Code section 1101, subdivision (a), character evidence is inadmissible when offered to prove a defendant's "conduct on a specified occasion," except to prove certain enumerated facts such as intent or absence of mistake. (*Id.*, subd. (b).) To prove such a fact, however, the uncharged conduct must be sufficiently similar to the charged crime to support a rational inference of the fact. (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) The "least degree of similarity" is required to prove intent. (*People v. Thomas* (2011) 52 Cal.4th 336, 355.) "There is an additional requirement for the admissibility of evidence of uncharged crimes: The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Id.* at p. 354.)

In sexual offense cases, evidence of the defendant's uncharged sexual misconduct is *not* excluded under Evidence Code section 1101 *if* the evidence is admissible under Evidence Code section 352. (Evid. Code, § 1108, subd. (a).)

Evidence Code section 352 affords a court the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues." (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) Thus, in this context, "prejudicial" is not synonymous with "damaging." (*Ibid.*) "Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124). We will disturb that ruling only if "the court exercised its discretion in an arbitrary,

capricious or patently absurd manner that resulted in a manifest miscarriage of justice.”
(*Ibid.*)

Here, the court did not abuse its discretion under Evidence Code section 352. It found that the K.W. evidence was more probative than prejudicial because of its similarity to the S.P. incident and because the K.W. evidence showed defendant *intended* to commit an assault — after all, he used his knife to actually rape K.W. and force her to perform oral copulation. This evidence of *intent* was critical because defendant argued he displayed his knife to S.P. only to get his money back. The two incidents were similar in that they both involved the pulling of a knife on a prostitute in a white van, the same knife was used in both incidents, both occurred late at night only two weeks apart along Harbor Boulevard in areas known for prostitution, both prostitutes agreed to give him oral sex for money, and defendant drove to an industrial area and had the victim move to the back seat of the van. In contrast, the court found the 2005 incident was more prejudicial than probative and excluded the evidence. The court did not abuse its discretion by admitting evidence of the incident with K.W.

Substantial Evidence Supports the Great Bodily Injury Enhancements

Defendant contends no substantial evidence supports the personal infliction of great bodily injury enhancements associated with counts 1 and 2, because S.P. “grabbed the knife and inflicted the injuries upon herself.” The Attorney General counters that defendant intentionally pulled out the knife and directed it toward S.P., causing her to grab the knife as a natural and probable consequence of his action.

The court instructed the jury that an “act causes injury if the injury is a direct, natural, and probable consequence of the act and the injury would not have happened without the act.” “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.” (CALCRIM No. 240.)

On appeal we “determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to ‘ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.’ [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319, fn. omitted.) We review the whole record “in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) To be substantial, evidence must be “reasonable, credible, and of solid value.” (*Id.* at p. 578.) “Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant’s burden to affirmatively demonstrate error.” (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) The same standard applies for sentencing enhancements. (See *People v. Fielder* (2004) 114 Cal.App.4th 1221, 1232; *People v. Mendez* (2010) 188 Cal.App.4th 47, 56.)

In *People v. Martinez* (1985) 171 Cal.App.3d 727, 732, the defendant grabbed the victim and demanded money while pointing a knife at her stomach. The victim “grabbed the knife, which was then pointed at her throat.” (*Ibid.*) As the defendant pulled the knife away, the victim’s fingers were cut. (*Ibid.*) The Court of Appeal concluded, “Viewing the record as a whole, it is clear the jury had ample evidence to find [defendant] inflicted great bodily injury on” the victim. (*Id.* at p. 735.) The appellate court stated that although section 12022.7 requires that a person specifically intend to inflict great bodily injury, the intent “to do the violent act which causes the victim to suffer great bodily injury is sufficient.” (*Martinez*, at p. 735.) “A

person must be presumed to intend the natural consequences of his acts. When one holds a knife to another's throat demanding money and sex, and a struggle ensues, any injury is the expected natural consequence of the original assault." (*Ibid.*)

Defendant attempts to distinguish *Martinez* by arguing he never directed the knife toward S.P., but instead just held the weapon. But substantial evidence supports the jury's implied finding to the contrary. S.P. testified defendant "pulled the knife out and was moving it towards" her. The knife was "facing" her. Defendant said, "You stupid bitch," many times. The jury had ample evidence to find he inflicted great bodily injury on S.P.

The Court Properly Instructed the Jury on Flight After a Crime

Defendant contends the court erred by instructing the jury with CALCRIM No. 372 because he did not flee from the scene but simply departed after S.P. left. Defense counsel objected to the instruction below, but the court ruled that, because the People were entitled to argue flight, the court needed to give the limiting instruction.

The court instructed the jury: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

"An instruction in substantially this form *must* be given whenever the prosecution relies on evidence of flight to show consciousness of guilt. [Citation.] A flight instruction is proper whenever evidence of the circumstances of defendant's departure from the crime scene . . . logically permits an inference that his movement was motivated by guilty knowledge." (*People v. Turner* (1990) 50 Cal.3d 668, 694, fn. omitted.) ""[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested." [Citations.] "*Mere* return to familiar environs from the

scene of an alleged crime does not warrant an inference of consciousness of guilt [citations], but the *circumstances* of departure from the crime scene may sometimes do so.” (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) “To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence.” (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.) A reviewing court must “determine whether sufficient evidence was presented by the People from which the jury could have reasonably inferred that defendant fled after the commission of the crime.” (*People v. Lutz* (1980) 109 Cal.App.3d 489, 498.)

Here, the evidence that defendant immediately ran to his van and drove away — so quickly that he left his hat behind, and without demonstrating any concern about whether S.P. was injured — supported the giving of the instruction. Based on this evidence, the jury could reasonably infer defendant drove away to avoid being observed or arrested. The court did not err by giving the flight instruction.

Section 654 Bars Double Punishment Here

Defendant contends the court should have stayed, under section 654, execution of sentence on count 1 and its associated enhancements. He asserts the assault with intent to commit rape or sodomy “was the very same act or the vehicle by which [he] sought to compel S.P. to orally copulate him.” The Attorney General counters that the court did not err, because defendant “had different intents and objectives in committing the two offenses.”

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.”

By its plain terms, section 654 bars multiple punishments of a single, physical act or omission. Over 50 years ago, our Supreme Court substantially enlarged the statute’s scope by adopting a test that focuses on whether the defendant engaged in an indivisible course of conduct. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on a different point in *People v. Correa* (2012) 54 Cal.4th 331, 334.) “Generally, whether a course of conduct is a divisible transaction depends on the intent and objective of the actor” (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006.) “However, the rule is different in sex crime cases. Even where the defendant has but one objective — sexual gratification — section 654 will not apply unless the crimes were either incidental to or the means by which another crime was accomplished.” (*Ibid.*) Thus, “[m]ultiple sex acts committed on a single occasion can result in multiple statutory violations. Such offenses are generally “divisible” from one another under section 654, and separate punishment is usually allowed. [Citations.]’ [Citation.] If the rule were otherwise, ‘the clever molester could violate his victim in numerous lewd ways, safe in the knowledge that he could not be convicted and punished for every act.’” (*Ibid.*)

We review for substantial evidentiary support the court’s implied finding that neither of defendant’s crimes was incidental to the other or the means by which the other crime was accomplished. We view the record in a light most favorable to the judgment, and presume in support of the court’s conclusion the existence of every fact the court could reasonably deduce from the evidence. (*People v. Andra* (2007) 156 Cal.App.4th 638, 640-641.)

In *People v. Liakos* (1982) 133 Cal.App.3d 721, 723, the Court of Appeal held the defendant could *not* be legally punished for both assault with intent to commit oral copulation and attempted oral copulation based upon the same facts. (*Id.* at p. 723.) In *Liakos*, the People conceded that the assault was the means by which the oral copulation was attempted and therefore the defendant could not be punished for both offenses under section 654. (*Liakos*, at p. 725.)

Here, defendant was convicted of attempted oral copulation and assault with intent to commit rape or sodomy. The assault was the *means* by which the oral copulation was attempted; there was no evidence the assault was a divisible course of conduct. (*People v. Reeves* (2001) 91 Cal.App.4th 14, 57.) The crime of forcible oral copulation requires that the act be “accomplished against the victim’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.” (§ 288a, subd. (c)(2)(A).) The record contains no evidence (besides the assault) of any other means of force, violence, duress, menace, or fear of bodily injury underlying the attempted forcible oral copulation conviction. Consequently, execution of sentence on count 1 and its enhancements must be stayed pursuant to section 654. (See *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 709, disapproved on a different ground in *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130, fn. 8 [“Where the base term of a sentence is stayed under § 654, the attendant enhancement must also be stayed”].)

DISPOSITION

The judgment is modified to stay the sentence on defendant’s conviction of assault with intent to commit rape or sodomy and its associated enhancements. The trial court is directed to amend the abstract of judgment accordingly and to forward the

amended abstract to the Department of Corrections and Rehabilitation. We affirm the judgment in all other respects.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.