Filed 7/11/17 P. v. Wagner CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ORLANDO WAGNER, Defendant and Appellant.	B271252 (Los Angeles County Super. Ct. No. BA424631)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa B. Lench, Judge. Affirmed as modified.

Gail Harper, 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, Assistant Attorney General, Margaret E. Maxwell and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

In an amended information filed by the Los Angeles County District Attorney's Office, defendant and appellant Orlando Wagner was charged with murder (Pen. Code, § 187, subd. (a), count 1),[1] assault by means likely to produce great bodily injury (§ 245, subd. (a)(4), count 2), false imprisonment by violence (§ 236, count 3), and dissuading a witness by force or threat (§ 136.1, subd. (c)(1), count 4). As to count 2, it was further alleged that defendant personally inflicted great bodily injury. (§ 12022.7, subd. (a).) Defendant pleaded not guilty and denied the allegations.

The trial court denied defendant's motion to sever counts 2, 3, and 4. Trial was by jury. The jury found defendant not guilty of first degree murder, but guilty of second degree murder in count 1. It found defendant guilty of counts 2 and 3, and found the great bodily injury allegation to be true. The jury found defendant not guilty of count 4.

The trial court denied probation and sentenced defendant to 22 years to life in state prison. It ordered defendant to pay various fines and assessments, including a $30 criminal conviction assessment. (Gov. Code, § 70373.)

Defendant timely filed a notice of appeal. On appeal, he argues: (1) The trial court's denial of his motion to sever resulted in an unfair trial and a denial of his constitutional rights; (2) The trial court's instruction that the jury could consider charged offenses as evidence that defendant committed the other charged offenses violated his constitutional rights; and (3) Because defendant's trial attorney did not present evidence to the jury

---

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

regarding his alleged schizophrenia and use of Phencyclidine (PCP) on the day of one of the crimes, and failed to request that the jury be instructed with CALCRIM No. 3428, he was deprived of the right to effective assistance of counsel. The People oppose all arguments raised by defendant, but ask that we modify the judgment, correcting the criminal conviction assessment imposed against defendant from $30 total to $30 for each criminal conviction ($90 total).

We agree with the People and modify the abstract accordingly. In all other respects, we affirm.

FACTUAL BACKGROUND

I. *Prosecution Evidence*

The Madison Hotel (Madison), located near Skid Row in Los Angeles, rents rooms to tenants by the month. The hotel has small rooms and shared bathrooms for men and women in the hallways. The hotel caters to a "diverse group" of people, including drug addicts. People with obvious mental illness or who openly use drugs are not permitted to rent rooms there.

At the relevant time period, about 80 percent of the hotel tenants were men. Some tenants at the hotel exchanged sex for drugs or money or both. A tenant could be evicted for using drugs, having fights, or having the police called.

As of May 2014, defendant had lived at the Madison for about a year. The hotel has surveillance cameras on every floor. There was a camera "almost directly outside" of room 316, occupied by defendant. A women's bathroom was located across from room 316.

A. Defendant assaults Diane S. (Diane) in March 2014

On March 5, 2014, Diane lived at the Madison, room 426, with Juan R. (Juan). Diane knew defendant because she had

purchased cigarettes from him before. Sometimes, Juan invited defendant to their room.

At around 12:05 a.m., Diane went to the bathroom; she found defendant sitting on her bed when she returned. Defendant locked the door. When Diane tried to escape, defendant choked and beat her. When Diane tried to scream for help, defendant choked her. She lost consciousness twice. Defendant smoked cocaine and told Diane to smoke it as well. He put the pipe to her mouth, but she did not inhale it. Diane tapped on the wall to alert her neighbor, who then called the front desk.

At around the same time, Charles Brown (Brown), a desk clerk at the Madison, received a report that a cry for help was coming from Diane's room, and he went to investigate. When he knocked on the door and asked if everything was okay, he heard some movement behind the door and a woman, later identified as Diane, replied "No." Brown asked the same question again, and Diane reiterated "No." A man, later identified as defendant, said, "Yes, it is." When Brown asked if he should call the police, Diane said, "Yes," and defendant said, "No." Brown turned to go down and call the police.

Juan then exited the bathroom and Brown asked him if he had his key. When Juan opened the door to the room, Diane, who was beaten up, went out and fell into his arms. She was wearing a dress. Juan and defendant, who was barefoot and wearing only his underwear, began exchanging words, and Brown left to call the police. As Brown waited for the police, defendant asked him for the keys to his room, stating that he had to leave because the police were coming. Brown tried to stall, but gave defendant the

keys. The police arrived in about five to 10 minutes, after defendant left the hotel.

Diane did not date defendant and did not arrange to have sex with him in exchange for something. Defendant told Diane that he was going to kill her, that he had to kill her because she would talk. Diane sustained injuries to her face and neck. She also suffered facial fractures, which caused headaches and blurred vision.

In 2007, Diane had been convicted of solicitation for prostitution.

B. Defendant kills Sheri Bickman (Bickman) in May 2014

On May 9, 2014, Vera Akopdjanian (Akopdjanian), who lived on the third floor of the Madison, was in her room when she heard a female voice yelling, "No, no," followed by someone knocking on a door, a male voice, and the female voice again. Akopdjanian initially believed that the voices came from the bathroom, but then realized that they were coming from room 316. Akopdjanian walked towards room 316 and then went downstairs to ask someone at the front desk to call the police.

At around the same time, Thomas Foster (Foster), the night clerk at the Madison, received a call regarding a disturbance on the third floor; he went upstairs to investigate. After finding Caroline Francis (Francis) talking loudly to herself in the women's bathroom, Foster returned to his desk. A "little while later," Foster overheard Francis calling 911 about "someone being murdered," and he returned to the third floor. Hearing a female voice from inside room 316, saying "let me go," Foster knocked on the room door. When there was no response, Foster said that he was calling the police. As Foster headed

back, defendant opened the door and said, "we're having sex" and closed the door. Foster returned to the office and called 911.

At around 10:30 p.m., Los Angeles Police Officer Francisco Martinez arrived at the Madison after receiving a call about a screaming woman in room 316. He was with his partner Officer Paxton, and other officers. Hearing "some movement inside," Officer Martinez knocked on room 316, but did not hear anything. Officer Martinez tried to open the door using the hotel master key, but each time he turned the lock to the open position, the key returned to the locked position. After a couple of minutes, Officer Martinez ordered the person inside, later identified as defendant, to open the door. Defendant responded that he was getting dressed and asked them to wait. When the door remained closed, Officer Martinez again tried to open it with the master key, but defendant kept locking it. Defendant said, "If I open the door you're going to take me to jail." He also said that he had taken some PCP and was going to kill himself. The officers told defendant that they "just want[ed] to make sure everything [was] okay in there." Eventually, the officers kicked in the door. A woman, later identified as Bickman, lay dead on the ground. Defendant said that Bickman "deserved it" and that she had smoked $100 worth of his drugs.

A surveillance video from the Madison was played to the jury, confirming the aforementioned story of events.

C. Bickman died of strangulation; Diane's injuries were caused by strangulation

Dr. Ogbonna Chinwah of the Los Angeles County Department of Coroner conducted the autopsy of Bickman. She had contusions around the left eye and on her left cheek, right cheek, back of the hands, chest, and head. A hemorrhage

suffered in the neck area indicated compression. Dr. Chinwah opined that Bickman died of strangulation based on her neck injuries.

Looking at a photograph of Diane, Dr. Chinwah opined that the bruising under the cheek extending towards the neck was consistent with strangulation.

D. Defendant's interview with Los Angeles Police Detective Brian Putnam

Detective Putnam, who was assigned to investigate the homicide at the Madison, interviewed defendant. The interview was videotaped. At the beginning of the interview, defendant was "irate, angry, excited." After Detective Putnam gave defendant some granola bars and water to calm him down, they had "an almost normal conversation." Defendant admitted his involvement in Bickman's death and in attacking Diane. He did not express regret for his actions. During the interview, defendant asked the detective for more granola bars and stated that he had not eaten. He also stated that he was a diabetic.

An edited version of the videotaped interview was played for the jury. Initially, defendant said that he met Bickman through "Loni," who brought her to his room. Later, he said that he saw Bickman at a Carl's Jr. earlier that day and that they went to defendant's room together. In his room, defendant and Bickman drank a lot of beer. He "spent a lot of money on drugs—cocaine." Bickman initially promised to have sex with him. While they were having intercourse, they heard "Carolina" outside and Bickman began screaming. Defendant told her to be quiet, but Bickman said, "'Oh he's gonna hurt me—he's gonna hurt.'" Defendant then choked her. Defendant tried to keep Bickman quiet because he "didn't want to lose [his] housing and

[his] freedom." Defendant believed that if was going to lose his housing and his freedom, then he was "gonna go ahead and just—I'm gonna do her" before he went blind. When the police began knocking on his door, defendant "knew [he] was going to jail so [he] might as [well] take somebody with [him]." Defendant killed Bickman to keep her quiet. He did not know how he got a cut on his right thumb. Bickman lied to defendant when she said that she did not have sex with anyone as defendant had heard her having sex with Sonny in room 416.

About six months before the Bickman incident, defendant choked another woman, Diane, at the Madison. Defendant had seen Diane on the street by the Midnight Mission and asked her if he could "buy some pussy." Diane told defendant that she was not a prostitute. Later, defendant and Diane were in Diane's room when Diane said that she would orally copulate him if he would "'go buy another something.'" After defendant returned, he and Diane tussled over the drug and Diane fell on the table. Diane kept yelling that defendant was trying to hurt her, and someone knocked on the door. He told Diane to keep quiet and not disturb the neighbors because he did not want to lose his "housing" and his "freedom." Defendant slapped Diane and knocked her down. She got "another black eye."

According to defendant, the tenants at the Madison were either drug addicts or prostitutes. There were not many women at the hotel, but they were all prostitutes.

Previously, defendant, who has advanced/aggressive glaucoma, had decided that he was going to kill someone before he completely lost his eyesight. Defendant knew that he was going to prison for life for killing Bickman, but he did not care because he was going blind and had no family support. He was

going to throw Bickman out of his window and then jump out himself, but there were ambulances on the street and he did not "have enough time." Defendant was an alcoholic and drank six to seven beers a day. He made "pretty good money" by selling cigarettes and drug paraphernalia.

After speaking with defendant, Detective Putnam went to defendant's room at the Madison and found insulin and syringes consistent with his claim that he was a diabetic. He also found a crack pipe.

II. *Defense Evidence*

John Treuting (Treuting), a toxicologist, testified that cocaine is absorbed more quickly into the blood system when smoked. Effects of cocaine, which include feeling euphoric, stimulated, and invincible, last less than an hour. Cocaine is a "very potent, pleasurable sexual stimulant." Negative effects include sleep deprivation, appetite suppression, dry mouth, dilated pupils, elevated heart rate, and somatomotor activation, which are caused by elevated core body temperature. Taking cocaine for a longer period of time could result in irritability, confusion, agitation, paranoia, hallucinations, delusions, and erratic behavior, including violence. When cocaine is taken with alcohol, the side effects become more pronounced. A person who stops taking cocaine feels "very depressed" and becomes "very agitated." The person might develop suicidal ideation. A diabetic person who uses cocaine increases the problems associated with having low blood sugar. Symptoms related to appetite or sleep could be caused by something other than alcohol or drugs. Using cocaine and alcohol lowers a person's inhibitions. A regular user of cocaine would be aware of the specific effects of cocaine to him or her.

Based on his review of defendant's interview with Detective Putnam and on his own interview with defendant, Treuting believed that defendant had taken cocaine "in some fashion" at the "time of the incident." Defendant told Treuting that he used PCP the night or two before the incident. Based on the video interview, whether defendant was on PCP was difficult to determine. PCP, cocaine, and methamphetamine could cause a person to experience lingering effects of the drug even after "the chemicals have been depleted from the body."

DISCUSSION

I. *Motion to Sever*

Defendant contends that the trial court erred in denying his motion to sever the Bickman murder charge (count 1) from the charges relating to Diane (counts 2, 3, & 4).

Under section 954, an accusatory pleading may charge two or more different offenses of the same class of crimes or offenses under separate counts. Here, the statutory requirement for consolidation was satisfied as murder (count 1), assault by means likely to produce great bodily injury (count 2), and false imprisonment by violence (count 3) were all assaultive crimes of the same class. (See *People v. Poggi* (1988) 45 Cal.3d 306, 320.) Thus, it became incumbent upon defendant, as the party moving to sever, to make a clear showing of potential prejudice if the crimes were tried together. (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) "'Because consolidation ordinarily promotes efficiency, the law prefers it.' [Citations.] Accordingly, if . . . joinder is proper under section 954 . . . , it is the defendant's burden to show error in allowing a joint trial of the charged offenses and relief will obtain only on a clear showing of prejudice to establish the trial court's abuse of discretion. [Citation.]" (*People v. Lucas*

(2014) 60 Cal.4th 153, 214, disapproved in part on other grounds in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53–54, fn. 19.) To establish that the denial of a motion to sever properly joined counts amounted to a prejudicial abuse of discretion, the defendant must demonstrate that the trial court's ruling exceeded the bounds of reason. (*People v. Capistrano* (2014) 59 Cal.4th 830, 848.)

The four criteria used to determine whether the burden has been met "are these: (1) would the evidence of the crimes be cross-admissible in separate trials; (2) are some of the charges unusually likely to inflame the jury against the defendant; (3) has a weak case been joined with a strong case or another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses; and (4) is any one of the charges a death penalty offense, or does joinder of the charges convert the matter into a capital case. [Citation.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 27–28.)

Defendant established none of these factors. First, the evidence regarding the Bickman count and the Diane counts was cross-admissible[2] to show motive and common scheme or plan. "To establish the existence of a common design or plan, the common feature must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) And, "that a defendant previously committed a similar crime can be circumstantial evidence tending to prove his . . . motive in the present crime." (*People v. Roldan* (2005) 35 Cal.4th 646, 705.) Here, the crimes against Bickman and Diane

---

[2] As the parties agree, the absence of cross-admissibility may not be dispositive of the issue.

both occurred at the Madison within a two-month period. Both victims were women, both instances involved drug use and sex, and both women were strangled after they began causing a disturbance. Defendant even told Detective Putnam that he tried to keep both women quiet because he did not want to lose his "housing" and his "freedom." These common features were admissible to prove defendant acted pursuant to a common scheme or plan and his motive.

Defendant contends that the evidence is not cross-admissible because he did not kill Diane and did not have sex (or attempt to have sex) with her. The fact that Diane was not murdered does not minimize the brutality of the crimes. And while defendant claims that he did not have sex with Diane, or attempt to have sex with her, he told Detective Putnam that he and Diane had made an arrangement of oral copulation in exchange for drugs.

Second, neither incident was unusually likely to inflame the jury against defendant. Extreme disparity between inflammatory and noninflammatory offenses is required in order to demonstrate the potential for prejudicial "spillover" from one case to another. (*People v. Mason* (1991) 52 Cal.3d 909, 934.) Here, the charges stem from assaultive, violent attacks against women; they "are similar in nature and equally egregious." (*People v. Soper* (2009) 45 Cal.4th 759, 780.) The fact that defendant killed Bickman does not make the beating against Diane any less brutal. Both incidents arose out of defendant being alone in a room with a woman, there was drug use and sex (whether actual sex or talk of sex), and defendant choked the woman when she began making noise. The difference in charges is due in part to the result of defendant's violent conduct in each

case (defendant killed Bickman before the police opened the door and Diane was able to escape when Juan opened the door); this difference does not render the crimes meaningfully different.

Third, Diane's case was not "weak" relative to the case involving Bickman. Diane testified about how defendant repeatedly choked her in her room when she tried to escape or scream for help. Brown went to Diane's room following a report that a cry for help was heard. Diane sought help while defendant told Brown that all was well. When Diane's door was finally opened, Brown saw that Diane was beaten up. She sustained injuries to her face and neck.

Defendant claims that the fact that "the physicians who had purportedly treated Diane's injuries following the assault" did not testify at trial compels a different result because trial counsel could not "test the veracity of Diane's testimony about being strangled." But Dr. Chinwah testified that she was choked. Photographs showed the injuries to Diane's face and neck. And, defendant admitted his crimes against Diane. In light of all of that evidence, the jury could weigh the evidence and decide whether Diane, with her history of prostitution, was a credible witness.

Fourth, the joinder did not convert the matter into a capital case.

Last, the joinder in this case did not result in "gross unfairness" amounting to a denial of due process. (*People v. Soper*, *supra*, 45 Cal.4th at p. 783.) The evidence regarding both attacks was "equally strong." (*People v. Thomas* (2012) 53 Cal.4th 771, 801.) The jury, which was instructed to "consider each count separately" and found defendant not guilty of first degree murder (convicting instead of second degree murder).

Thus, we conclude that there was no prejudice to render defendant's trial unfair.

II. *Jury Instruction*

Relying heavily upon the dissenting opinion in *People v. Villatoro* (2012) 54 Cal.4th 1152 (*Villatoro*), defendant contends that his constitutional rights were violated when the trial court instructed the jury with a modified version of CALCRIM No. 375. More specifically, defendant claims that the jury should not have been instructed that it could consider evidence relating to the offenses against Diane when deciding whether he acted with "premeditation and deliberation and/or malice" in murdering Bickman or whether he had a motive to murder Bickman based upon the crimes' similarity.

We are not convinced. As set forth above, the crimes against Diane and Bickman occurred at the same place within a two-month period. Both victims were women, both instances were preceded by drug use and sex (either talk of sex or the actual act), and both women were strangled after they yelled. Defendant told Detective Putnam that he tried to keep both women quiet because he did not want to lose his "housing" and his "freedom." Although Diane was able to escape before defendant could kill her, that does not alter our conclusion. The bottom line is that the Diane offenses tended to show that defendant harbored the same intent and motive as in the Bickman offense when he choked Diane in her room. (See *People v. Roldan*, *supra*, 35 Cal.4th at p. 705.)

Briefly, we note that defendant's reliance upon the dissent in *Villatoro* is misplaced. *Villatoro* concerned the question of whether charged sexual offenses could be used to prove a defendant's propensity to commit another sexual offense charged

in the same case pursuant to Evidence Code section 1108. (*Villatoro*, *supra*, 54 Cal.4th at pp. 1166–1167.) Evidence Code section 1108 is not at issue here. To the extent *Villatoro* is on point, we are bound by the majority opinion. (*People v. Johnson* (2012) 53 Cal.4th 519, 528.) And the instruction given in this case, like the one approved in that case, told the jurors that they needed to find that defendant committed the Diane offenses beyond a reasonable doubt before they could consider the evidence to determine defendant's intent and motive in the murder of Bickman. Moreover, as in *Villatoro*, the jury was instructed with CALCRIM No. 220 on the prosecution's burden of proof and defendant's presumption of innocence. We presume the jury followed these instructions. (*People v. Ervine* (2009) 47 Cal.4th 745, 775.)

It follows that we find no instructional error.

III. *Effective Assistance of Counsel*

Defendant contends that his trial counsel was ineffective by failing to present evidence that his mental state was affected by his schizophrenia and his use of PCP on the day he killed Bickman and by failing to request CALCRIM No. 3428.

The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686–694; see also Cal. Const., art. I, § 15.) "Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If

the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) "Moreover, '"a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." [Citation.]' [Citation.]" (*Ibid.*; see also *Strickland v. Washington*, *supra*, at pp. 688, 694.)

Here, defendant's claim fails because there is no information or explanation as to why defense counsel did not present evidence on his mental state and use of PCP or request CALCRIM No. 3428.[3] (*People v. Ledesma* (2006) 39 Cal.4th 641, 746 ["If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation'"].) Contrary to defendant's claim, defense counsel could have had a tactical reason for his decisions. He may have determined that there was insufficient evidence that defendant was suffering from schizophrenia or the lingering effects of PCP when he killed Bickman. Although defendant told officers that he had taken

---

[3] CALCRIM No. 3428 provides, in relevant part: "You have heard evidence that the defendant may have suffered from a mental disease. You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted with the intent or mental state required for that crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted with the required intent or mental state, specifically: 'malice aforethought.' If the People have not met this burden, you must find the defendant not guilty of murder."

some PCP and told Treuting that he had used PCP the night or two before he killed Bickman, nothing in the record shows that defendant exhibited symptoms or behaviors consistent with PCP use or schizophrenia when he committed the murder. Trial counsel may have therefore decided that presenting that evidence would have made defendant less credible.

We reject defendant's contention that trial counsel should have presented expert testimony on schizophrenia. Aside from a "social history report" prepared by a paralegal and attached to defendant's sentencing memorandum, defendant presents no declaration setting forth the substance of any mental health expert's proffered testimony. Thus, his claim that a mental health expert "would have bolstered [his] defense considerably" is mere conjecture and "'unsubstantiated speculation.'" (*People v. Bolin* (1998) 18 Cal.4th 297, 334.)

IV. *Court Operations Assessment*

An unauthorized sentence may be corrected at any time. (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.) Under Government Code section 70373, subdivision (a), a $30 fee "shall be imposed" on every felony criminal conviction as a court construction fee. One fee of $30 should be imposed for each conviction. (*People v. Lopez* (2010) 188 Cal.App.4th 474, 480.)

Here, the trial court only ordered a $30 criminal conviction assessment fee. Because a $30 fee should have been imposed for each conviction, the abstract of judgment should be corrected to reflect a $90 assessment.

DISPOSITION

The abstract of judgment is modified to reflect a court operations assessment of $90. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

---

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