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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO APONTE,

Defendant and Appellant.

H035701

(Monterey County

Super. Ct. No. SS082273)

I. STATEMENT OF THE CASE

After a court trial, the court convicted defendant Roberto Aponte of inflicting corporal injury on his spouse and further found that he caused great bodily injury and had a prior serious felony conviction. (Pen. Code, §§ 273.5, subd. (a), 12022.7, subd. (e), 1170.12, subd. (c)(1), 459.)¹ Under the parties' negotiated agreement, the court sentenced him to four years in prison. It gave him 623 days of presentence custody credit and, under section 2933.1, subdivision (c), limited his presentence conduct credit to 15 percent of custody credit, giving him 93 days, for total presentence credit of 716 days.

¹ Apparently, in a separate case, defendant was charged with knowingly violating a protective order. (Pen. Code, § 166, subd. (c)(1).) The two cases were consolidated, and after trial, the court acquitted defendant of that charge.

All unspecified statutory references are to the Penal Code.

On appeal from the judgment, defendant claims defense counsel rendered ineffective assistance. He also claims the court erred in applying the 15 percent credit limitation.²

We affirm the judgment.

II. BACKGROUND

The Prosecution

Defendant and his wife Jane Doe went to a barbeque on August 31, 2008, and stayed from about 1:00 p.m. to 7:30 or 8:00 p.m. Defendant and Doe were drinkers, sometimes to excess, and both had numerous drinks at the barbeque.³ At the party, Doe observed defendant flirting with someone. Defendant got angry when a man named Ricky brought Doe a drink. Defendant seemed jealous and exchanged words with Ricky, warning him to stay away from Doe.

Doe testified that when the party ended, defendant drove them home. They stopped on the way at Burger King for some food. At home, Doe lay down on the bed to watch TV. Defendant accused her of flirting at the party and tried to provoke an argument. Doe was not interested in fighting, curled up, and continued to watch TV. Defendant pressed his accusation. Doe told him to “shut up.” She did not want to talk

² In addition to this appeal, defendant has filed a petition for a writ of habeas corpus in which he asserts the same claim of ineffective assistance (H037509). Defendant has also filed an appeal from the denial of his post-judgment motion for additional presentence conduct credit (H036822). In that appeal, defendant reasserts his claim the court erred in limiting his conduct credit.

We ordered that all three cases would be considered together.

In a separate order, we dismiss the appeal in H036822 as moot; and in a separate opinion, we deny the petition for a writ of habeas corpus.

³ Doe testified that she had around 10 to 12 drinks, including four or five alcoholic “jelly shots.” However, she said she was not stumbling around or slurring her speech. She also said she was not intoxicated when they left because she stopped drinking an hour or two before leaving.

During this period in her life, Doe was taking several prescription medications. She testified that she did not take her medication when she drank and did not do so the day of the barbeque.

about it and said they could discuss it in the morning. Defendant persisted, and Doe just kept watching TV and dozing a little. Suddenly, without warning, defendant smacked her in the ear with what felt like a closed fist and knocked her to the floor. She grabbed her ear in pain and started screaming. Doe told defendant to get her car. She then took some of her things and left for her parents' house.

Two days later, Doe complained to the police and filed a formal report seeking defendant's arrest. The officer did not see any exterior bruising but suggested she go to the hospital to have her ear checked. While Doe was at the police station, defendant called and left her a voice message apologizing, admitting that he was "wrong" and had "stepped out of our boundaries," and wanting her to know how much he loved her. Doe testified that defendant's message echoed the kinds of comments he had made after prior incidents of violence against her.

After defendant was arrested, his brother Domingo called Doe and asked her to drop the charges. Doe also received a card and love letters. The return address on an envelope listed the name "Joseph Santos." However, the letters were not signed by "Joseph Santos." Rather, on one side of the card were three small hearts that sequentially read "I" "Love" and "You" and were followed by a fourth larger heart that read, "Bobby," the name she used in referring to defendant at trial. The card was signed "Tu Papi." One letter was signed "Hubby" and told her to use her maiden name if she wrote him back. Doe identified defendant's handwriting on the letters. The card and letters were sent from the Monterey County Jail, where defendant was being held.

The handwritten love letters professed defendant's undying devotion to her and their marriage. He talked about being husband and wife and making their marriage stronger; he acknowledged that he was not the easiest person to get along with; he admitted that he had been wrong; he said he was sorry and promised this would never happen ever again; he begged her to forgive him; and he sought reconciliation. He said that only she could pardon him. In addition, he told her that he had accepted God and

Christ into his life, was clean and sober, promised to quit drinking and go to AA, and was willing to attend marriage counseling. He further pointed out that he could go to prison for eight years but advised her about a “new law” that “if the person doesn’t come to court it will be thrown out of court,” and therefore “if you don’t come I can be set free, but I still have too [sic] do my 6 months for the violations of parole. I’m asking you please think of My Kids and you and me! I was wrong and I don’t want to loose [sic] you”⁴

A few days after being attacked, Doe went to the hospital because she was experiencing more pain and some hearing loss. She had not had any problems with her ear before defendant hit her. The treating physician said she had a hole in her ear. She was referred to Doctor Mark Vetter, M.D., a specialist. Doe said that she had been struck on the ear and had some hearing loss. Doctor Vetter found two perforations in her eardrum. He could not tell whether the perforations were caused by trauma or infection. However, he saw no signs of infection. He had Doe wait three months to see if her eardrum would heal naturally. It did not, and he surgically repaired it and restored her hearing.

Doctor Vetter testified that it was possible for an old perforation that had healed to spontaneously reappear. He also testified that one could perforate an eardrum twice with a Q-tip. However, he considered such a scenario unlikely because of the pain the first perforation would cause. The more likely cause of multiple perforations would be an abrupt and traumatic change in pressure inside the ear due to, for example, being slapped on the ear with an open hand, although it could also happen with a closed fist.⁵

⁴ Defendant denied writing the letters.

⁵ Doe’s medical records revealed that in 1992, there was some old scarring in her ear.

The Defense

Defendant testified that he saw Doe take medication on the day of the barbeque. He also said she drank heavily during the party and was still intoxicated when they got home. She seemed angry at him. They argued, and at one point, she came at him. He instinctively raised his hands in self-defense but then backed up, turned around, and left the room. He did not touch her. Defendant admitted that when he explained what happened to the police, he gave two stories, and in one, he falsely said that Doe had actually hit him on the head.

Defendant testified that during their relationship, Doe often complained about pain in her ear, and when she was drunk, she would dig in her ear with a Q-tip.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that counsel rendered ineffective assistance in failing to request a limiting instruction concerning evidence that defendant's brother Domingo had called Doe and urged her to drop the charges. He asserts that the evidence was admissible for some purposes—for example, to explain Doe's state of mind and credibility, show that she was afraid to testify and feared retaliation, and reveal Domingo's bias as a witness for the defense. However, it was not admissible to prove an attempt to dissuade Doe from testifying or suppress evidence because there was no evidence that defendant authorized, directed, or was otherwise connected with Domingo's call. Accordingly, defendant argues that if counsel had requested a limiting instruction, the court "would have been put on notice that the testimony was inadmissible to show any wrongdoing on [defendant's] part." He argues that without the requested instruction, the court would tacitly impute Domingo's conduct to him, which would then undermine the court's evaluation of defendant's credibility.

A. Applicable Principles

To obtain reversal due to ineffective assistance, a defendant must first show “that defense counsel’s performance fell below an objective standard of reasonableness, i.e., that counsel’s performance did not meet the standard to be expected of a reasonably competent attorney[.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003 (*Cunningham*); *Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*)). Second, the defendant must show that there is “a reasonable probability that defendant would have obtained a more favorable result absent counsel’s shortcomings.” (*Cunningham, supra*, 25 Cal.4th at p. 1003.) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland, supra*, 466 U.S. at p. 694; *People v. Staten* (2000) 24 Cal.4th 434, 450-451.)

Because the defendant bears this burden, “[a] reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.” (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) Moreover, where the record on direct appeal “does not show the reason for counsel’s challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation.” (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) Under such circumstances, claims of ineffective assistance are generally rejected on direct appeal and more properly raised in a petition for habeas corpus, which can include declarations and other information outside the appellate record that reveal the reasons for the challenged conduct. (*People v. Mayfield* (1993) 5 Cal.4th 142, 188 [“tactical choices presented . . . on a silent record” are “better evaluated by way of a petition for writ of habeas corpus” and will be rejected on direct appeal].)

In this case, the record on appeal does not shed light on why counsel failed to request a limiting instruction. Moreover, he reasserts this claim in his petition for a writ of habeas corpus and provides a response from trial counsel concerning his performance.

Under the circumstances, we reject defendant's claim on appeal and shall address it in connection with his petition.

IV. PRESENTENCE CONDUCT CREDIT

Defendant contends that the trial court erroneously capped his presentence conduct credit at 15 percent of his presentence custody credit under sections 2933.1 and 667.5, subdivision (c)(8), which together limit credit for those convicted of “[a]ny felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7” Defendant asserts that properly construed, the applicable statutes limit conduct credit only if the prosecutor proves that the defendant inflicted great bodily injury *with the specific intent to do so*. Because the prosecutor here did not prove that he attacked Doe with that specific intent, the credit limitation was inapplicable. In his opening brief, defendant argued that he was entitled to conduct credit at the rate of 50 percent of his presentence custody credit. In a supplemental opening brief, however, defendant claims that under the Equal Protection Clauses of the state and federal Constitutions, he is entitled to retrospective application of more recent amendments to sections 2933 and 4019, which allow one-for-one credit equal to the amount of presentence custody credit.

A. Applicable Statutes

Section 2933.1, subdivision (a) provides, “Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933.”

Section 2933.1, subdivision (c) provides, “Notwithstanding Section 4019 or any other provision of law, the maximum credit that may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a).”

Section 667.5, subdivision (c) lists numerous felonies and includes “[a]ny felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7” (§ 667.5, subd. (c)(8).)

Section 12022.7 sets forth a number of enhancements for those who inflict great bodily injury in the commission of a felony. Among them is section 12022.7, subdivision (e), the enhancement alleged and found true by the court in this case, which provides, in relevant part, “Any person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years.”

B. Discussion

The rules governing interpretation of statutes are settled. “ ‘As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature’s intent so as to effectuate the law’s purpose.’ [Citations.] The well-established rules for performing this task require us to begin by examining the statutory language, giving it a plain and commonsense meaning. [Citation.] We do not, however, consider the statutory language in isolation; rather, we look to the statute’s entire substance in order to determine its scope and purposes. [Citation.] That is, we construe the words in question in context, keeping in mind the statute’s nature and obvious purposes. [Citation.] We must harmonize the statute’s various parts by considering it in the context of the statutory framework as a whole. [Citation.] If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then we may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history. [Citation.]” (*Los Angeles County Metropolitan Transp. Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1106-1107.)

As applicable here, sections 2933.1, subdivision (c), 667.5, subdivision (c), and section 12022.7, subdivision (e), both individually and collectively, are simple, direct, and unambiguous: the 15 percent limitation on conduct credit applies to those who were charged with an enhancement under section 12022.7, subdivision (e) and found to have personally inflicted great bodily injury under circumstances involving domestic violence. Moreover, as the Attorney General correctly points out, section 12022.7, subdivision (e), formerly subdivision (d), does not require proof that the perpetrator acted with specific intent to inflict injury. (*People v. Carter* (1998) 60 Cal.App.4th 752, 754-755; see *People v. Poroj* (2010) 190 Cal.App.4th 165, 172-173; compare Stats. 1993, ch. 608, § 2, p. 3262 [§ 12022.7 originally required specific intent] with Stats. 1995, ch. 341, § 1, pp. 1851-1852 [deleting requirement from all subdivisions].) Thus, the fact that the prosecutor did not prove, and court did not find, that defendant hit Doe with the specific intent to cause great bodily injury is irrelevant and does not preclude application the 15 percent credit limitation.

In claiming that the limitation required a finding of specific intent, defendant invokes the rule of statutory construction that “where a statute incorporates by reference another specific law, the reference is to that law as it then existed and not as subsequently modified.” (See *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58-59.) Thus, according to defendant, the reference to section 12022.7 in section 667.5, subdivision (c)(8) must be read to incorporate the version of section 12022.7 that existed when that reference was added to section 667.5, subdivision (c)(8) in 1977. He notes that at that time, section 12022.7 required proof of specific intent to cause great bodily injury. We are not persuaded.

Even when one statute specifically refers to another, the rule of construction invoked by defendant cannot be used to achieve a result contrary to a legislative intent that is evident in the unambiguous language of the statute. (See *In re Jovan B.* (1993) 6 Cal.4th 801, 816-817 & fn. 10 [legislative intent governed despite specific statutory

reference].) In other words, “ “ “the Legislature is presumed to have meant what it said and the plain meaning of the language governs.’ ” [Citation.] Therefore, if a statute is unambiguous, it must be applied according to its terms. *Judicial construction is neither necessary nor permitted.*’ [Citations.]” (*People v. Pecci* (1999) 72 Cal.App.4th 1500, 1505, italics added.)

For example, in *People v. Van Buren* (2001) 93 Cal.App.4th 875 (*Van Buren*) (disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 3), the defendant was convicted of second degree robbery. The court applied the 15 percent credit limitation. He invoked the same rule of construction and asserted that the reference to section 667.5 in section 2933.1 referred to the version of section 667.5 applicable at the time of the reference in 1994, and at that time, section 667.5 listed only residential robbery with a personal use of a deadly or dangerous weapon as a violent felony; did not include all robberies until 1998. Thus, defendant argued that the credit limitation did not apply to him. The court rejected this analysis holding instead that section 2933.1 incorporated the contemporaneous version of section 667.5, subdivision (c) along with all subsequent amendments. (*Van Buren, supra*, 93 Cal.App.4th at pp. 878-879.)

The court acknowledged that the “special rule of statutory interpretation has been developed for statutes that incorporate other statutes” but explained that “[w]hen interpreting a statute . . . our primary task is to determine the Legislature’s intent. [Citation.] In cases ‘where it is questionable whether only the original language of a statute is to be incorporated or whether the statutory scheme, along with subsequent modifications, is to be incorporated, the determining factor will be the legislative intent behind the incorporating statute.’ ” (*Van Buren, supra*, 93 Cal.App.4th at p. 879.)

The court held, “Here, section 2933.1 adopted a list of violent felonies set forth in section 667.5, subdivision (c), through a specific reference to section 667.5. Nevertheless, section 667.5 is a general statute which provides for enhanced punishment

for persons convicted of violent felonies. And, although it enumerates specific crimes, section 667.5, subdivision (c), is a critical element in the general body of law concerning treatment of violent criminals. The scope of the statute, together with its legislative history, establishes that section 2933.1 was intended to apply generally to felonies listed in section 667.5, subdivision (c), as that subdivision is amended from time to time.” (*Van Buren, supra*, 93 Cal.App.4th at pp. 879-880.)

The court further explained, “Section 2933.1 is not a sentencing statute. It is an expression of the Legislature’s desire to delay the parole of violent felons, a common purpose it shares with section 667.5, subdivision (c), and was enacted as a counterpart to the Three Strikes law sentencing scheme. Section 667.5, subdivision (c), is intended to identify ‘violent felonies’ and to single them out for special consideration ‘when imposing a sentence to display society’s condemnation for these extraordinary crimes of violence against the person.’ (§ 667.5, subd. (c) [last paragraph]; [citation].)

[¶] Similarly, section 2933.1 is intended to protect the public from dangerous offenders who might otherwise be released on parole on an earlier date. [Citation.] By limiting custody credits for defendants convicted of violent felonies, section 2933.1 complements the purpose of the Three Strikes law to ensure longer prison sentences and greater punishment for those who commit serious or violent felonies. [Citation.] This intent can be fully effectuated *only* if section 2933.1 incorporates offenses defined as ‘violent felonies’ at the time of enactment and thereafter.” (*Van Buren, supra*, 93 Cal.App.4th at p. 880, italics added.)

The court reviewed the legislative history of section 2933.1 and found confirmation that “the Legislature contemplated application of section 2933.1 to the evolving scheme of ‘extraordinary crimes of violence against the person’ to which section 667.5, subdivision (c), is directed. Certainly, the Legislature did not believe that the list of felonies in section 667.5, subdivision (c), was immutable. At the time section 2933.1 was passed in 1994, the Legislature had already enacted several amendments to

section 667.5, subdivision (c), adding to the list of violent felonies. [Citations.] [¶] The Legislature must have contemplated that the category of violent felonies would continue to change as offenses were added to or deleted from section 667.5, subdivision (c), to reflect the experience of law enforcement, changes in crime statistics, and the will of the public. Since these changes would not alter the statute's purpose to single out violent crimes for special treatment, it is unlikely the Legislature intended to restrict section 2933.1 to the 1994 version of section 667.5, subdivision (c). [¶] Stated differently, there is no basis to believe that the Legislature intended that the same defendant could be sentenced as a violent felon without suffering a corresponding limitation on custody credits, or that he or she could suffer a limitation on custody credit without being sentenced as a violent felon. It is also not reasonable to believe that the Legislature intended to require a parallel amendment to section 2933.1 each time section 667.5, subdivision (c), was amended.” (*Van Buren, supra*, 93 Cal.App.4th. at pp 881-882.)

We find the analysis in *Van Buren* persuasive and applicable here. We recognize that in *Van Buren*, the court dealt with whether section 2933.1 incorporated an amendment to section 667.5, not an amendment to section 12022.7. However, we find this to be a distinction without a difference. Sections 667.5 and 12022.7 were both part of the overall statutory scheme for dealing with violent offenders when section 2933.1 was enacted and bolstered that statutory scheme by adding a credit limitation that would further protect the public by delaying the release of those convicted violent acts and offenses. (See Stats.1994, ch. 713, § 2, p. 3448 [§ 2933.1, declaration of urgency]; *People v. Reeves* 35 Cal.4th 765, 771; *Van Buren, supra*, 93 Cal.App.4th at pp. 880-881.) Thus, just as section 2933.1 was intended to apply generally to the felonies listed in section 667.5, subdivision (c), as that subdivision is amended from time to time, so too, in our view, sections 2933.1 and section 667.5, subdivision (c) were intended to apply to any felony in which the defendant inflicts great bodily injury as charged and proved under section 12022.7, as *that* section is amended from time to time. Indeed, given the purpose

of the statutory scheme for protecting the public from violent offenders, we consider it unreasonable to find that the 15 percent credit limitation does not apply to a defendant who personally inflicted great bodily injury under circumstances involving domestic violence and who, as a result, was subject to enhancement punishment under 12022.7, subdivision (e).⁶

VI. DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

ELIA, J.

WALSH, J.*

⁶ Given our conclusion that the 15 percent limitation applies, we need not address the equal-protection claim defendant raises in his supplemental opening brief.

* Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.