Filed 1/23/17 P. v. Zamora CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. IVAN ZAMORA, Defendant and Appellant.	B269930 (Los Angeles County Super. Ct. No. BA431089)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne E. Egerton, Judge. Affirmed.

Adrian K. Panton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Blythe J. Leszkay and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The District Attorney of Los Angeles County filed an information charging defendant and appellant Ivan Zamora with the second degree robberies of Gabriel Avila and Kevin Navarro (Pen. Code, § 211[1]) (counts 1 and 5), making criminal threats against Avila and Dora Y. (§ 422, subd. (a)) counts 2 and 8), kidnapping Dora Y. during a carjacking (§ 209.5, subd. (a)) (count 3), carjacking a vehicle in Navarro's possession (§ 215, subd. (a)) (count 4), attempted first degree automated teller machine (ATM) robbery—i.e., the attempted first degree robbery of Dora Y. who was using an ATM (§§ 211, 664) (count 6), kidnapping Dora Y. for ransom (§ 209, subd. (a)) (count 7), the attempted extortion of Marilyn Lopez (§ 524) (count 9), and sexual battery by restraint against Dora Y. (§ 243.4, subd. (a)) (count 10). The information alleged that defendant personally used a firearm within the meaning of section 12022.53, subdivision (b) in committing the offenses charged in counts 1, 3, 4, 5, 6, and 7, and within the meaning of section 12022.5, subdivision (a) in committing the offenses charged in counts 2, 8, and 9.

The jury found defendant guilty as charged and found true the accompanying firearm allegations as to all counts except for count 7, on which count the jury found defendant not guilty of kidnapping for ransom but guilty of the lesser included offense of false imprisonment (§ 236) and found true the allegation that defendant personally used a handgun within the meaning of section 12022.5, subdivision (a) in committing that offense. The trial court sentenced defendant to 35 years eight months to life in state prison. On appeal, defendant contends that the combined

---

1 All statutory citations are to the Penal Code unless otherwise noted.

effect of the trial court's instructions on making false statements as consciousness of guilt (CALCRIM No. 362) and voluntary intoxication (CALCRIM No. 3426) violated his federal constitutional right to due process. Because defendant failed to request modifications to the instructions in the trial court, he forfeited appellate review of those claims, and we therefore affirm.

FACTUAL BACKGROUND

Around 11:30 p.m. on October 29, 2014, Dora Y., Avila, Navarro, and Lopez and her baby were in Hollenbeck Park. Navarro and Lopez separated from Dora Y. and Avila, taking Lopez's baby to a playground on the other side of the park.

At some point, defendant ran up to Dora Y. and Avila, pointed a gun at them and demanded they give him "everything that [they] had." Defendant led Dora Y. and Avila to a "darker place"—a staircase underneath a freeway.

Defendant "asked for a car." Dora Y. called Navarro and told him to "get his car ready." Defendant told Avila to sit by the edge of the park's lake and then left with Dora Y. Defendant took Dora Y. to a nearby restroom where they waited for Navarro to arrive with his car keys. Before they reached the restroom, defendant lowered Dora Y.'s hand to defendant's "penis area," kissed her, and touched her legs and butt.

When Navarro arrived at the restroom, defendant pulled out his gun and said, "I'm not playing around. [¶] . . . [¶] You see, I just want a ride." Defendant then placed Navarro against a wall and told Navarro to give him all of Navarro's property. Navarro took out his wallet, telephone, and car keys, and gave

them to defendant. Defendant then told Navarro to remain in the restroom or something bad would happen to him.

Defendant and Dora Y. left the restroom and walked to Navarro's car. Dora Y. went with defendant because she felt she had no option and had to go. At defendant's direction, Dora Y. got into the driver's seat. Defendant sat on the passenger side. Defendant, holding his gun, told Dora Y. where to drive.

At some point, defendant and Dora Y. drove to an ATM to withdraw money. Dora Y. had found a credit card in Navarro's car and told defendant it belonged to her. Dora Y. knew she would not be able to withdraw money from the card, but still inserted it in the machine. When Dora Y. was unable to withdraw money, defendant became angry.

Dora Y. told defendant she could obtain money from a friend whom she asked to call. Defendant gave his permission and told Dora Y. to tell her friend to bring a specified sum of money to a nearby McDonald's. Dora Y. called Lopez who agreed to meet Dora Y.

Lopez was at a police station when she received Dora Y.'s call. As soon as the call ended, a police helicopter showed up above Navarro's car and illuminated it with a spotlight. Reacting to the arrival of the police, defendant said that Dora Y.'s friend had "screwed everything up," and that he was going to kill Dora Y. Dora Y. was "very, very frightened." Dora Y. asked defendant to give her a chance to help him escape and drove away. Around 3:00 a.m., after a high-speed chase, the police apprehended defendant when Navarro's car ran out of gas.

Defendant was arrested and taken to the police station. He was at the station for about 45 minutes before he was placed in a holding tank where he fell asleep for many hours. He remained

asleep until Detectives Araceli Negrete and Gil Silva interviewed him at 10:50 a.m. the next morning.

In the interview, defendant initially told the detectives that he encountered a male and a female in Hollenbeck Park after someone had tried to kill him for being a "rat." He asked if they would take him to his mother's house, and the female said she would. She drove him around and fed him. She went to an ATM because she wanted to withdraw money, but she did not take out any money. Defendant did not force the female to give him a ride and did not have a gun. He denied that he went to a restroom with anyone.

During that same interview with the detectives, defendant eventually admitted that he "jack[ed]" the car. He said that he was armed with a loaded .38 gun, pointed the gun at the female, and told her to "get in the car and drive." He further admitted that he "jacked" the female's friends, taking from two men phones, money, wallets, and keys. He admitted asking the female for $300. He said that he asked the female to call her family to meet them with the money, "but she called the cops."

Defendant, however, continued to deny any physical contact with the female. According to defendant, he did not try to touch her, she did not touch him, and he never made her touch his penis. Defendant said that the female "might have just kissed me to calm down, I don't know."

At trial, defendant recounted a version of the events that differed both from his false statements and confession to the detectives. Defendant testified at trial that he previously was a gang member who had testified against members of his former gang and was placed in a witness protection program. On October 29, 2014, defendant slept during the day and woke up at

night because he had been smoking "a lot of crystal meth." After defendant woke up, he smoked "a lot of P.C.P." Around 11:00 p.m., "Adam," a gang member, called defendant and said he wanted to meet with defendant. Defendant believed that Adam wanted to talk to him about his testimony.

Defendant went to Adam's house and took a gun for protection. At Adam's house, defendant got into Adam's car, and Adam drove to a closed psychiatric hospital that was near a park. There, Adam said that he had heard defendant had testified against defendant's "homeboys." Defendant denied the allegation. Adam pulled a gun and said, "You're going to die." Adam attempted to shoot defendant in the head, but the gun jammed. Defendant got out of the car and ran to the park.

Once in the park, Dora Y. and Avila approached defendant. "Paranoid" because someone had just tried to kill him, defendant pulled out his gun and pointed it at them. Once he determined that Dora Y. and Avila were not "into gangs," he pointed it down. Defendant then put the gun in his waistband. He explained to Dora Y. and Avila that someone had just tried to kill him and asked them for a ride.

Defendant further testified that Dora Y. said she would give defendant a ride and called Navarro to borrow his car. Defendant did not threaten Dora Y. to obtain her cooperation. When Navarro arrived, defendant had the gun in his hand because he did not know Navarro. He did not point the gun at Navarro or threaten him. Defendant told Navarro to give him Navarro's wallet. Navarro asked defendant, "What's going on?" Defendant responded that he needed a ride. Asked at trial how possessing Navarro's wallet would help him get a ride, defendant

responded, "At that point, I wasn't really thinking, sir. I was on P.C.P. and crystal meth."

Defendant also denied that he touched Dora Y. in any way and did not have her touch his penis. Instead, defendant testified that Dora Y. kissed defendant that night, but he did not know why.

At some point, Dora Y. offered to help defendant by giving him money, and they drove to an AM/PM market so Dora Y. could withdraw money from an ATM. Defendant was not upset with Dora Y. when she could not withdraw money.

Defendant and Dora Y. then drove to defendant's friend Chino's house. There, defendant asked Dora Y., "Can you help me out with money? Can you call a friend to help me out with money?" Defendant did not threaten Dora Y. Dora Y. agreed and "hopped on the phone."

As Dora Y. was on the phone, a helicopter and a police vehicle arrived. Dora Y. became "paranoid" and said, "Don't worry about it, I'll get you out of this" and "sped off." As they drove away, Dora Y. gave defendant a phone and told him to throw it out the window. Defendant also threw his own phone and Navarro's wallet out the window. Around 3:00 a.m., the car ran out of gas, and defendant was arrested.

Defendant testified that he was feeling the effects of his drug use from 11:00 p.m. until he was arrested. When he spoke with the police, he felt tired and as if he had a chemical imbalance—"Like, I was coming down, and I wasn't really awake because I was sleeping and they just woke me up out of nowhere, and I was up for a couple of days."

DISCUSSION

Defendant Forfeited His Challenges to CALCRIM Nos. 362 and 3426

Defendant contends that his Fourteenth Amendment right to due process was violated when the trial court instructed the jury with both CALCRIM No. 362[2] and CALCRIM No. 3426.[3]

---

[2] In accordance with CALCRIM No. 362, the trial court instructed the jury as follows:

"If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt.

"If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

[3] In accordance with CALCRIM No. 3426, the trial court instructed the jury as follows:

"You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding, as to Counts 1 and 5, alleging robbery, and Count 6, alleging attempted robbery, whether the defendant acted with the intent to permanently deprive the owner of his or her property; as to Counts 2 and 8, alleging criminal threats, whether the defendant acted with the intent that his statement be understood as a threat; as to Count 3, alleging kidnapping during a carjacking, whether the defendant acted with the intent to facilitate the carjacking or to help himself escape or prevent Dora [Y.] from sounding an alarm; as to Count 4, alleging carjacking, whether the defendant acted with the intent to deprive Kevin Navarro of the possession of the vehicle either temporarily or permanently; as to Count 7, alleging

kidnapping for ransom, whether the defendant intended to hold to detain Dora [Y.] for ransom or to get money; as to Count 9, alleging attempted extortion, whether the defendant intended to use force or fear to obtain the consent of Marilyn Lopez to give the defendant money; and, as to Count 10, alleging sexual battery, whether the defendant touched Dora [Y.] for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.

"A person is voluntarily intoxicated if he becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing it could produce an intoxicating effect or willingly assuming the risk of that effect.

"In connection with the charges of robbery and attempted robbery, the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to permanently deprive the owner of his or her property.

"In connection with the charge of criminal threats, the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent that his statement be understood as a threat.

"In connection with the charge of kidnapping during a carjacking, the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to facilitate the carjacking or to help himself escape or prevent Dora [Y.] from sounding an alarm.

"In connection with the charge of carjacking, the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to deprive Kevin Navarro with the possession of the vehicle either temporarily or permanently.

"In connection with the charge of kidnapping for ransom, the People have the burden of proving beyond a reasonable doubt that the defendant intended to hold or detain Dora [Y.] for ransom or to get money.

"In connection with the charge of attempted extortion, the People have the burden of proving beyond a reasonable doubt

CALCRIM No. 362 instructed the jury that, if defendant knowingly made a false pretrial statement about a charged crime, the making of that false statement might show consciousness of guilt and could be used in determining defendant's guilt. CALCRIM No. 3426 instructed the jury that evidence of defendant's voluntary intoxication could be considered only in deciding if he had the requisite intent to commit the charged offenses. The effect of the combined instructions, defendant contends, was improperly to prevent the jury from considering defendant's voluntary intoxication on the issue of whether any of his false pretrial statements were made knowingly. Further, defendant contends that the combination of the instructions improperly allowed the jury to infer that CALCRIM No. 362 applied to all 10 of the charged crimes because the instruction erroneously failed to identify the charged crimes for which defendant's false statements might be considered evidence of guilt, while CALCRIM No. 3426 listed all 10 of the charged crimes. The People contend that defendant forfeited appellate review of those claims by failing to request

---

that the defendant intended to use force or fear to obtain the consent of Marilyn Lopez to give defendant money.

"In connection with the charge of sexual battery, the People have the burden of proving beyond a reasonable doubt that the defendant touched Dora [Y.] for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.

"If the People have not met this burden as to any count, you must find the defendant not guilty of the crime charged in that count.

"You may not consider evidence of voluntary intoxication for any other purpose. Voluntary intoxication is not a defense to the allegations that, in the commission of the crimes, the defendant personally used a firearm."

modifications to the instructions in the trial court. We agree that review has been forfeited.

I. Background

At the conclusion of the evidence, the trial court discussed jury instructions with the parties. With respect to CALCRIM No. 362, the trial court said, "I also have no problem with 362, false statements, because [defendant] essentially testified that he made some false statements to the police and he explained why." Defense counsel did not object to the trial court instructing with CALCRIM No. 362 or request that the trial court modify the instruction.

Later, the trial court explained to the parties that it believed it should instruct on voluntary intoxication with CALCRIM No. 3426, even though neither party requested the instruction. It explained, "Nobody asked for it, and I don't think it's a sua sponte, but given that he testified that he was high on P.C.P. and/or meth and possibly weed at the time, I thought, in an abundance of caution, I should give it. Each of these charges is a specific intent crime; the gun is, of course, not. So I've modified 3426 to list the specific intent, which seems to be the format of the instruction, and then to note at the bottom that it's not a defense to the gun allegation. [¶] Does anybody have any thoughts about that?" Defense counsel responded, "No, I didn't say anything, specifically because I believe the court, yesterday, off the record said you were going to give that instruction; so I didn't say anything."

The trial court concluded its discussion of jury instructions by listing the instructions it intended to give, including CALCRIM Nos. 362 and 3426. It asked the parties if they had

any objections, not previously discussed, to any of the instructions. Defense counsel responded, "No, your Honor."

II. Forfeiture

"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. [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) A "[d]efendant's failure to request clarifying language forfeits the issues on appeal." (*People v. Covarrubias* (2016) 1 Cal.5th 838, 877.) The California Supreme Court has held that CALCRIM No. 362 is a correct statement of the law. (*People v. Howard* (2008) 42 Cal.4th 1000, 1025 ["We have repeatedly rejected arguments attacking the instruction [citations] and do so again"].) Defendant does not contend that CALCRIM No. 3426 is an incorrect statement of the law.

Defendant effectively argues that the trial court erred in failing to modify CALCRIM No. 3426 to inform the jury that it could consider evidence of defendant's voluntary intoxication in deciding whether he knowingly made a false pretrial statement and to modify CALCRIM No. 362 to inform the jury of the charged crimes to which that instruction applied. Defendant's failure to request modifications to CALCRIM Nos. 362 and 3426 forfeited his claims on appeal. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 503; *People v. Covarrubias, supra,* 1 Cal.5th at p. 877.)

Relying on section 1259,[4] defendant contends that he did not forfeit his claims because the asserted errors affected his

---

[4] Section 1259 provides in pertinent part, "The appellate court may . . . review any instruction given, refused or modified,

substantial rights. Section 1259 is a permissive statute that gives an appellate court discretion to consider an alleged instructional error that affected a defendant's substantial rights despite the defendant's failure to object in the trial court. "'Substantial rights' are equated with errors resulting in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818 [299 P.2d 243]. [Citation.]" (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 465.) That is, whether it is reasonably probable that the defendant would have achieved a more favorable result in the absence of the error. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

Even if defendant is correct that the trial court erred in failing to modify CALCRIM Nos. 362 and 3426, those errors were harmless in light of the overwhelming evidence of his guilt, including corroborated testimony from multiple victim witnesses, defendant's confession, and defendant's shifting—and often implausible—accounts of what occurred. Thus, any such purported errors did not affect defendant's substantial rights. (*People v. Mitchell, supra,* 164 Cal.App.4th at p. 465; *People v. Watson, supra,* 46 Cal.2d at p. 836.) Moreover, even fully crediting defendant's testimony that he was under the influence of drugs from the time he met with Adam at 11:00 p.m. until he was arrested at 3:00 a.m., there was no evidence that defendant remained under the influence when Detectives Negrete and Silva interviewed him nearly 12 hours after his meeting with Adam

---

even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

and after defendant had slept at the jail for several hours.[5]

Accordingly, we decline to address defendant's forfeited claims.

---

[5] Defendant's testimony that he was tired and felt as if he had a chemical imbalance—"Like, I was coming down," when Detectives Negrete and Silva interviewed him was not evidence of current intoxication. (See *People v. Winston* (1956) 46 Cal.2d 151, 156 [concerning marijuana users, the court distinguished between the users' "'high' feeling and "their feeling of 'coming down,' that is, their feeling of depression"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIN, J.*

We concur:

TURNER, P. J.

BAKER, J.

---

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