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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRYAN MITCHELL,

Defendant and Appellant.

B285079

(Los Angeles County
Super. Ct. No. TA138142)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Patrick Connolly, Judge. Affirmed in part
and reversed in part with directions.

Kathy R. Moreno, under appointment by the Court of Appeal,
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant Attorney
General, Paul M. Roadarmel, Jr., and John R. Prosser, Deputy
Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Bryan Mitchell appeals from the judgment of his convictions of spousal rape, attempted murder, and assault with a deadly weapon. Mitchell argues that he was denied a fair trial and due process when the court coerced the jury into reaching a guilty verdict on the rape charge and that the court erred in failing to grant a mistrial based on jury misconduct and the jury's exposure to an out of court verbal exchange between the victim and a member of Mitchell's family. As we shall explain, we disagree. Notwithstanding our conclusion, we remand this matter for resentencing because the court imposed an unauthorized sentence on the attempted murder conviction.

FACTUAL AND PROCEDURAL BACKGROUND

Mitchell married S.S. in 2014 and they had a child together. Their marital relationship involved multiple episodes of domestic violence. In August 2014, the couple separated, and Mitchell moved out, but they still saw each other on occasion and continually argued about their child and other issues.

On September 4, 2015, S.S. was alone at home when Mitchell broke into the house and assaulted her. As S.S. attempted to flee the house, Mitchell struck her multiple times on the head and body with a baseball bat. Mitchell then raped S.S.

Mitchell was arrested and charged with spousal rape (Pen. Code, § 262, subd. (a)(1))¹; attempted murder (§§ 664, 187, subd. (a)); and assault with a deadly weapon (§ 245, subd. (a)(1)).² Mitchell pleaded not guilty.

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

² The information also alleged that Mitchell committed the attempted murder willfully, deliberately, and with premeditation, and that he personally used a dangerous or deadly weapon (§§ 667.61, subds. (b) & (e), 12022, subd. (b)(1)). As to all counts,

The trial lasted six days. After less than two hours of deliberation, the jury reported that it had reached guilty verdicts on the attempted murder and assault counts, but was unable to reach a verdict on the rape count. After further argument by counsel and additional instructions, the jury continued to deliberate and ultimately returned a guilty verdict on the rape count.³ The trial court sentenced Mitchell to a total term of 60 years to life. Mitchell filed a timely notice of appeal.

DISCUSSION

I. MITCHELL HAS NOT DEMONSTRATED THE COURT COERCED THE VERDICT ON THE RAPE COUNT

Mitchell contends that the trial court's conduct in handling the rape count effectively coerced the jury to reach a guilty verdict on that count, and thus violated his state and federal constitutional rights to due process, and fair trial. We disagree.

A. Factual Background

The jury began deliberating at 3:21 p.m. on Friday, June 16, 2017. About 40 minutes later, the jury requested a read-back of certain testimony. The court granted the request but decided to

the information alleged that Mitchell inflicted great bodily injury (§§ 667.61, subds. (a) & (d), 12022.7, subd. (e)); Mitchell had suffered a prior conviction under California's "Three Strikes" law (§§ 667, subds. (b)-(j), 1170.12); and had served two separate prison commitments and suffered a prior serious felony conviction (§§ 667, subd. (a), 667.5, subd. (b)).

³ The jury made true findings on the sentence enhancement allegations except for the allegation that Mitchell committed the attempted murder willfully, deliberately, and with premeditation. In a bifurcated proceeding, the trial court found the alleged prior convictions and prison commitments true.

adjourn the proceedings for the week and to conduct the read-back the following week.

When proceedings resumed on Monday, June 19, the court allowed the read-back of testimony and then recessed the proceedings for lunch. Approximately 35 minutes after deliberations resumed on the afternoon of June 19, the jury announced that it had reached verdicts on the attempted murder and assault charges but they were unable to reach a verdict on the rape count. The trial court accepted the guilty verdicts on the attempted murder and assault charges, and without objection, the trial court asked the jury to deliberate for another 10 minutes to consider whether additional instructions, review of the evidence, or argument from counsel might help them reach a verdict on the rape charge. The jury resumed deliberations, and about 10 minutes later returned to the courtroom. The foreperson told the court that nothing would assist them in reaching a verdict. The court responded:

“All right. You guys have been out for less than a day. Okay. And it was not a very long time, especially on a charge like this. It’s obvious that you guys have gone through it, especially with the way that your verdicts were. And I do appreciate that.

“So this is what I’m going to ask you to do. I’m going to ask you to come back here tomorrow. We won’t have you come back at 9:30 [a.m.] We’re going to have you come back at 10:00 [a.m.] Just sleep on it and see if . . . there is anything that you can come up with. If there is, we’ll handle it. If not, I’m going to be speaking to you probably in the very late morning, to see if there’s been any changes. Okay. If there hasn’t, I accept that. But maybe there is something that somebody comes up with over the evening, or there’s something just during the conversation tomorrow morning.”

The jury resumed deliberations at 10:05 a.m. on Tuesday, June 20. About an hour later, the jury asked for additional

argument on “evidence the sexual intercourse happened before or after the beating.” The jury also stated that it had “questions about consent and/or [t]he ability to give consent.” The court excused the jury for the lunch break, informing them that counsel would present additional argument at 1:30 p.m. When the proceedings resumed in the afternoon, counsel presented additional argument responsive to the jury’s question, and the court read additional instructions related to the issue of consent. The jury then resumed deliberations, and about 15 minutes later, the jury reached a guilty verdict on the rape count.

B. Analysis

Section 1140 allows a trial court to discharge a jury and declare a mistrial if the court determines that the proper period of time for deliberations has expired and “there is no reasonable probability” that the jurors can agree on a verdict. The decision whether to declare a hung jury or to order further deliberations rests in the trial court’s discretion. (*People v. Bell* (2007) 40 Cal.4th 582, 616, overruled on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 665, 686 & fn. 13.) “Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency [citation], the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived ‘as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.’ ” (*People v. Proctor* (1992) 4 Cal.4th 499, 539.)

Mitchell argues that after the jury initially reported that it was at an impasse on the rape count and indicated the belief that nothing would help it reach a verdict, the court should have discharged the jury and declared a mistrial. He maintains that the

court's conduct after that—asking the jury to “sleep on it” overnight and return the next day for further deliberations, coupled with the subsequent argument from counsel and jury instructions—coerced the jury to reach a verdict.

As a threshold matter, we note that Mitchell's counsel did not object to the court's response to the situation and thus he has forfeited his state law claim that the court coerced a verdict. (See *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1038.) And he has also forfeited his related constitutional claims. (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

In any event, no impropriety occurred. The court's main concern was that the jury had not deliberated for a sufficient amount of time in light of the evidence presented during the six days of trial. The court did not urge the jury to reach an agreement, nor did it pressure the jury to secure a verdict. In *People v. Cook* (2006) 39 Cal.4th 566, 615, the California Supreme Court held that the trial court did not abuse its discretion when it ordered a deadlocked jury, which had deliberated for a day and a half, to continue deliberating for the afternoon, telling the jurors to “‘try your best’ ” and “ ‘if you can't [reach a verdict], you can't.’ ” Similarly, here, given that the jury had deliberated for less than two hours before declaring an impasse on the rape count, the trial judge could reasonably conclude that his direction “sleep on it” and return in the morning for further deliberations would be perceived as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict. And subsequent events bore out that conclusion—the jury's request for the additional argument from counsel and its question regarding the law of consent suggested “that it had overcome whatever impasse it had reached” in its previous deliberations. (*Id.* at p. 616.) Consequently, there was nothing coercive about

the court's actions and the court did not err in directing the jury to continue to deliberate.

**II. THE COURT ADEQUATELY ADDRESSED
THE ALLEGED JUROR MISCONDUCT AND
THE JURORS' EXPOSURE TO AN INCIDENT
BETWEEN MITCHELL'S MOTHER AND S.S.**

A. Factual Background

On June 14, 2017, at the end of the lunchtime recess during the trial, the courtroom clerk informed the court that Juror No. 10 reported that Mitchell's mother and S.S. were arguing in the hallway outside of the courtroom. The clerk stated that five to six jurors might have witnessed the argument.

The trial court conducted an inquiry of the six jurors who may have been exposed to the argument. Juror No. 10 told the court that she saw Mitchell's mother and S.S. arguing and heard Mitchell's mother threaten S.S. Juror No. 10 stated that she did not hear any discussion about the case and affirmed that she could remain fair to both sides. Similarly, Juror No. 11 reported that she observed Mitchell's mother accusing S.S. of lying to get sympathy from the jury. Juror No. 11 also stated that she could remain fair. The trial court also individually questioned the other jurors who were present during the argument: Juror No. 1, Juror No. 2, Juror No. 3, and Juror No. 4, who all reported that they overheard parts of the argument between S.S. and Mitchell's mother; all four of the jurors told the court they could remain fair.

Juror No. 4 also reported to the court that before the argument between Mitchell's mother and S.S., he thought he saw Mitchell's mother conversing with one of the jurors. The trial court observed that, based on the description given by Juror No. 4, the only jurors who could have possibly spoken to Mitchell's mother were Juror No. 2 or Juror No. 1. Accordingly, the trial court

questioned Juror No. 2 and Juror No. 1 again, and they both denied speaking with Mitchell's mother. Mitchell's counsel did not request a further inquiry of the jury, but counsel moved for a mistrial based on the jurors' exposure to the argument between Mitchell's mother and S.S. The court denied the motion.

B. Analysis

Mitchell complains that the court did not conduct an adequate investigation of the jury's conduct and erred in failing to grant a mistrial based on the jurors' exposure to the argument between S.S. and Mitchell's mother, and the purported conversation between Mitchell's mother and a member of the jury. We are not persuaded.

When a trial court is aware of possible juror misconduct, the court must make whatever inquiry is reasonably necessary to resolve the matter and to protect the defendant's right to a fair trial. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1284.) "[N]ot every incident involving a juror's conduct requires or warrants further investigation. 'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court.' " (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.)

The trial court did not abuse its discretion. The court interviewed all of the jurors identified as having been exposed to the argument between S.S. and Mitchell's mother and the jurors all assured the court that the events they had observed outside the courtroom would not affect their ability to remain impartial. Mitchell's counsel never objected to the manner in which the court conducted the investigation of the incident and offered no reason to doubt the court's assessment of the jurors' statements. Given that no other jurors were present during the incident, it was reasonable for the court to limit the scope of the inquiry only to those identified

as potential witnesses rather than risk exposing the entire jury to the matter.

Likewise, the court examined the two jurors who fit the description of the juror whom Juror No. 4 thought might have conversed with Mitchell's mother, and the court determined that neither juror had engaged in such a discussion. Mitchell has pointed to nothing in the record to suggest that these jurors or any other members of the jury engaged in any misconduct during the trial. Accordingly, we conclude there was no abuse of discretion in the trial court's investigation of the jury's conduct or in denying the motion for a mistrial.

III. THE COURT IMPOSED AN UNAUTHORIZED SENTENCE.

The trial court originally sentenced Mitchell to a total term of 74 years to life. On the spousal rape conviction, the trial court imposed an indeterminate term of 55 years to life, comprised of 25 years to life (§ 667.61, subds. (a) & (d)), doubled for the strike prior (§§ 667, subds. (b)-(j), 1170.12), plus five years for the prior serious felony conviction (§ 667, subd. (a)(1)). On the attempted murder conviction, the court sentenced Mitchell to 19 years, comprised of the upper term of nine years, doubled for the strike prior, plus one year for the use of a deadly weapon, to run consecutively to the sentence on the rape conviction. The trial court imposed and stayed the upper term of four years for the assault conviction (§ 654) and stayed the enhancements for both prior prison commitments and the great bodily injury (§§ 667.5, subd. (b), 12022.7, subd. (e)).

The court subsequently issued a nunc pro tunc order, modifying the sentence on the attempted murder conviction—the trial court selected a determinate term of five years, comprised of 2 years 4 months (one-third the midterm of seven years), doubled

for the strike prior (§§ 667, subds. (b)-(j), 1170.12), plus five years for the use of a deadly weapon enhancement (§ 12022, subd. (b)(1)), to run consecutively to the sentence for rape.

The Attorney General argues that although the court's initial sentence on the attempted murder conviction was appropriate, the subsequent modification resulted in a legally unauthorized sentence. We agree.

As originally sentenced the court properly designated the attempted murder conviction as the "principal term" under the section 1170.1 sentencing formula; however, in modifying the sentence the court imposed "one-third" of the midterm, which reflects that the court designated the attempted murder conviction as a "subordinate term" under the section 1170.1. And in modifying the sentence for the attempted murder conviction, the court did not indicate which, if any, of the other sentences served as the "principal term." As the Attorney General suggests, the court's modification might reflect an effort to treat the indeterminate term on the spousal rape count as a "principal term." Alternatively, the court's modification may signify the decision to designate the determinate term sentence on the conviction for assault as the "principal term."

Under either scenario, the modification resulted in an unauthorized sentence. The spousal rape conviction is punishable by an indeterminate term sentence and, thus, cannot be selected as the "principal term" for crimes, such as attempted murder, punishable by determinate sentences. (See *People v. Neely* (2009) 176 Cal.App.4th 787, 797 [holding that an unauthorized sentence results where a crime punishable by an indeterminate sentence is used as "principal term" under section 1170.1].) And the assault conviction cannot serve as the principal term for the attempted murder conviction under section 1170.1 because the attempted murder conviction carries a longer sentence than an assault

conviction. (See § 1170.1; *People v. Felix* (2000) 22 Cal.4th 651, 655 [explaining, “if a defendant is convicted of more than one offense carrying a determinate term, and the trial court imposes consecutive sentences, the term with the longest sentence is the ‘principal term’; any term consecutive to the principal term is a ‘subordinate term.’ (§ 1170.1, subd. (a).)”].) Accordingly, the sentence on the attempted murder conviction cannot stand.

DISPOSITION

The sentence on the attempted murder conviction is reversed, and the case is remanded to the trial court for resentencing. After resentencing, the trial court clerk is directed to prepare a new abstract of judgment and forward certified copies of the abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

CHANEY, J.

BENDIX, J.*

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