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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ISAAC LYNN WHITE,

Defendant and Appellant.

B239344

(Los Angeles County
Super. Ct. No. YA078012)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Brandlin, Judge. Affirmed.

Michael W. Flynn, 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 Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

During deliberations the jury notified the court it had reached verdicts on counts charging Isaac Lynn White with evading an officer and possession of marijuana, but was deadlocked on the kidnapping count.¹ Although White's counsel was present, White himself was absent when the court brought the jury out for further proceedings because he left the courthouse contrary to the court's explicit order. The court informed the jury White was absent without its permission and appropriate action would be taken when he was located. It then inquired whether additional information might help the jury resolve the deadlock. Shortly after receiving further instruction and rehearing the audio tape of a witness's call to the emergency operator, the jury completed its deliberations, finding White guilty of kidnapping and evading an officer. On appeal White contends the court's comment constituted prejudicial misconduct and asserts the jury punished him for his absence rather than for kidnapping. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Summary of the Evidence Presented at Trial

On May 9, 2010 White's former girlfriend, Latoria Coleman, was out walking with Brittany Powell. White approached them from behind, picked Coleman up and carried her to his car. Coleman, crying and kicking, repeatedly screamed "No." Powell tried to stop White, but stopped when he lifted his hand to strike her. Panicked, Powell ran to the nearby house of their friend Elsie Gonzalez. Gonzalez called the police emergency number, explaining her friend "got snatched up by her boyfriend, and he took her. He started hitting her. And he, like, pretty much grabbed her and, like, threw her in the car." While Gonzalez was talking to the emergency operator, White called Powell on

¹ White had been charged by information with kidnapping (Pen. Code, § 207, subd. (a)) and evading an officer (Veh. Code, § 2800.2, subd. (a)), both felonies, and possession of 28.5 grams or less of marijuana (Health & Saf. Code, § 11357, subd. (b)), a misdemeanor.

her telephone and accused Powell of “having my bitch texting boys’ numbers from your phone.”² The audio recording of the 911 call was played for the jury.

After a description of White’s car was broadcast, Los Angeles County Sheriff’s Deputy Rahn Hunter saw the vehicle as it was being followed by another patrol car and began following it as well. White failed to stop after the other patrol car’s lights and siren were activated and at several stop signs. White eventually pulled over. As he got out of the car, White repeatedly told Coleman, who had a swollen red mark under her eye, not to speak to the officers. Officers found a container containing marijuana in the rental car White had been driving.

White did not testify or present any other evidence in his defense.

2. Jury Deliberations; the Verdict

Toward the end of the first day of deliberations the jury asked, “If we do not reach a verdict on one or more counts, will the verdict on the counts we have still stand?” The court did not respond because it was late in the day. Just before 11:00 a.m. the following day counsel agreed the jury should be told the verdict would stand but also instructed to continue deliberating unless they were hopelessly deadlocked. The court then ordered White, who was not in custody during trial, to remain in the building while the jury deliberated: “Mr. White, we tried reaching you to have you come into the courtroom. Apparently, you were downstairs and what, fell asleep in your car?” “What I’m going to do . . . is I’m going to order you to remain up here on the fifth floor. That way, we know where to find you. You can stay out in the hallway if you like. But, while the jury is in deliberations, I need you to be up here on the fifth floor so we don’t have to look for you; okay?”

Shortly thereafter the jury indicated it was deadlocked on the kidnapping count. White, however, had left the courthouse. White’s sister told defense counsel he had gone to the hospital. A spectator in the courtroom explained White began hyperventilating

² Powell testified White had phoned her the day before and said he missed Coleman, calling her “his bitch,” and wanted to get back together with her.

when he heard there was a verdict and drove himself to get medical attention. Finding no justification for White's failure to appear, the court ordered his bond forfeited and bail revoked and issued a bench warrant. Defense counsel agreed the court could take the verdict in White's absence.

When the jury was brought back, the court said, "Ladies and gentlemen, the defendant is not currently present, and it's not with the permission of the court. My inclination is to continue processing the case to the extent that I can. And when we locate the defendant, we'll take appropriate action." Defense counsel did not object to the court's statement. After determining the jurors were divided 10 to two on the kidnapping count, the court asked whether further instruction, the rereading of additional testimony or allowing the attorneys to reopen argument might help them reach a unanimous decision. The jury foreperson requested further instruction on consent,³ to rehear the 911 call because the sound quality was poor and for read-back of a portion of Powell's testimony. The court excused the jury until 1:45 p.m. and told White's family members, "I would recommend to you that you do your best to get [White] here at 1:45."

When trial resumed, the People's investigator reported White had not been located and had not been admitted to any local hospitals. After finding White had fled or was attempting to flee its jurisdiction, the court decided to continue with White in absentia. The court then asked to hear from counsel whether it should provide any further definition of consent and sua sponte raised the question "whether or not to instruct them they're not to consider the defendant's absence at this point in their determination of guilt or innocence." Over defense counsel's objection the jury was further instructed on the

³ CALCRIM No. 1215, the instruction on kidnapping, provides consent is a defense to kidnapping: "The defendant is not guilty of kidnapping if he reasonably and actually believed that the other person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime."

definition of consent.⁴ Both counsel agreed, however, the jury should be instructed to disregard White's absence: "You are further instructed that you may not consider the defendant's absence from trial today in any way in your deliberations. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations." Soon after rehearing the 911 call and receiving these further instruction the jury found White guilty of kidnapping and evading an officer but not guilty of possession of marijuana.

3. *White's Subsequent Arrest; the Motion for New Trial; Sentencing*

On July 8, 2011, approximately six weeks after the jury verdict in the instant case, White was arrested and charged with one count of cohabitant abuse (Pen. Code, § 273.5) and one count of pandering (Pen. Code, § 266i, subd. (a)(2)), both felonies. After pleading no contest on October 5, 2011 White was initially sentenced in the new case to a state prison term of four years for pandering with a concurrent term of three years for cohabitant abuse.

On January 17, 2012 White moved for new trial in the case at bar, asserting the court had erred when it commented White was absent from court without permission because he had a statutory right to waive his presence at trial. White argued, "the message conveyed to this hung jury was highly prejudicial because it amounted to a comment by the trial court on White's guilt, to wit, ' . . . []only one who expects his guilt to be proved at trial will attempt an escape and that an innocent man will stay for trial in order to clear his name and win lawful liberty.'"

The court denied the motion. Although commenting it wished, in retrospect, it had said something different, the court explained the comments "were neutral and innocuous" and the further instruction not to consider White's absence cured any potential prejudice.

⁴ The jury was further instructed, "To consent to an act or transaction, a person must, one, act freely and voluntarily and not under the influence of threats, force, or duress; two, have knowledge of the true nature of the act or transaction involved; and three, possess sufficient mental capacity to make an intelligent choice whether or not to do something proposed by another person."

The court sentenced White to an aggregate state prison term of nine years four months, consisting of the upper term of eight years for kidnapping, a concurrent sentence of two years (middle term) for evading an officer, and a subordinate term of one year four months for the pandering conviction in the unrelated case.

DISCUSSION

1. Governing Legal Principles

The due process clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of the case. (See *Bracy v. Gramley* (1997) 520 U.S. 899, 904-905 [117 S.Ct. 1793, 138 L.Ed.2d 97].) Judicial misconduct occurs when a trial judge conducts the proceedings in a manner that strongly suggests to the jury the judge disbelieves the defendant's case or otherwise favors the prosecution. (See *Liteky v. United States* (1994) 510 U.S. 540, 555-556 [114 S.Ct. 1147, 127 L.Ed.2d 474].) To violate a defendant's right to a fair trial, the judge's intervention must be significant and adverse to a substantial degree. (See *McBee v. Grant* (6th Cir. 1985) 763 F.2d 811, 818; see also *Duckett v. Godinez* (9th Cir.1995) 67 F.3d 734, 740.)

In *People v. Sturm* (2006) 37 Cal.4th 1218 (*Sturm*) the Supreme Court summarized the California standard for judicial misconduct: “‘The object of a trial is to ascertain the facts and apply thereto the appropriate rules of law, in order that justice within the law shall be truly administered.’ [Citation.] To this end, ‘the court has a duty to see that justice is done and to bring out facts relevant to the jury’s determination.’ [Citation.] The trial court has a statutory duty to control trial proceedings, including the introduction and exclusion of evidence. [Citation.] . . . However, ‘a judge should be careful not to throw the weight of his judicial position into a case, either for or against the defendant.’ [Citation.] [¶] Trial judges ‘should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.’ [Citation.] A trial court commits misconduct if it “‘persists in making discourteous and disparaging remarks to a defendant’s counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of

the witnesses is not believed by the judge.”” (Id. at pp. 1237-1238; see id. at p. 1233 [“trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression that it is allying itself with the prosecution”].)

2. *The Trial Court’s Comment on White’s Absence Was Not Judicial Misconduct*

Ideally the trial court’s statements to the jury about White’s absence would have been limited to the fact he was not present and the jurors were not to consider his absence during deliberations. Due process, however, guarantees defendants a fair trial, not a perfect one. (*People v. Osband* (1996) 13 Cal.4th 622, 702.) The court’s additional comment that White’s absence was not authorized, a true statement inasmuch as White had disobeyed a direct court order within less than an hour of receiving it, and appropriate action would be taken when he was located does not begin to approach the realm of judicial misconduct. Nothing the court said suggested it was allying itself with the prosecution or believed White was guilty of the crimes charged.

Indeed, the comment was so innocuous defense counsel failed to object and request a curative instruction, ordinarily resulting in forfeiture. (See *Sturm, supra*, 37 Cal.4th at p. 1237 [“[a]s a general rule, judicial misconduct claims are not preserved for appellate review if no objections were made on these grounds at trial”].) The court sua sponte asked whether jurors should be instructed not to consider White’s absence during their deliberations. Having been so instructed, there was no prejudice even if the comment amounted to judicial misconduct because we presume the jury followed the court’s instructions. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 139 [“we and others have described the presumption that jurors understand and follow instructions as ‘[t]he crucial assumption underlying our constitutional system of trial by jury’”]; *People v. Holt* (1997) 15 Cal.4th 619, 662 [“[j]urors are presumed to understand and follow the court’s instructions”]; cf. *Sturm*, at p. 1237 [judicial misconduct can be cured by admonition].)

White argues the guilty verdict on the kidnapping count, which was returned shortly after the court’s comment on his absence, demonstrates the jury failed to follow the curative instruction. But the break in the jury deadlock also followed further

instruction on the definition of consent and the replaying of the 911 audiotape. On this record, which included Powell's compelling testimony that Coleman was crying, kicking and screaming "No" as White carried her to his car, it is beyond question the jury arrived at its guilty verdict because it believed White had committed the crime of kidnapping, not because he was absent from the courtroom without the court's permission.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.