Filed 5/22/17 P. v. Rodriguez CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN MICHAEL RODRIGUEZ,

Defendant and Appellant.

2d Crim. B271681
(Super. Ct. No. 14C-27771)
(San Luis Obispo County)

A jury found Brian Michael Rodriguez guilty of 22 felonies and 3 misdemeanors arising out of his relentless and nearly fatal physical abuse of Vanessa Doe, his cohabitant and the mother of his two children.[1] He was sentenced to a total term in state prison of 31 years and 8 months.

[1] Appellant was convicted of: six counts of assault with a deadly weapon, a knife (§ 245, subd. (a)(1)); six counts of inflicting corporal injury to a child's parent (§ 273.5, subd. (a)); two counts of mayhem (§ 203); four counts of dissuading a witness (§ 136.1, subd. (c)(1)); one count of attempted murder

Appellant challenges only three of the convictions on appeal: count 21, attempting to dissuade a crime victim by means of an implied threat of force or violence (Pen. Code, § 136.1),[2] and counts 5 and 12, mayhem. (§ 203.) Appellant contends the dissuading conviction is not supported by substantial evidence. He further contends the trial court prejudicially erred when it prevented his trial counsel from arguing, in closing, that permanent scars on Vanessa's arm and knee were not as serious as other types of injuries that also meet the statutory definition of mayhem.

The trial court failed to impose certain mandatory fees and assessments. (§ 1465.8, subd. (a)(1); Gov. Code, § 70373, subd. (a)(1).) At respondent's request, we modify the abstract of judgment to impose these fees and assessments. As so modified, the judgment is affirmed.

Facts

Appellant and Vanessa met in June 2012 and were living together, along with Vanessa's two young daughters, by October or November of that year. Appellant used methamphetamine and began physically abusing Vanessa soon after they moved in together.

In February 2013, appellant slashed Vanessa's arm with a knife. He later abandoned her at an urgent care clinic

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(§§ 187, 664); two counts of criminal threat (§ 422, subd. (a)); one count of child abuse (§ 273a, subd. (a)); and three counts of cruelty to a child by endangering health, a misdemeanor. (§ 273a, subd. (b).) The jury found appellant not guilty of two counts of torture. (§ 206.)

[2] All statutory references are to the Penal Code unless otherwise stated.

after becoming convinced that she was flirting with the doctor who was stitching up her wound. Vanessa convinced appellant to return to the clinic and pick her up. On the drive back to their apartment, appellant stabbed Vanessa in her knee with a kitchen knife. She treated the wound herself because appellant threatened her and she did not want him to get in trouble.

In March 2014, appellant slashed Vanessa's arm with a pocket knife and then punched and kicked her. In April of that year, he stabbed Vanessa in the leg with the same pocket knife before leaving their apartment with their infant son. When he returned, appellant grabbed Vanessa's bleeding leg; dragged her across the room and kicked her in that leg. He told Vanessa not to tell anyone about what he had done or he would hurt her father.

A few months later, the couple went out to play pool with another couple. When they returned home, appellant accused Vanessa of being a "whore and a slut" and began hitting and kicking her. Then, he stabbed Vanessa in the knee with a bread knife. He also slashed his own leg with the knife, telling Vanessa he would claim self defense if she called the police. Appellant threatened to hurt Vanessa's father if she talked to police. Later that same month, appellant used a screwdriver to scratch Vanessa's left cheek.

In July 2014, appellant, Vanessa, and the children drove to Cambria to visit Vanessa's friends, Teresa and Belarmino. The visit ran long and the family was invited to stay the night. As the night wore on, and appellant drank more beer, he became violent with Vanessa. First, he slapped Vanessa and struck her on the side of her head and her side, while she was holding their infant son. Appellant got a knife from the kitchen

and stabbed Vanessa's arm several times. He also stabbed Vanessa in her left side, near her waistline.

The fight eventually woke up Teresa, Belarmino and their two daughters. Vanessa picked up a chair to protect herself and used it to knock the knife out of appellant's hand. Teresa tried to help Vanessa get away from appellant and lock herself in the bathroom. Belarmino grabbed the eight-month old infant from appellant, handed him to Teresa and then started fighting with appellant. Appellant said that he wanted to finish what he had started; Vanessa understood this to mean that appellant wanted to kill her. Teresa and Belarmino heard appellant say several times that he was going to kill Vanessa.

As the fight was raging, one of the children called 911. Appellant heard the call and told Belarmino that he would kill Belarmino and the whole family for snitching if they talked to the police. Appellant repeated these threats as Belarmino struggled to restrain him. Teresa eventually got the children outside and put them in her truck. She drove away in her truck, toward the main road, to wait for the police. Vanessa continued to hide in the bathroom.

The two men were still struggling when sheriff's deputies arrived. As appellant was placed under arrest, he again threatened to kill "that bitch," Vanessa. Vanessa came out of the house only after appellant had been handcuffed. As she walked past appellant, he asked if she was really going to "rat him out." He called Teresa a "raton" and a "rat." Vanessa understood these statements to be threatening.

The evidence at trial also included 18 text messages, sent by appellant to Vanessa in April 2014, in which appellant threatened to kill or injure Vanessa. In one message, appellant

told Vanessa he had put a bomb in her car because she was a "rat."

Discussion

Substantial Evidence

Appellant contends there is no substantial evidence to support his conviction on count 21 for attempting to dissuade a crime victim. This count relates to the statements appellant made while attempting to murder Vanessa in July 2014. During that melee, appellant said many times that he wanted to "finish what he started" and that he wanted to kill Vanessa. She testified that, as she was walking to the ambulance and after appellant had been placed under arrest, appellant "was saying that if I really was gonna do that – if I was really gonna rat him out. And how was I gonna do that to him. [¶] Then he started calling Teresa a raton and rat and telling her she was going to see when – whenever he got out and stuff—to where he started throwing it both back and forth. I told him I was tired of his stuff and that this time there was no going back. And he just kept on yelling things." Vanessa understood these statements to be threatening.

Appellant contends the evidence is not sufficient to establish that he attempted, by means of threat of force or violence, to dissuade Vanessa from cooperating with law enforcement. According to appellant, his question about Vanessa being a "rat" was not an express or implied threat to her.

In evaluating this contention, we review "'the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]"

(*People v. Tafoya* (2007) 42 Cal.4th 147, 170.) The question is ""'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.]' [Citation.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 142.) We "presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. . . . The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) We may not reweigh the evidence or second-guess credibility determinations made by the jury. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "Simply put, if the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citations.]" (*Farnam*, *supra*, at p. 143.)

Section 136.1, subdivision (b)(1) provides, "[E]very person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense . . . : (1) Making any report of that victimization to any peace officer . . . ." (*Ibid.*) A person who "knowingly and maliciously" attempts to prevent or dissuade a crime victim or witness is guilty of a felony, "[w]here the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person." (§ 136.1, subd. (c)(1).)

""There is, of course, no talismanic requirement that a defendant must say "Don't testify" or words tantamount thereto,

in order to commit the charged offenses. As long as his words or actions support the inference that he . . . attempted by threat of force to induce a person to withhold testimony [citation], a defendant is properly' convicted of a violation of section 136.1, subdivision (c)(1). [Citation.]" (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1344.)

Substantial evidence supports appellant's conviction on count 21. In the context of appellant's relationship with Vanessa, his question about whether she was going to "rat" him out was a threat. Appellant beat and stabbed Vanessa for nearly two years. He also sent Vanessa numerous text messages in which he threatened her life and the life of her father, while also calling her a "rat," among many other insults. Immediately before he called Vanessa a rat on July 24, appellant attempted to murder her by stabbing her numerous times. Even after Belarmino separated appellant from Vanessa that night, appellant expressly threatened her life, saying he wanted to "finish what he started." He also told Belarmino that he was going to kill Belarmino and Teresa "because you ratted." As he was being handcuffed, appellant repeated, "I want to kill that bitch."

Vanessa testified that she did not think appellant's statements were trying to prevent her from cooperating with law enforcement. However, she also testified that, as she was walking to the ambulance, appellant expressly threatened to kill Belarmino, Teresa and their children for being rats. She thought that appellant was being threatening when he talked about her and Teresa being rats. In this context, a reasonable jury could find that appellant's question was an attempt to dissuade her from cooperating with law enforcement or from testifying against

him. (*People v. Mendoza*, *supra*, 59 Cal.App.4th at pp. 1344-1345.) The conviction is, therefore, supported by substantial evidence.

Closing Argument on Mayhem

Counts 5 and 12 alleged that appellant committed the crime of mayhem (§ 203) against Vanessa because his stabbings left her with permanent scars on her right knee and in the crook of her left arm. During the conference on jury instructions, appellant's trial counsel informed the trial court that he "was intending to use the other types of mayhem that are listed in [the statute] to show what is really mayhem. In other words, I want permission to argue that mayhem is typically things like removing a body part, disabling, so on and so forth." The trial court responded that counsel appeared to be arguing that permanent scarring should not count "when compared to the other types of activities that can amount to mayhem. So, I think your argument is more with the law and the statute, rather than with the evidence in this case." It concluded that "using those other examples of mayhem is not an appropriate idea." Defense counsel responded, "I just won't do it, then." The trial court clarified that defense counsel was free to argue "the parameters of permanent disfigurement."

Appellant now contends the trial court abused its discretion when it indicated that counsel could not, in closing argument, compare Vanessa's scars to other forms of mayhem. We are not persuaded.

A criminal defendant's right to have counsel present closing argument "is not unbounded, however; the trial court retains discretion to impose reasonable time limits and to ensure that argument does not stray unduly from the mark. [Citation.]"

(*People v. Marshall* (1996) 13 Cal.4th 799, 854-855.) The trial court "is given great latitude in controlling the duration and limiting the scope of closing summations." (*Herring v. New York* (1975) 422 U.S. 853, 862.) "It is axiomatic that counsel may not state or assume facts in argument that are not in evidence." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 102.)

Section 203 provides that mayhem occurs when a person "unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip . . . ." (*Ibid.*) In addition, "case law has 'grafted' on to section 203 the requirement that a disfiguring injury be permanent [citations]; in that regard, 'an injury may be considered legally permanent for purposes of mayhem despite the fact that cosmetic repair may be medically feasible' [citations.]" (*People v. Santana* (2013) 56 Cal.4th 999, 1007.)

Here, the evidence at trial demonstrated that Vanessa was left with permanent scars on her knee and inner arm after appellant stabbed her numerous times. By luck or design, appellant avoided dismembering Vanessa, putting out one of her eyes or slitting her nose, ear or lip, so none of the other injuries he inflicted on Vanessa qualify as mayhem. Because there was no evidence that appellant inflicted any other type of mayhem, defense counsel's proposed argument concerning other forms of mayhem was not supported by the evidence at trial.

Moreover, the trial court only precluded counsel from comparing Vanessa's scars to other types of injuries that might also constitute mayhem. Counsel was permitted to argue that appellant had not committed mayhem because Vanessa's injuries were not serious enough to constitute "permanent disfigurement."

Counsel took advantage of that latitude by reminding the jury that it had to decide whether Vanessa's scars were mayhem or "just the residue of your garden variety battery or assault with a deadly weapon[.]" The trial court did not err when it limited closing argument to the facts adduced at trial.

Modification of Judgment

Section 1465.8 requires that, "To assist in funding court operations, an assessment of forty dollars ($40) shall be imposed on every conviction for a criminal offense . . . ." (§ 1465.8, subd. (a)(1).) Government Code section 70373 requires that an assessment "shall be imposed on every conviction for a criminal offense . . . in the amount of thirty dollars ($30) for each misdemeanor or felony . . . ." (Gov. Code, § 70373, subd. (a)(1).) The trial court failed to impose the appropriate fees and assessments, resulting in an unauthorized sentence. (*People v. Miles* (1996) 43 Cal.App.4th 364.) Respondent asks us to modify the abstract of judgment to correct the error.

The court security fee and court facilities assessment are mandatory and may be imposed on appeal. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-188; *People v. Rodriguez* (2012) 207 Cal.App.4th 1540, 1543 fn. 2.) A separate fee and assessment must be imposed as to each conviction, even if the sentence on that conviction has been stayed under section 654. (*People v. Sencion* (2012) 211 Cal.App.4th 480, 484; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327.)

Appellant was convicted of 25 separate crimes. The trial court should have imposed a $40 court security fee and a $30 court facilities assessment as to each of those convictions. Instead, it imposed a single $40 fee and a single $30 assessment. We will modify the judgment to impose a total of 25 court

security fees, for an aggregate fee of $1,000 (§ 1465.8, subd. (a)(1)), and 25 court facilities assessments, for an aggregate assessment of $750.

Disposition

The judgment is modified to impose court security fees in the aggregate amount of $1,000 (§ 1465.8, subd. (a)(1)), and court facilities assessments in the aggregate amount of $750. (Gov. Code, § 70373, subd. (a)(1).) The clerk of the superior court is ordered to prepare and forward to the Department of Corrections an amended abstract of judgment reflecting these fees and assessments. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Rita Federman, Judge

Superior Court County of San Luis Obispo

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