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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ARTURO PLASCENCIA, Defendant and Appellant.	B260422 (Los Angeles County Super. Ct. No. GA091652)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Carter, Judge. Affirmed.

Jean Margaret Wiebe; Louisa B. Pensanti for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Arturo Plascencia was convicted of one count of kidnapping his girlfriend Andrea. On appeal, he contends that there was insufficient evidence and that the court improperly excluded evidence of Andrea's drug use. We affirm.

I. Procedural background

On March 13, 2014, defendant was charged by information with attempted willful, deliberate and premeditated murder (Pen. Code, §§ 664/187, subd. (a); count 1),[1] kidnapping (§ 207, subd. (a); count 2), criminal threats (§ 422, subd. (a); counts 3 and 4), and assault with a firearm (§ 245, subd. (a)(2)). As to count 5 only, there was an allegation that defendant personally used a firearm (§ 12022.5, subd. (a)). Defendant pleaded not guilty to all of the counts and denied the special allegations. The court granted defendant's motion to set aside counts 1 and 3, pursuant to section 995, and defendant proceeded to trial on the remaining counts. The jury convicted defendant of kidnapping, and acquitted him on the remaining counts. The trial court denied probation and sentenced defendant to a term of three years in state prison.

Defendant filed a timely notice of appeal.

II. Factual background

A. *The prosecution's case*

1. The charged incident

On December 1, 2013, at about 5:00 p.m., defendant Arturo Plascencia drove his live-in girlfriend Andrea[2] to work at

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[1] All further undesignated references are to the Penal Code.

[2] For the sake of clarity, we refer to the victim by her first name throughout this opinion.

Applebee's restaurant in Temple City. While Andrea was working, defendant went inside the Applebee's to have a beer and watch football. During the two hours that he was there, Andrea tried to break up with defendant by telling him she was seeing someone else. He got furious, said " 'you already know what I'm going to fucking do,' " and left.

At 9:19 p.m., defendant texted Andrea at work, and asked her to come outside so he could give her something. Andrea went out to the parking lot, as she believed that defendant was going to give her keys she had left in the car. Defendant was standing next to his parked Tahoe SUV, about 50 yards from the restaurant. Andrea was uneasy because she knew that defendant was mad and he normally parked closer, next to the Applebee's exit.

However, she walked closer to defendant, and stopped about 10-12 feet from defendant, as she saw that his arm was in the rear cargo area of the Tahoe, as if he was holding onto something. Andrea asked defendant what was in his hand, and he repeatedly answered " 'get over here' " in an angry tone. She said that she needed to go back to work and took a step backwards. Defendant then grabbed Andrea in a "bear hug" by the shoulder and arms, and forced her into the front passenger seat of the Tahoe, in a facedown position, bruising her neck and chest, and ripping her shirt. They struggled, and Andrea hooked her feet underneath the running board to prevent defendant from shutting the passenger door. Defendant then tried to open the rear passenger door, appeared to be looking for something, and said " 'if you make my heart broken, you and I are going to die together.' "

At this point, Andrea was able to get out of the car. She ran a few feet, was tackled to the ground by defendant, ran a few more feet and was again tackled to the ground by defendant. A bystander tried to intervene. Andrea got up and yelled " 'he has a gun,' " and ran to the Applebee's. (Although she did not actually see a gun that day, Andrea assumed he had a gun with him as she knew that he had three guns, an AR-15, a shotgun and a .22 rifle, he was furious and he kept his arm in the cargo area of the Tahoe when she came out of the Applebee's.) As Andrea ran to the Applebee's, defendant yelled " 'I'm going to get you and the whole restaurant.' "

After the incident, at about 11:00 p.m., defendant went to the house of a friend, Ignacio Monge. Defendant related that he thought the police were looking for him, and gave his AR-15, .22 rifle, shotgun, magazines and ammunition to Mr. Monge for safekeeping.

2. The investigation

Deputies and detectives from the Los Angeles County Sheriff's Department arrived to investigate the incident. Andrea was visibly upset, had a torn shirt and redness around the neck. Deputies went to the apartment shared by defendant and Andrea looking for the firearms. They did not find the firearms, but saw items strewn around the apartment, including a sweater on a Christmas tree, and items that had been spray painted.

The next morning, defendant surrendered at the Temple Sheriff's Station. The deputies recovered a machete on the backseat floorboard of the Tahoe. Later that morning, they recovered the three guns from the home of Mr. Monge.

3. Prior incidents of domestic violence

On October 29, 2013, approximately one month before the Applebee's incident, there was a prior incident of domestic violence, at the apartment of defendant and Andrea. Defendant kneed Andrea in the ribs and chest, hit her in the left jaw with either his fist or the butt of a gun, and threw her to the floor by the neck. Deputies were called to the apartment, however, Andrea refused to tell them what had happened. Another time, defendant did not want Andrea to leave the apartment, so he locked her in the bathroom and pointed an AR-15 at her.

B. *The defense case*

Andrew Plascencia, defendant's 22-year-old son, testified that although he never lived with his father, they often went camping together. Defendant purchased a machete which he used while camping. Defendant directed his son to leave the machete under the seat of the Tahoe.

In addition, multiple character witnesses testified that defendant was calm, peaceful and kind, and not violent.[3] The character witnesses included defendant's son Andrew, defendant's 19-year-old daughter Briana Plascencia, his cousins Alicia Lourette and Grace Rullan, and his ex-wife Leticia Plascencia.

Finally, defendant testified. Andrea was originally his daughter's friend; he met her when he was coaching his daughter's softball team. A few years later they started dating. After approximately 10 to 11 months of dating, defendant moved

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[3] Initially, some of the witnesses testified about specific instances of conduct; once the prosecutor objected, the testimony was limited to reputation and opinion.

into Andrea's apartment in September 2013. Andrea was jealous of other women, particularly defendant's ex-wife Leticia. This jealousy sometime led to anger, where Andrea would throw things at defendant such as pillows, a brush, shorts or a phone. Sometimes Andrea would throw punches at defendant; he never hit her.

On December 1, 2013, defendant drove Andrea to work. He stayed to watch a football game. While he was watching the game, Andrea told him she was dating someone. He was mad and shocked, so he went back to their apartment, where he broke shelves, spray painted and then cut up a sweater and a jersey that he had purchased for Andrea. He put the sweater and jersey in a plastic bag. Defendant then texted Andrea and told her that he had something to give her. Defendant drove to the parking lot where he waited for Andrea.

Andrea walked over to defendant, who was waiting outside the Tahoe with his hand in the plastic bag. Andrea asked " 'are you going to shoot me,' " defendant said " 'no' " " 'what are you talking about?' " Andrea asked defendant to take his hand out of the car; defendant complied and said he wanted to give her something. Andrea gave a quizzical look, and defendant tried to hug her. Defendant grabbed her arms, and said " 'let's just go[,] [l]et's talk,' " and they "got" to the passenger door. Defendant opened the passenger door, guided her to the car, and Andrea fell onto the seat. Andrea said " 'stop,' " and pulled away. Defendant then opened the back door to reach for the bag, and when he turned around, she was on the ground, "walking like a crab."

Andrea got up and ran away; defendant followed and grabbed her shirt. Andrea again fell, someone asked " 'is everything okay,' " and defendant answered " 'everything is

fine.' " Andrea got up and ran back to Applebee's, saying " 'call the police.' " Defendant drove back to his apartment, where he retrieved his guns and some of his ammunition. He gave his guns to his friend Ignacio Monge.

DISCUSSION

I. Sufficiency of the evidence

Defendant contends that there was insufficient evidence of kidnapping. In assessing a claim of insufficiency of the evidence, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66; see also *People v. Vines* (2011) 51 Cal.4th 830, 869.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) " 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; see also *Jackson v. Virginia* (1979) 443 U.S. 307.)

In order to establish a kidnapping under section 207, subdivision (a), the prosecution must prove " '(1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance.' [Citation.]" (*People v. Bell* (2009) 179 Cal.App.4th 428, 435; see also *People v. Arias* (2011) 193 Cal.App.4th 1428, 1434

Defendant appears to only challenge the first and second elements.[4] First, he contends that Andrea never testified that she was fearful, and "therefore the jury should not have found her to have experienced sustained fear." "Sustained fear" is not an element of kidnapping. Rather, the first element requires "a person was unlawfully moved by the use of physical force or fear." In this case, trial evidence established that defendant used force to move Andrea. Specifically, defendant grabbed her in a bear hug by the shoulder and arms and forced her into the front passenger seat. Once in the Tahoe, they struggled, defendant bruised Andrea's neck and chest and ripped her shirt. Andrea even hooked her feet underneath the running board to prevent defendant from shutting the door. Moreover, there was also sufficient evidence that defendant moved Andrea by the use of fear. Andrea assumed that defendant had a gun with him that day, and even yelled "he has a gun" as she was running back to the Applebee's. When defendant tried to open the rear passenger door, he stated "if you make my heart broken, you and I are going to die together." After the incident, Andrea told a deputy that she was afraid when she saw defendant in the parking lot because she thought he would hurt her.

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[4] As such, we do not address the third element, asportation.

Next, defendant maintains that the prosecution did not establish that the movement was without the person's consent. Specifically, defendant claims that he hugged Andrea "and in an attempt to 'talk things out' moved both of them towards the passenger side of his vehicle by walking." We disagree. Here, the trial evidence showed that when defendant repeatedly stated "get over here," Andrea said she needed to get to work and took a step backwards. Further, Andrea struggled with defendant, and tried to prevent him from shutting the door of the Tahoe. Finally, when she was able to escape, she ran away and told a bystander "he has a gun." Also, defendant admitted in a post-arrest statement that he grabbed Andrea and " 'pushed her in the car.' " We therefore reject defendant's contention that the evidence was insufficient to support his conviction for kidnapping.

Without citing any authority, defendant suggests that CALCRIM No. 224,[5] shifted the prosecution's burden of proof

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[5] CALCRIM No. 224, as given, provides:

"Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.
"Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

regarding consent.[6] This claim is not cognizable. It is merely a claim that an instruction that is otherwise correct on the law should have been modified to make it clearer. "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." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) If defendant had been concerned the instruction somehow shifted the burden of proof, he should have requested a clarification. He did not do so.[7] Moreover, insofar as defendant is asserting that the instruction diluted the prosecutor's burden of proof, this claim is also not cognizable as defendant was obligated to seek amplification or clarification of the instructions. (*People v. Lucas* (2014) 60 Cal.4th 153, 295.)

Defendant suggests that we should not apply the forfeiture doctrine by asserting these errors affected his state and federal constitutional rights. (See § 1259 ["Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved

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6 The contention appears to conflate required elements, mental states and affirmative defenses. Defendant contends: "the wording of CALCRIM 224 is such that the jury may apply the principle incorrectly to mental states which are exculpatory such as consent, self defense, duress, heat of passion, etc." Insofar as consent is the only one of these concepts at issue in this appeal, we are limiting our analysis to consent.

7 At the jury instruction conference, the trial court indicated that it was going to give, inter alia, CALCRIM No. 224, and specifically inquired whether there were any objections or requested additions to the instructions; defense counsel indicated she had no objections, and requested no additions.

in any . . . instruction . . . which affected the substantial rights of the defendant"]; *People v. Covarrubias* (2016) 1 Cal.5th 838, 904–905 ["To the extent defendant claims the instructions affected his substantial rights, we may review his claim under section 1259 despite his failure to raise the issue below"].) In any event, there is no reasonable likelihood that the jury misunderstood the instruction in the manner that defendant contends. The instruction did not shift the burden of proof. Indeed, CALCRIM No. 224, in a portion not cited by defendant, instructs that "[b]efore you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt." The jury also received instructions regarding reasonable doubt and the prosecution's burden of proof beyond a reasonable doubt (CALCRIM No. 220), the evaluation of witness testimony (CALCRIM No. 226), and the evaluation of conflicting evidence (CALCRIM No. 302).

II. Exclusion of evidence of purported drug use

Defendant contends that the trial court abused its discretion by excluding testimony that Andrea may have ingested a drug-laced brownie prior to the day of the kidnapping.

A. *Additional facts*

When cross-examining Andrea, the following colloquy occurred:

"Q. Okay. All right. Now, the night before December 1st which was November 30, 2013, did you go out with your co-workers?

"[Prosecutor]: Objection. Relevance.

"The Court: What day?

"[Defense counsel]: That would be November 30, 2013.

"The Court: I am going to allow it.

"The witness: No.

"Q: By [Defense counsel]: You did not go out?

"A: I didn't. I worked.

"Q: Did you go out after work with your co-workers?

"A: No.

"Q: What about the day before?

"[Prosecutor]: Objection. Relevance.

"The Court: We are getting a little far afield.

"[Defense counsel]: Okay.

"Q: Did you have any alcohol or drugs in the 24 or 48 hours before this event?

"A: Yes.

"Q: When was that?

"A: November 30, the last day of November, right before the incident."

The trial court then excluded further cross-examination regarding the alcohol or drug consumption, ruling Andrea's consumption of alcohol 24 hours earlier irrelevant, and, indicating that there would be a hearing regarding the consumption of psychedelic drugs at a later date.

Subsequently, the court excluded defendant's testimony that Andrea had told him that on the night before the Applebee's incident, she had been "drugged at work" when she ate a brownie with some co-workers and she appeared disoriented. Defense counsel argued that the testimony was relevant as the drug use may have impaired her perception. The prosecution objected on the grounds that the testimony was hearsay, irrelevant and improper character testimony. The court excluded evidence of

the hearsay conversation that the defendant had with Andrea regarding "the brownie or drugs or anything along those lines," reasoning:

> "With regard to the brownie or any consumption of drugs, I agree that that is irrelevant. It's not probative of anything in particular and I think that the defense is attempting to put it on to basically dirty up the victim. There is no evidence that other than -- and when I am saying evidence, we don't have any evidence with regard to her perception being altered or drugs or anything along those lines . . . ."

B. *Analysis*

Defendant makes two claims of error. First, defendant claims that the trial court erred in excluding evidence of the complaining witness's impairment. Second, defendant argues that the evidence was admissible pursuant to *People v. Wheeler* (1992) 4 Cal.4th 284. Both contentions fail.

"Of course, only relevant evidence is admissible (Evid. Code, § 350), and relevance is defined as 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action' (*id.*, § 210)." (*People v. Jones* (2013) 57 Cal.4th 899, 947.) "This definition includes evidence 'relevant to the credibility of a witness.' [Citations.]" (*People v. Contreras* (2013) 58 Cal.4th 123, 152.) "Conversely, a matter is 'collateral' if it has no logical bearing on any material, disputed issue. [Citation.] A fact may bear on the credibility of a witness and still be collateral to the case. [Citations.]" (*Ibid.*) "The trial court has broad discretion to determine the relevance of evidence [citation], and we will not disturb the court's exercise of that discretion unless it acted in an arbitrary, capricious or patently absurd manner [citation]."

(*Jones*, *supra*, at p. 947.) Here, the trial court acted within its broad discretion in ruling that evidence regarding Andrea's alleged drug use was irrelevant, in that there was no actual evidence of impairment. Nor was any evidence produced regarding the amount of drugs Andrea ingested, or how it affected her perception. Even if it was marginally relevant, the trial court acted within its discretion in excluding the evidence which merely impugned the victim. (*People v. Carter* (2005) 36 Cal.4th 1215, 1259, fn. 30 [no abuse of discretion in excluding evidence that victim was an alcoholic].)

Defendant also claims that the trial court "should have made the testimony admissible and should have instructed on a prior misconduct admitted pursuant to *People v. Wheeler*, [*supra*,] 4 Cal.4th 284" and then considered whether to give CALCRIM No. 316. There was no evidence, however, of criminal drug use. And even if there was evidence of simple possession, unlike possession of narcotics with intent to sell, simple possession is not a crime of moral turpitude and thus has little bearing on the veracity of the witness. (*People v. Contreras*, *supra*, 58 Cal.4th at p. 157, fn. 24 ["Hence, trial courts have broad discretion to exclude impeachment evidence other than felony convictions where such evidence might involve undue time, confusion, or prejudice."].) It was unnecessary that the trial court expressly state that it had weighed the evidence's prejudice against its probative value. (*People v. Padilla* (1995) 11 Cal.4th 891, 924, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Finally, given the overwhelming evidence of defendant's guilt, any error in excluding the prior drug use evidence the night before the incident could not have affected the verdict. Thus, had

the trial court erred, any error was harmless under either the test of *People v. Watson* (1956) 46 Cal.2d 818, 836, or *Chapman v. California* (1967) 386 U.S. 18, 24.

DISPOSITION

The judgment is affirmed.

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BACHNER, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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