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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.

TIMOTHY BRIAN SHIPP,

Defendant and Appellant.

G049441, G049945

(Super. Ct. No. 12WF0634)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant of the following: count 1, aggravated mayhem (Pen. Code, § 205)¹; counts 2 and 6, domestic battery causing injury with a prior conviction (§ 273.5, subd. (a), & former subd. (e)(1))²; count 3, assault with a deadly weapon (§ 245, subd. (a)(1)); count 4, false imprisonment by violence (§§ 236, 237, subd. (a)); and count 5, child endangerment (§ 273a, subd. (b)). The jury also found the following enhancement allegations to be true: and as to counts 2, 3, and 6, that defendant personally inflicted great bodily injury in a domestic violence incident (§ 12022.7, subd. (e)); and as to count 2, that defendant personally used a deadly weapon (§ 12022, subd. (b)(1)). In a bifurcated trial, the court found true a prior strike conviction.

The court sentenced defendant to an aggregate determinate state prison term of 20 years and eight months, plus a consecutive indeterminate term of 19 years to life. On count 1, defendant was sentenced to 19 years to life, consisting of 14 years, which was double the minimum term for the strike, and an additional five years for a prior serious felony. On count 2, defendant was sentenced to 11 years, consisting of double the middle term (six years) plus four years for the enhancement under section 12022.7, subdivision (e), and another year for the enhancement under section 12022, subdivision (b)(1). On count 3, defendant was sentenced to 10 years, consisting of six years (double the middle term) plus an additional four years under section 12022.7, subdivision (e); the sentence was stayed pursuant to section 654. On count 4, defendant was sentenced to one year, four months. On count 5, defendant was sentenced to six months in county jail, which was stayed pursuant to section 654. On count 6, defendant was sentenced to one-third of the middle term, doubled, for two years, plus an enhancement of 16 months under section 12022.7, subdivision (e). The court added five years to the determinate sentence for a prior serious felony. (§§ 667, subd. (a)(1).)

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

² The offense is now defined in section 273.5, subdivision (f)(1).

This case arises out of a domestic violence incident where, over the course of two hours, defendant mercilessly beat his wife. After knocking her unconscious by repeatedly striking her head with a bat, he savagely bit both of her breasts, to the point where one of her nipples dislodged.

On appeal, defendant raises five issues. First, he contends there was insufficient evidence to support the aggravated mayhem conviction (count 1), and, second, that the jury was misinstructed. Third, he contends the court abused its discretion in denying him postconviction access to the jurors to investigate potential misconduct. Fourth, he contends some of the restitution award to the victim was unsupported. Fifth, he contends he was entitled to one additional day of presentence custody credit. We reject each of his contentions.

With regard to the sufficiency of the evidence, defendant contends that because his biting of the victim's nipples was part of a broader attack, the evidence does not show he had the requisite specific intent to maim her. We reject that contention. The circumstances of the attack suggest a focused, intentional attack on wife's breasts. Just because he beat her in other ways does not mean his specific attacks on her breasts were not intended to maim.

With regard to the instructional error, defendant contends the court should have sua sponte provided a pinpoint instruction to the effect that an indiscriminate attack could not, by itself, support a specific intent to maim. However, the jury instructions adequately covered the required specific intent, and to the extent defendant wanted a more specific instruction, he was obligated to request it, which he did not.

With regard to the remaining three contentions, we conclude that the court did not abuse its discretion in denying defendant postconviction access to the jurors, that the evidence supports the restitution award, and that the preconviction custody credits were properly counted.

FACTS

Defendant and his wife were married in November 2009 and lived together in a two bedroom, one bath apartment. Wife's 13-year old daughter (defendant's stepdaughter lived with them).³ Defendant and wife were heavy drinkers.

On the day of the incident, March 9, 2012, defendant and wife took a shot of tequila before defendant left for work. They had another shot when defendant returned from work, and another couple of shots before friends came over that evening. During the remainder of the evening both defendant and wife got drunk.

Later in the evening, after the guests had left, defendant went into daughter's room and told her to clean the bathroom. At that point, wife mentioned that daughter should clean it tomorrow instead. Defendant responded by stating that wife was undermining his authority, and that is why daughter did not listen to him. Defendant then went and punched his wife in the face, bloodying her nose.

Over the course of the next two and a one-half hours, defendant beat up wife. Defendant forced wife into the bathroom and turned on the shower. From her room, daughter could hear wife pleading with defendant to stop hurting her, and daughter could hear thumping on the bathroom walls. She heard her mother say "that she would stay. And she was crying." Defendant and wife then went back into the bedroom where daughter continued to hear thumping sounds and wife crying "Please stop. You are hurting me." Sometime later wife came out of the bedroom screaming for her neighbor to help and running for the front door. Before she could get there, however, defendant chased after her and grabbed her hair from behind, dragging her to the ground and back to the bedroom, while kicking at her shoulders and side. The dragging motion caused burns on wife's backside and exposed nails in the thinning carpet cut her. As defendant

³ For the sake of their privacy, we refer to the wife and the daughter as simply "wife" and "daughter."

was passing daughter's bedroom, he shut her door. After they were back in the bedroom, daughter heard more thumping. She did not call 911 because defendant had previously said that if she ever called the cops on him, he would take them down with him.

At some point, defendant came into daughter's room, emptied the contents of a trash can onto the floor, and instructed her to clean up the trash.

Later he came back into daughter's room, looked under her bed, and found her aluminum baseball bat. As defendant was going back into his bedroom, he said to daughter, "Don't leave. Don't try to leave." According to daughter, "Then my mom says 'oh, you are going to come at me with a baseball bat this time, Tim?' Then I hear more screaming." [¶] . . . [¶] "Thumping and her begging for him to stop." Wife testified that she was sitting on the edge of the bed, crying, when defendant swung the bat and hit her in the leg as he was stating, "This is what you get for cheating on me." Wife cried out that he had broken her leg, but defendant did not seem to care. He proceeded to strike her in the face with the bat. He took a second swing at her face, which she managed to block or deflect with her hand. He then took a third swing at her face, which connected. After that, wife was knocked unconscious and she has no memory of what else transpired that night.

Thirty minutes after defendant had taken the bat, he returned to daughter's room, handed daughter the bat, and said, "Both of mom's headlights." Daughter took this to mean that defendant wanted her to hit the windshield and headlights (presumably to make it look as though wife had been in a car accident). She was not able to do so, however, because the door had been barricaded with furniture.

Wife woke up the next morning feeling "like hell," her whole body hurting. She noticed a lot of blood and bruising on her chest. She started towards the bathroom and discovered her left leg could not bear weight. She expressed her belief to defendant that he had broken her leg, to which he replied, "Man up, bitch." He also said she should get to a doctor "because he hasn't seen anything that bad since he beat the shit out of [his

ex-girlfriend].” She did not, however, go to the doctor, as she was scared that defendant would go to jail. Once she made it to the bathroom, she noticed her face was bruised and bloody in numerous places, her eyes were blackened, one tooth was missing and others were chipped, and part of her nipple was dislodged. Her nipple was not dislodged when she was last conscious. As a first aid measure, she put band-aids on her nipple. Wife described the pain as “excruciating.” A portion of the nipple ultimately fell off. At the time of trial, part of her nipple was still numb.

Daughter took pictures of wife’s injuries on the following day, Saturday, as well as the following Monday. Wife was mostly bedridden for the following week. She had to lay in a particular contorted position, because in any other position her head would start spinning (which lasted a couple of weeks). She did not go to the hospital immediately because defendant threatened to kill her family.

Wife eventually went to the hospital on March 17 (approximately one week after the beating), where she stayed for four days. She also contacted the police that day. She finally overcame her fear because she felt that she and her daughter deserved better and she thought if she did not she would end up dead. And in particular, defendant had been calling the house and her cell phone, and when she did not pick up, he left voice mails indicating “he was going to beat the crap out of” her because she was not answering her phone.

One treating physician determined that wife had a fracture on the “small finger of her left hand and a fracture in the area of her fibular shaft of the left leg just below the knee.” Another treating physician observed teeth marks on both of her breasts.

Prior to trial, the court denied defendant’s motion to dismiss the aggravated mayhem charge under section 995 on the ground that defendant’s attack on wife was an “indiscriminate attack,” not the sort of attack from which one can infer specific intent to maim. The court denied the motion, noting that defendant’s attack on wife’s breast combined with his allegation that she was cheating on him is sufficient for a jury to find

specific intent. The court denied a similar motion under section 1118.1 after the prosecution rested.

DISCUSSION

The Evidence Supports the Verdict

Defendant first challenges the sufficiency of the evidence establishing the specific intent to maim element of aggravated mayhem.

“When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

“A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body.” (§ 205.) “Aggravated mayhem requires the specific intent to cause the maiming injury. [Citations.] ‘Evidence that shows no more than an “indiscriminate attack” is insufficient to prove the required specific intent.’ [Citations.] “Furthermore, specific intent to maim may not be inferred solely from evidence that the injury actually inflicted constitutes mayhem; instead, there must be other facts and circumstances which support an inference of intent to maim rather than to attack indiscriminately.”” (*People v. Assad* (2010) 189 Cal.App.4th 187, 195.) “As our Supreme Court has explained, ‘[e]vidence of a defendant’s state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.

[Citations.]’ [Citation.] In particular, ‘[a] jury may infer a defendant’s specific intent from the circumstances attending the act, the manner in which it is done, and the means used, among other factors.’” (*People v. Park* (2003) 112 Cal.App.4th 61, 68.)

Defendant contends, his “behavior on that night, and [wife’s] subsequent injuries, reflect no more than an indiscriminate attack; the evidence is insufficient to demonstrate the specific intent to maim required for aggravated mayhem.” Defendant notes that the attack lasted two hours and resulted in nearly head-to-toe injuries.

However, we are hard pressed to imagine how one could indiscriminately bite another person’s nipple off. Perhaps if bite marks had been found over much of wife’s body, it would suggest a more indiscriminate attack. But here, the evidence showed bite marks only on her breasts. It was a focused attack, and the force required to actually bite the nipple off clearly suggests an intent to maim. As the trial court noted, defendant’s accusations of wife cheating on him further reinforces the inference that an attack on the breast was focused and intentional. Moreover, the fact that the attack on wife’s breast was in the context of a more general beating is not dispositive. While an indiscriminate attack is not, in and of itself, substantial evidence of specific intent to maim, certainly a defendant can entertain and carry out a specific intent to maim in the midst of a more indiscriminate beating. It is simply a question of whether there is evidence above and beyond the more general beating to support the specific intent to maim. Here, the circumstances of the attack on wife’s breast provides that evidence. Accordingly, we reject defendant’s substantial evidence challenge.

The Jury Instructions Were Adequate; Defendant Forfeited Any Argument for More Specific Instructions

Next, defendant argues the court erred by failing sua sponte to instruct the jury that an indiscriminate attack is insufficient to establish specific intent.

The jury was instructed using CALCRIM No. 800 (Aggravated Mayhem) as follows: “The defendant is charged in Count 1 with aggravated mayhem in violation of Penal Code section 205.

“To prove that the defendant is guilty of this crime, the People must prove that:

“1. The defendant unlawfully and maliciously (disabled or disfigured someone permanently/ or deprived someone else of a limb, organ, or part of her body);

“2. When the defendant acted, he intended to (permanently disable or disfigure the other person/ or deprive the other person of a limb, organ, or part of her body);

“AND

“3. Under the circumstances, the defendant’s act showed extreme indifference to the physical or psychological well-being of the other person.

“Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

“A disfiguring injury may be *permanent* even if it can be repaired by medical procedures.

“The People do not have to prove that the defendant intended to kill.”
(Italics added.)

The court also instructed the jury, with regard to aggravated mayhem, “For you to find a person guilty of this crime, that person must not only intentionally commit the prohibited act, but must do so with a specific (intent/ [and/or] mental state). The act and the specific (intent/ [and/or] mental state) required are explained in the instruction for that crime.” (See CALCRIM No. 252.)

“A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial.” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) However, “[i]nstructions regarding the elements of the crime affect the substantial rights of the defendant, thus requiring no objection for appellate review.” (*Ibid.*)

The instructions concerning the intent required for aggravated mayhem adequately informed the jury of the elements of the crime. Taken together, they indicate that the defendant must have specifically intended to maim. While courts have held an indiscriminate attack is inadequate, by itself, to prove specific intent, that holding is not an element of the crime. It is commentary on what constitutes sufficient evidence to establish the element of specific intent. To the extent defendant wanted a more specific instruction distinguishing an indiscriminate attack from a focused attack, defendant needed to ask for it. His failure to do so forfeited the issue.

The Court Did Not Abuse Its Discretion in Denying Defendant Postconviction Access to the Jurors’ Identifying Information

Next, defendant contends the court abused its discretion in denying him access to juror information after his conviction. The jury returned its verdict on July 9, 2013. On August 29, 2013, defendant filed a “Motion to Disclose Jury Identifying Information.” The motion was based on an interview of two individuals who were outside of the courtroom on July 9, 2013, the day the jury returned its verdict and who heard one juror say to another juror the words “domestic violence.” According to the witnesses, the juror in question then looked up at the witnesses and stopped talking. According to one witness, this incident occurred as the jurors were returning from lunch break. By that point in time, jury deliberation had already commenced. The court denied the motion, finding the evidence did not “establish a prima facie showing of good cause to release the juror information,” and describing what the witnesses heard as “an isolated

remark.” In addition, the court noted, “Those two words weren’t anything new to the case. The jurors were told this is a domestic violence case.”

We review the denial of a motion to disclose juror information for abuse of discretion. (*People v. Osband* (1996) 13 Cal.4th 622, 675.) To obtain a juror’s personal identifying information, a defendant must establish a prima facie showing of good cause. (Code Civ. Proc., § 237, subd. (b).)

On the record before us, we find no abuse of discretion. As the court noted, the two words, “domestic violence,” generally describe the case. There is no concrete indication from those two words that the jurors were actually discussing the evidence outside of the deliberation room. Given the ambiguous nature of the comment, it was within the court’s discretion to conclude that there was an insufficient showing of good cause to support the release of the juror’s personal identifying information.

The Restitution Award is Supported by Substantial Evidence

Next, defendant contends some of the restitution award was not supported by the evidence. However, the only charges he disputes were paid by the Victim’s Compensation & Government Claims Board (the Board). Pursuant to section 1202.4, subdivision (f)(4)(A), these charges “shall be presumed to be a direct result of the defendant’s criminal conduct and shall be included in the amount of the restitution ordered.” Thus it is not enough for defendant to point to a *lack* of evidence, he must show that he rebutted the presumption that the expenses were caused by his criminal conduct.

First, he contends certain dental charges regarding resin-based composites to teeth numbers 7, 8, and 23 were not related to the crime. He argues that, while defendant is clearly responsible for charges relating to the tooth he knocked out (which, according to defendant, was tooth number 10, wife never testified to any damage related to teeth numbers 7, 8, and 23. What defendant seems to have overlooked, however, is

that wife did testify that other teeth were chipped or cracked. Moreover, as noted above, simply pointing to a lack of evidence is insufficient. Defendant has not identified any portion of the record that rebuts the presumption that these expenses were caused by defendant.

Second, defendant contends certain relocation expenses were not related to his criminal conduct. In particular, he notes that the relocation in question happened in April 2013, more than one year after the crime occurred. He also notes that daughter testified she and wife were already planning to move away from defendant before the crime occurred. Defendant concludes the relocation was not related to the crime.

However, the fact that wife was already planning to leave defendant was likely due to the prior domestic violence incidents in which defendant had struck wife. Moreover, the Board provided a law enforcement relocation verification form in which a law enforcement officer stated, “Def . . . [h]as friends & associates that might assist him in locating victim.” The record does not reveal what evidence might have justified that concern, but because the Board covered this expense, the presumption is that it was caused by defendant’s conduct. And once again, defendant did not present any evidence to rebut that presumption.⁴

Finally, defendant contends a \$170 charge for new glasses should have been disallowed. Defendant’s only argument, however, is that “[c]learly this expense is not supported by anything testified to at trial.” But the presumption provides the missing link, and defendant offered nothing to rebut the presumption.

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Defendant also speculates that wife may have received security deposit money back when she moved out of the apartment, which should offset the restitution award. There is no evidence, however, that she received a security deposit back.

The Abstract of Judgment Recites the Correct Number of Custody Credits

Defendant's final contention is that the abstract of judgment should list 644 days of actual presentence custody credits instead of 643 days. When the court announced the sentence in open court, it announced 643 days of actual presentence custody credits. Defense counsel replied by saying he had calculated 644 days. The court then asked the prosecutor if there was any objection to 644 days, and with no objection forthcoming, the court announced 644 days of actual credit. The abstract of judgment, however, lists only 643 days of actual credit.

There seems to be no dispute on appeal that the actual number of days defendant spent in custody prior to being sentenced was 643 days. Defendant was arrested on March 17, 2012, and sentenced on December 19, 2013. By our count, 643 days is correct. Defendant contends, however, that by failing to raise an objection to 644 days when given the opportunity, the People forfeited any right to dispute that amount.

“Computational errors of this kind result in an unauthorized sentence, and are subject to correction by the trial court or the appellate court when presented. [Citations.] The correction should be made even if it results in less credit (and hence a longer term in custody) for the defendant. [Citation.] [¶] We are aware of recent decisions indicating that such correction should be sought from the trial court in the first instance, with resort to the Courts of Appeal only on a showing that relief is not available or is refused at the trial court level. [Citations.] We agree that when the question presented involves a fact determination or an exercise of discretion, the issue should be tendered first to the trial court. Arguably, the same is true when the claim of error in calculation is the only issue in the case. But when the sentence issue presented is essentially arithmetic in nature, involving no factual assessment or exercise of discretion and, in fact, will take no more than a few minutes of appellate time, it is far more economical to resolve it through the appellate process than to require the institution of a trial court proceeding.” (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764.)

Here, it is clear that defense counsel misled the court (probably inadvertently), which had originally calculated the correct number of days. Presumably, the court caught the error in preparing the abstract of judgment and inserted the correct number of presentence custody days. Given that this is a purely arithmetic issue, we do not deem the People to have forfeited it. The correct number of presentence custody credits is 643 days, as reflected on the abstract of judgment.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.