Filed 8/28/12 P. v. McGeisey CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT B. McGEISEY, Defendant and Appellant.	B234981 (Los Angeles County Super. Ct. No. BA375380)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Affirmed.

Lea Rappaport Geller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Robert McGeisey was convicted of two counts of assault by means likely to produce great bodily injury for beating his girlfriend, Celeste Garcia. Defendant moved for a new trial on the grounds of juror misconduct. The trial court admitted part and excluded part of the juror testimony and declarations submitted by the defense, and denied the motion. Defendant, on appeal, argues that the trial court improperly excluded evidence and improperly denied the motion for a new trial. Defendant also argues that the sentence for one of the two counts of assault should have been stayed, because his actions constituted a singular course of conduct done in furtherance of one objective. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Underlying Facts*

Defendant and Garcia had been in a turbulent relationship since August 2009. On August 6, 2010, Garcia had an operation to resolve an ectopic pregnancy. On August 26, 2010, Garcia and defendant went to Disneyland and returned to Garcia's home for the night. The following day, they began arguing, and Garcia ended their relationship. Garcia drove defendant back to his home in Commerce. When Garcia was returning home after driving defendant to his house, she received a voicemail from him saying that he had "something you may need." Garcia realized that he still had her credit card and identification card from when she had given them to him to hold the day before. She returned to defendant's home and went to his bedroom, where she found both her credit card and identification card in a bag on his bed. When she turned to exit the room, defendant was standing in the doorway.

The two began arguing, and defendant grabbed Garcia's arms and prevented her from leaving the room. He then pushed her and said, "the only way you'll leave is in a box." Garcia tried multiple times to leave the room, but defendant continued to block her path and pushed her on his bed. Defendant then began hitting her. He kicked her in the area of her incision from the operation, making it bleed. Defendant then pushed Garcia onto his bed and began choking her with both hands. Garcia complained about the pain and inability to breathe until defendant finally released his grip.

After Garcia attempted to leave the room again, defendant stopped her and took her car keys and phone from her. When Garcia tried to reclaim her possessions, defendant stabbed her right arm with her keys, drawing blood. He then attempted to stab her again with the keys in her rib-cage area, but Garcia blocked his attack. Defendant then pulled Garcia's hair and would not let her go despite her crying and pain. After eventually releasing her hair, defendant sat on his bed and raised the volume of the television to muffle the sounds of the struggle, while Garcia sat on a pile of clothes. After twenty minutes, she tried to leave, but defendant "jumped up" to stop her. Defendant then left to obtain food for himself and his grandmother,[1] leaving Garcia in the house. She looked for a phone but could not find one. She did not leave the house because she did not have access to her car without her keys and did not know the neighborhood.

---

[1] Defendant's grandmother was in the house for the entire duration of the incident. Nothing in the record suggests that the grandmother left her bedroom at any time during the incident or that she was aware of what occurred between defendant and Garcia.

When defendant returned, Garcia again asked to leave, but he refused. She then showed him the blood from her open incision, and he accompanied her to the restroom to see how serious the injury was. When they returned to his bedroom, defendant told Garcia to lay down with him on his bed. She refused. Defendant then pushed her on the bed, forced himself on top of her, and tried to kiss her. When she turned her face away, they struggled for about ten minutes. They then moved to opposite sides of the bed. Garcia closed her eyes for two hours. After that time, she checked to see if defendant was asleep, but he was not. She then fell asleep until the next morning.

When Garcia woke up, defendant was already awake and watching television. Garcia told defendant that she needed to go see her father in the hospital, and they began arguing. Defendant then demanded that Garcia "show him love." Garcia said that she did not want to have sex with him, and that she could not engage in any sexual activity because of her operation. Defendant forced himself on top of her, pulled down her yoga pants and underwear, and inserted his fingers into her vagina. When he removed his fingers, he told her to leave and threw her keys at her. Garcia left the house at 11:00 A.M. on August 28, 2010.

Garcia then went home and showered. The shower burned parts of her scalp because defendant had pulled out entire patches of her hair. She then went to visit her father in the hospital. At the hospital, she showed her stepmother the cuts and bruises she received, but did not report the incident to any police or hospital staff.

The following day, August 29, 2010, Garcia went to the Los Angeles Sheriff's Department and reported the incident. The deputies took pictures of her injuries.

Los Angeles County Sheriff's Deputy Crystal Hernandez interviewed Garcia and found her to be scared and nervous.

2. *The Information and Trial*

Defendant was charged by information with two counts of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)), one count of false imprisonment by violence (Pen. Code, § 236), and one count of sexual penetration by a foreign object (Pen. Code, § 289, subd. (a)(1)(A)). A jury trial was held, and defendant was found guilty of the two assault charges and not guilty of the sexual penetration charge. The jury hung as to the false imprisonment charge, and that count was ultimately dismissed.

3. *Motion for New Trial*

Before sentencing, defendant filed a motion for a new trial on the grounds of juror misconduct. Among other grounds, defendant argued that the jury foreperson had stated during deliberations that if the jurors found defendant guilty of the first count of assault, they had to find him guilty of the second count of assault. Defendant also argued that the jury did not reach a unanimous decision as to which acts constituted each count of assault in coming to the verdict. Defendant submitted declarations from two jurors in support of the motion (Juror A's Declaration and Juror B's Declaration).

Juror A's Declaration stated that the unanimity rule "was not discussed at all during the deliberations and no one specifically stated which injury he/she found to be true." It also stated that the jurors speculated that defendant could have easily pushed Garcia onto the bed and could have easily hurt her; the jury also allegedly proffered

speculative reasons as to why Garcia did not leave the house or seek help when defendant left the house to get food—for example, defendant may have been friends with his neighbors. Juror A's Declaration also stated that Juror A felt pressured to come to a verdict because one of the jurors had been talking about an upcoming trip. Finally, Juror A stated that "at some point during the deliberations, I inquired whether Mr. McGeisey could be found guilty of simple assault as to Count II. [The foreperson] informed me that we had to find him guilty of Counts I and II in their entirety, and since we had already found him guilty as to Count I, we were legally obligated to find him guilty as to Count II."

Juror B's Declaration stated that one juror informed the others that the two assaults did not need to be the same acts by each juror and that no vote took place as to which acts comprised each count of assault. Juror B's Declaration alleged that the jurors speculated as to the causes of Garcia's injuries because neither the defense nor the prosecution provided "adequate explanations." The jurors also allegedly speculated as to self-defense and whether defendant "should have just walked away." Juror B also declared that one juror stated to the others that she did not want to miss an upcoming flight.

The trial court admitted the following statement from Juror A's Declaration: "Calcrim 3500, the unanimity rule, was not discussed at all during the deliberations and no one specifically stated which injury he/she found to be true." The trial court admitted the following statements from Juror B's Declaration: "During jury deliberations, [a juror] informed the other jurors that the two assaults alleged in Counts I

and II did not need to be the same ones by each juror . . . [and] at no point during jury deliberations, did we vote on which two acts comprised the assaults alleged in Counts I and II." The trial court struck the remainders of both declarations, on the ground that they concerned inadmissible juror thought processes.

Juror A testified at the hearing on the motion. The juror testified that no discussion occurred as to whether the jurors had to be unanimous as to which acts each assault encompassed. The defense then questioned Juror A as to what discussions, if any, occurred concerning which acts constituted counts I and II. The court sustained its own objection, observing that such a line of questioning delved into the jurors' inadmissible thought processes. The defense then questioned Juror A as to statements made during deliberations concerning another juror's scheduled trip and whether the jury discussed scenarios that were not presented at trial. Both times the court sustained its own objections. The trial court denied the motion for a new trial, observing that the declarations did not rise to misconduct and that defendant's arguments rested on the jurors' inadmissible discussions and thought processes.

4. *Sentencing*

On August 3, 2011, defendant was sentenced to the low term of two years on each count of assault. The terms were to be served concurrently in state prison.

ISSUES ON APPEAL

There are essentially two issues raised in this appeal: (1) Did the trial court err in denying the motion for a new trial based on juror misconduct? and (2) Should the sentence for the second count of assault have been stayed pursuant to Penal Code

section 654 on the ground that defendant's actions constituted a single course of conduct incident to one objective? We answer both questions in the negative.

DISCUSSION

1. *The Trial Court Did Not Err in Denying the Motion for a New Trial*

" "In ruling on a request for a new trial based on jury misconduct, the trial court must undertake a three-step inquiry. [Citation.] First, it must determine whether the affidavits supporting the motion are admissible. (Evid. Code, § 1150.) If the evidence is admissible, the trial court must determine whether the facts establish misconduct. [Citation.] Lastly, assuming misconduct, the trial court must determine whether the misconduct was prejudicial. [Citations.]' " (*People v. Garcia* (2001) 89 Cal.App.4th 1321, 1338.)

a. *Standard of Review*

"The trial court is vested with broad discretion to act upon a motion for new trial. (Citation.) When the motion is based upon juror misconduct, the reviewing court should accept the trial court's factual findings and credibility determinations if they are supported by substantial evidence, but must exercise its independent judgment to determine whether any misconduct was prejudicial. (Citations.)" (*People v. Dykes* (2009) 46 Cal.4th 731, 809.)

b. *The Stricken Portions of the Declarations and Testimony Were Inadmissible Because They Pertained to Subjective Juror Thought Processes*

"[A]ny otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such

a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (Evid. Code, § 1150(a).)

The California Supreme Court has "emphasize[d] that, when considering evidence regarding the jurors' deliberations, a trial court must take great care not to overstep the boundaries set forth in Evidence Code section 1150. The statute may be violated not only by the admission of jurors' testimony describing their own mental processes, but also by permitting testimony concerning statements made by jurors in the course of their deliberations." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419.) " ' "[A] verdict may not be impeached by inquiry into the juror's mental or subjective reasoning processes, and evidence of what the juror 'felt' or how he understood the trial court's instructions is not competent." ' " (*People v. Lindberg* (2008) 45 Cal.4th 1, 53.)

"Where . . . the affidavit or declaration suggests ' " 'deliberative error' in the jury's collective mental process—confusion, misunderstanding, and misinterpretation of the law," ' particularly regarding 'the way in which the jury interpreted and applied the instructions,' the affidavit or declaration is inadmissible. (Citation.) The mere fact that such mental process was manifested in conversation between jurors during deliberations does not alter this rule. (Citation.)" (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 476.)

"[J]urors may testify to 'overt acts'—that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject

to corroboration'—but may not testify to 'the subjective reasoning processes of the individual juror . . . . ' (Citation.)" (*In re Stankewitz* (1985) 40 Cal.3d 391, 398 (*Stankewitz*).) Although overt acts may be admitted, statements must be received with caution. "Statements have a greater tendency than nonverbal acts to implicate the reasoning processes of jurors—e.g., what the juror making the statement meant and what the juror hearing it understood. They are therefore more apt to be misused by counsel in an effort to improperly open such processes to scrutiny." (*Ibid.*)

Here, the trial court properly excluded parts of both jurors' declarations. The general contents of the jury's deliberations may not be admitted. The declarations stated that the jury, during deliberations, speculated about self-defense on the part of defendant, possible reasons that Garcia did not leave the house when defendant went to get food, and potential causes of Garcia's injuries. These general summaries of what was said or speculated during deliberation are precisely the sort of statements regarding thought processes which cannot be admitted. The members of the jury were in the process of communicating with each other and vocalizing their own subjective understanding of the facts and law. Additionally, both Juror A's Declaration and Juror B's Declaration expressed that they had felt pressured to reach a verdict because of another juror's upcoming trip. These portions are similarly inadmissible because such inner thoughts do not amount to an "overt act" in even the broadest sense.

The trial court also properly excluded other parts of Juror A's testimony. When that juror was being questioned in court, the trial court sustained its own objections when the juror was questioned about whether (1) one of the jurors had pressured the

other jurors into making a decision so that juror could be on time for an upcoming trip, (2) the jurors speculated about unsupported scenarios during deliberations, and (3) what discussions occurred when deciding which acts supported Count I or II. The court correctly reasoned that such questions also delved into an area of subjective juror thought process and subjective interpretation that is inadmissible as evidence. Defendant asserts that the statements made during deliberations are "overt acts" that are admissible. We are not persuaded. What is said during the jurors' deliberation is merely an outward manifestation of the individual jurors' reasoning processes. Only "overt acts" which do not simply reflect individual thought processes are admissible. The line of questioning posited by the defense in asking what, if any, discussions occurred concerning the unanimity rule was improper, and the trial court did not err in excluding such testimony.[2]

---

[2] Defendant relies on *Stankewitz, supra,* 40 Cal.3d 391 in support of his claim that the juror foreperson's statement should have been admitted and amounts to juror misconduct, but his reliance is misplaced. In *Stankewitz*, a juror repeatedly told his fellow jurors that he knew from being a police officer of twenty years that robbery occurred once the defendant took the victim's wallet at gunpoint regardless of any intent as to keeping the wallet permanently. "Had he merely kept his erroneous advice to himself, his conduct might be the type of subjective reasoning that is immaterial for purposes of impeaching a verdict. But he . . . vouch[ed] for its correctness on the strength of his long service as a police officer, [and] he stated it again and again to his fellow jurors and thus committed overt misconduct." (*Id.* at pp. 399-400.)

Here, the foreperson's alleged statement that the jury must find defendant guilty of both counts of assault should it find him guilty of one count does not rise to the level of "overt misconduct" as articulated in *Stankewitz*. First, this statement was made during jury deliberations and is nothing more than deliberative error, which is inadmissible. Second, even if the statement was admissible, only the statement and not any effects it had on other jurors may be considered in considering whether misconduct occurred. Third, the statement was not likely to have influenced the verdict improperly. Nothing in the record suggests that the foreperson bolstered her statement with any form

c. *The Admitted Portions of the Declarations and Testimony Did Not Establish Misconduct*

The trial court also did not err in denying the motion for a new trial based on the admitted portions of the juror declarations. " 'In spite of the perception that, in recent times, the law concerning the ability of jurors to impeach a verdict has been liberalized, the process must be carefully scrutinized and controlled.' " (*Ford v. Bennacka* (1990) 226 Cal.App.3d 330, 334.) "In cases of a 'deliberative error[,]' which appears to produce a mistaken or erroneous verdict, the result has almost invariably been to bar impeachment of the verdict. . . . [¶] To grant a new trial in [cases of deliberative error] would permit enterprising but dissatisfied litigants to cull the jurors' deliberations for 'clerical' errors, then artfully draft affidavits aimed at exploiting their mistaken beliefs. The stability of verdicts . . . is too important to be so easily tampered with." (*People v. Romero* (1982) 31 Cal.3d 685, 694-695.) Courts have found juries to have engaged in misconduct when the members of the jury agreed to ignore the court's instructions: "evidence of a jury's explicit or implicit agreement to violate a court's instruction does not touch upon the juror's subjective reasoning processes . . . such agreement in and of itself constitutes misconduct." (*People v. Perez* (1992) 4 Cal.App.4th 893, 908.) Here, however, the members of a jury did not agree to ignore a court's instruction. The jury

---

of authority like the police officer in *Stankewitz* did. Further, the statement was made once, where in *Stankewitz*, the officer made the incorrect statement "again and again." The foreperson, in making that statement, articulated her own subjective misunderstanding of the law. Her single statement as to finding defendant guilty as to both counts of assault implicated the foreperson's subjective reasoning process and misunderstanding of the law and was not a command clothed in the authority of an office. Such subjective reasoning does not rise to the level of misconduct.

did not commit misconduct, but simply applied an incorrect understanding of an instruction.

The declarations contradicted themselves in part. Juror A's Declaration stated that the jurors did not discuss the unanimity rule at all, while Juror B's Declaration stated that a juror mentioned, during deliberations, that the acts for each count of assault did not have to be the same for each juror.[3] The final part of Juror B's Declaration that was admitted was the assertion that there was no vote as to which act comprised which count of assault.

The trial court had all of the evidence before it and, after weighing the conflicting declarations, concluded that the juror declarations did not establish misconduct. At most, the declarations were evidence of the jury's "deliberative error" in the application of the court's unanimity instruction. This "deliberative error" or misunderstanding of the law cannot be used to impeach a verdict. There is no evidence that the jury expressly or impliedly agreed to disregard the court's instruction, and the declarations only speak to a misinterpretation of the law. Nothing alleged in the admitted portions of the declarations amounts to misconduct, and the trial court did not err in denying the motion for a new trial.

2. *Penal Code Section 654 Does Not Require the Trial Court to Stay the Term as to Count II*

Defendant argues the sentence on Count II should have been stayed under Penal Code section 654. The trial court did not err in deciding not to stay the second term.

---

[3] The trial court had properly instructed the jury in the language of CALCRIM No. 3500, the unanimity rule.

"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." (Pen. Code, § 654(a).)

The California Supreme Court has recently clarified whether the protection of section 654 applies to multiple offenses of the same Penal Code section: "Both the language and purpose of section 654 counsel against applying it to bar multiple punishment for violations of the *same* provision of law." (*People v. Correa* (2012) 54 Cal.4th 331, 340-341.) Both the plain language of the statute and the Supreme Court's clarification support the trial court's decision to not stay the punishment for Count II in this case.

However, defendant was sentenced prior to *Correa* under law that presumed section 654 applied to multiple violations of the same statute. Even under such prior authority, there was no error. "If . . . the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Whether a defendant had multiple objectives is a question of fact for the trial court. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.) "A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence." (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

Here, after examining whether defendant's acts during the incident were incidental to a singular intent, the trial court's determination was supported by substantial evidence. The long duration of the incident and defendant's leaving the house and returning sufficiently support the trial court's decision not to stay the sentence for Count II. After kicking Garcia, choking her, stabbing her with keys, and pulling out patches of her hair, defendant stayed in the room with her for hours. He then left for a substantial period and returned with food before assaulting Garcia again. Upon defendant's return, he pushed Garcia onto his bed and struggled with her for several minutes. Further, the next morning, defendant threw Garcia's keys at her before finally allowing her to leave. The different assaults were not continuous and were spaced apart by breaks in time during which the defendant could have evaluated what he was doing and stopped. Each subsequent assault carried with it a new intent. There is substantial evidence in the record to support the trial court's implied finding that each offense had a different intent.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.