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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN PROSHAK, Defendant and Appellant.	B237975 (Los Angeles County Super. Ct. No. LA067701)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth A. Lippitt, Judge. Affirmed.

Alaleh Kamran, 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, Senior Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Steven Proshak was convicted, following a jury trial, of one count of willfully inflicting corporal injury on a cohabitant in violation of Penal Code section 273.5, subdivision (a).[1] The trial court sentenced appellant to two years in state prison.

Appellant appeals from the judgment of conviction, contending that the trial court erred in failing to instruct the jury sua sponte on the lesser included offense of battery against a cohabitant. The judgment is affirmed.

Facts

On April 22, 2011, about 4:21 p.m., Los Angeles Police Officer Shawn Svoboda responded to an emergency call on Ben Avenue in North Hollywood. He looked inside a home at the location and saw a woman lying in the hallway against the door frame. She appeared to be unconscious. The officer saw redness on her neck. Officer Svoboda then saw appellant inside the home, naked. They made eye contact. Officer Svoboda and his partner knocked on the door, identified themselves as police officers and entered the home.

Appellant became irate. He said to the officers, "Get the fuck out of my house. I will fuck you in the ass." Appellant continued "yelling, threatening, flailing his arms [and] making . . . aggressive postures."

The woman, Marina Revina, told the officers that she had come home that day about 3:30 p.m. and discovered that appellant was intoxicated and angry at her for coming home late. They had an argument and appellant punched her in the head and back. She left the house, but returned when appellant called her cell phone. Once Revina was home, the fighting resumed. Revina locked herself in a bedroom, but appellant began kicking the door in. She called 911, but appellant was able to get into the room, grab the phone and began choking her. He said, "I'm going to kill you, bitch." Revina told the officers that she then lost consciousness.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Revina was crying when she spoke with the officers, and appeared fearful and in pain. She refused an emergency protective order because "she was afraid that more violence would occur, and specifically she was afraid that he would actually kill her."

Paramedics came to the residence to treat Revina. She told them that appellant hit her with a closed fist and choked her. One of the paramedics saw red marks on Revina's neck and marks on her face where she had been hit.

At trial, Revina gave a different account of events on April 22. She testified that she and appellant had "crazy sex" that day and she asked him to choke her "a little bit" to make the experience more pleasurable. Revina scratched appellant's face and back, and called him nasty words afterwards. Appellant became angry and broke down the door to the master bedroom. Revina was afraid and called 911, but hung up when appellant calmed down. She did not pick up the phone when 911 called back because she did not know where the phone was. She did not tell the police about the rough sex because she was embarrassed. Revina denied telling the police that appellant hit her with a closed fist because she came home late. She also denied telling paramedics that appellant had punched her with a closed fist. She claimed that she did not understand English well and did not understand what the police and paramedics were saying to her. She denied telling police that appellant had been violent to her in the past and that she was afraid of him.

In his defense, appellant presented the testimony of Lynda Larsen, a private investigator who had interviewed Revina on a number of occasions. Larsen always used a Russian interpreter to speak to Revina.

Appellant also testified in his own behalf that on April 22 he and Revina had had rough sex. As part of the rough sex, he choked Revina and pulled her hair. Afterwards, Revina scratched appellant's back and face and called him names. He became angry and they argued. Appellant began breaking door panels in various rooms of the home. Appellant denied ever striking Revina with a closed fist. He also denied ever using any physical force on Revina.

Discussion

Appellant was charged with inflicting corporal injury on a cohabitant. He contends that the trial court erred in failing to instruct the jury sua sponte on the lesser included offense of battery against a cohabitant. We see no error.

A trial court has a sua sponte duty to instruct the jury on a lesser included offense "if the evidence 'raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. [Citations.]'" (*People v. Lopez* (1998) 19 Cal.4th 282, 287-288.) Instructions on lesser included offenses are not required if there is no evidence that the offense was less than that charged. (*People v. Coddington* (2000) 23 Cal.4th 529, 592.) ""'Speculation is an insufficient basis upon which to require the giving of an instruction on a lesser included offense.'" [Citations.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 116.)

A violation of section 273.5 requires proof that the defendant willfully inflicted a physical injury on the victim and that the injury, however minor, was caused by the direct application of physical force. Battery on a cohabitant is a lesser included offense of corporal injury to a cohabitant. (*People v. Jackson* (2000) 77 Cal.App.4th 574, 580.) Battery on a cohabitant does not require evidence of an injury. Any willful or unlawful touching done in a harmful or offensive way constitutes battery. (*People v. Myers* (1998) 61 Cal.App.4th 328, 335.)

Appellant contends that the only evidence of a physical injury to Revina was the marks on her neck, and that both his and Revina's testimony was that appellant choked her consensually during sexual intercourse to enhance the experience for her. Appellant acknowledges that Revina had "redness around her eyes and puffiness on her face" which she at one point attributed to being hit by appellant, but argues that these conditions were "more likely the result of her crying" than being punched by him.[2] He concludes that the jury could have found that Revina suffered no injury as a result of unconsented touching.

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[2] At trial, Revina denied that appellant had hit her at all during the period in question, but offered no explanation for the trauma to her cheekbone.

Given appellant's claim that the choking of Revina was consensual, it is not clear what unconsented touching would be the basis for the battery instruction.[3] The only other evidence of touching was Revina's statement that appellant had punched her. Since appellant was at pains to argue that Revina did not suffer an injury on her face, we will assume for the sake of argument that appellant is referring to the face punching as the basis of the battery instruction.

Appellant's description of Revina's face, quoted above, is not accurate. The paramedic who attended to Revina did not describe "puffiness" on her face. He referred to swelling on her cheekbone, which he described as "trauma." The swelling was more pronounced on one side of her face. The jury was shown photos of this injury. There is no evidence in the record to support appellant's contention that crying could cause swelling of the cheekbone on one side of the face. Appellant is simply speculating such a condition could be caused by crying. Speculation that the physical injury observed by the paramedic (and shown in photos) was caused by crying rather than an unlawful touching is not sufficient to raise a question as to whether the physical injury element of a section 273.5 violation was present.

In his reply brief, appellant contends that the basis for the battery instruction was that he lacked the specific intent to commit an assaultive act and injure Revina. He then speculates that in the throes of passion he might have exceeded "the bounds of the couple's previously agreed upon limitations," but done so without an intent to commit an assault or injure Revina.

Section 273.5 is a general intent crime. It is fundamentally a battery offense. (*People v. Thurston* (1999) 71 Cal.App.4th 1050, 1053.) Battery "does not require a goal-oriented mens rea: '[T]he nature of the defendant's *present willful conduct alone suffices to establish the necessary mental state without inquiry as to an intent to cause further consequences. [Citations.] Accordingly, upon proof of a willful act that by its*

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[3] If the choking was consensual, appellant was not guilty of any crime based on the choking, and the trial court so instructed the jury.

nature will directly and immediately cause "'the least touching,'" "it is immaterial whether or not the defendant intended to violate the law or knew that his conduct was unlawful. . . ."" (*Id.* at p. 1054 [quoting *People v. Colantuono* (1994) 7 Cal.4th 206, 217-218].)

Specific intent to cause an injury is not a requirement of section 273.5. (*People v. Thurston*, *supra*, 71 Cal.App.4th at p. 1055 ["Defendant argues that, even if characterized as a general intent crime, section 273.5, subdivision (a) still requires an instruction that the perpetrator had a separate intent to bring about the injury. [Defendant] is simply wrong."].) Thus, since specific intent is not a requirement of section 273.5, lack of a specific intent would not warrant an instruction on the lesser included offense of battery.

Disposition

The judgment is affirmed.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.