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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.

LOUIE DIAZ et al.,

Defendants and Appellants.

B231897

(Los Angeles County
Super. Ct. No. KA088991)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce Marrs, Judge. Affirmed as modified.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant Louie Diaz.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant Gabriel R. Campos.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Louie Diaz and Gabriel Campos were convicted of multiple offenses after they entered a house, shot one person, and kidnapped another. Each appeals and joins in the arguments of the other. We modify the judgment as to Diaz to stay a sentence enhancement under Penal Code¹ section 12022.7, but otherwise affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

Louie Diaz is the uncle of Gabriel Campos. On December 4, 2009, the men entered a home in El Monte and found Melanie Nieto inside, walking out of her bedroom. Diaz pointed a gun at her head and told her to go back into the bedroom. The men followed Nieto into the bedroom, where they found Diaz's friend Rigoberto Duran and Raymundo Urzua, Diaz's cousin. Diaz was jealous because Duran was spending time with Sandra Cardenas, Diaz's ex-girlfriend with whom Diaz had two children.

The two men moved toward Duran. Nieto described it as "working in sync, you know. Like flowing water." Nieto heard one urge the other to "shoot 'em," and then she heard a gunshot. Campos hit Duran's face with something metal or slashed it with a knife and Diaz shot him in the abdomen. The men left the bedroom, one screaming, "Where's Sandra?"

Cardenas, in another bedroom, heard the shot and Duran crying out. As a person in the bedroom with Cardenas opened the door in response to the sound, Diaz ran into that bedroom. Diaz, now waving a knife, was acting "crazy" and ordered Cardenas to get up. Campos came to the door of the room, pointed the gun at Cardenas, and said, "[L]et me just shoot the bitch." Diaz grabbed Cardenas by the hair and picked her up from the floor. Diaz and Campos walked Cardenas out of the house and placed her in Diaz's truck against her will.

Police responded to the home after the shooting. Nieto told the police that Diaz had the gun and identified him from a photographic six-pack. She also described the other man as a male Hispanic, dark-complected, possibly in his 20s, dressed in dark

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

clothing, holding a knife. Urzua told police that two men entered the bedroom, one of whom, Diaz, shot Duran. When shown a photograph of Diaz, Duran told the police that he would not identify his best friend. Based on Duran's body language, the police officer had a distinct impression that Duran was lying and attempting to deceive him when he said that he could not identify the person in the photograph as the person who had shot him.

Meanwhile, Campos drove Diaz and Cardenas to Diaz's house in Diaz's truck. Diaz told Campos to shoot Cardenas because she would testify against them, but Cardenas said that she had not seen anything. Diaz threatened to take Cardenas out to a canyon and "do some stuff" to her. Cardenas was frightened. Shortly thereafter, Campos left the vehicle and Diaz drove Cardenas to a hotel.

Cardenas was in shock. She wanted to know where her children were. Diaz said they were with his mother. She asked to see the children and Diaz said he would pick them up the following day. The next day, Diaz said that his sister had the children. Then he told her someone named Lola had the children. Cardenas wanted to be with her children and urged Diaz to tell her where the children were.

At some point over the next few days, Diaz and Cardenas were arrested at the hotel in conjunction with the use of a false identification. During this time Cardenas made no attempt to report that she was being held against her will because she wanted to see her children, whom Diaz had been keeping away from her. Because the police knew about Cardenas's drug use, she did not believe that they would help her to get her children back if she disclosed that she had been kidnapped and that Diaz was keeping her from the children; instead, she believed, they would turn the children over to the Department of Children and Family Services. After Cardenas's release by the police, she went to Diaz's mother's home to find the children, only to learn that they were neither there nor with his sister. This prompted Cardenas to contact Diaz again to try to find the children.

Diaz took Cardenas to another motel room, and then brought the children to her. Once Cardenas had seen the children, she asked Diaz to drop her off at her mother's

home, and Diaz agreed. The family got into Diaz's truck and Diaz started to drop Cardenas off at a gas station near her mother's home. As soon as Cardenas had left the truck, however, and while the children remained inside, Diaz told her to get back into the truck. Cardenas complied.

Diaz next drove to Cardenas's mother's house and Cardenas again left the truck. Cardenas's mother passed by, and Diaz ordered Cardenas back into the truck, saying that her mother was going to set him up. Cardenas got back into the truck and Diaz drove some distance on the freeway. When he exited, Cardenas told Diaz to drop her off at the nearby home of a friend, but as Diaz drove there, police attempted to stop the car.

Diaz began to lead the police on a chase. Cardenas urged Diaz to pull over, let her out, and let the police officer stop them. Diaz "just started flipping out. He was just screaming [at Cardenas] like ['Y]ou're fucking setting me up, you're fucking setting me up.[']" Cardenas told him she was not setting him up but saying he needed to stop because the children were in the car. Diaz kept driving, even as Cardenas attempted to convince him to stop the pursuit because the children could be hurt. He drove erratically, speeding up to 60 miles per hour on residential streets and running red lights. He eventually drove to his mother's house. He stopped the car and ran into his mother's home, leaving Cardenas and the children in the car. He was arrested without further incident. Campos was apprehended a few days later.

The men were charged with assaulting Nieto with a firearm (§ 245, subd. (a)(2)); assault with a deadly weapon on Duran (§ 245, subd. (a)(1)); attempted murder of Duran (§§ 664/187); first degree burglary (§ 459) and kidnapping Cardenas (§ 207, subd. (a)). Diaz was also charged with child abuse (§ 273a, subd. (a)); evading an officer (Veh. Code, § 2800.2, subd. (a)); and criminal threats to Nieto (§ 422).

Diaz and Campos were tried together. At trial, Nieto identified Diaz as the man with the gun. Cardenas testified that Diaz and Campos were the armed men who kidnapped her immediately after the gunshot in the other bedroom. Duran claimed that Diaz was not the shooter and not to have any idea who the men were, but the jury heard a recorded phone call between Duran and Cardenas describing an incident in which he had

been placed in the same holding cell as Diaz and Campos. In the phone call, Duran said that everyone was looking at him and that they all knew that “those two guys shot me.” Duran approached Campos and Diaz, who were standing together, and Diaz told Duran that he had learned from his attorney that Duran “didn’t say nothing.” Diaz assured Duran that “they’re not gonna do nothing to you.” Duran told Cardenas that he felt confident that nothing was going to happen to him and that he was “not a rat.” He reported that Campos said, “[Y]eah, I just did it for my uncle.” Diaz said, “I told you he wouldn’t rat, Gabriel [Campos], I told you he wouldn’t rat.” In another telephone conversation with Cardenas, Duran said, “I gotta keep my mouth shut. I have to. You understand? I mean I can’t say nothing”

Both Diaz and Campos were convicted as charged, with all sentence enhancement allegations presented to the jury found true. Diaz was sentenced to a term of 54 years to life in prison, and Campos to 19 years to life in prison. Both appeal.

DISCUSSION

I. Court’s Refusal to Permit Diaz to Recall Nieto

During the defense case, Diaz’s counsel informed the court that Diaz wanted the jury to learn that Nieto, who had been called as a witness during the prosecution’s case, had been in a mental institution and had tried to commit suicide more than once. Counsel asked to recall Nieto to the stand to ask her those questions, although counsel acknowledged the testimony would “only substantiate what she’s already testified to, that she was a heavy user of methamphetamine at the time and was using methamphetamine.” Counsel admitted not knowing when this purported institutionalization took place or how long it lasted. The court stated that it was trying to determine how this evidence could be relevant and denied the motion under Evidence Code section 352: “There is nothing in here that’s likely to assist the defense, and it certainly would confuse the jury if we

started talking about psychiatric [or] psychological issues.” The court observed that numerous witnesses had corroborated Nieto’s testimony.

Diaz² contends that the court’s ruling under Evidence Code section 352 denied him his constitutional right to confront witnesses against him. He claims that he had an interest in “presenting evidence that Nieto’s ability to perceive, not only the events of the incident, but reality itself, had become so severely compromised by her habitual and long term methamphetamine abuse that she had become so mentally unstable that she actually required institutionalization and treatment.” From this, he argues, the jury “could reasonably have determined that her credibility was likewise so compromised by her mental instability that, given the contrary testimony of Cardenas [as to who had the gun], they could have discounted her identification of appellant, rather than Campos, as the individual who possessed the firearm just prior to the shooting.”

Diaz made no showing that Nieto’s psychiatric treatment, if it occurred, was recent, related to methamphetamine use, or related to her ability to perceive. Its only relevance was, as Diaz’s counsel noted, “to show that she was a heavy methamphetamine user based on [expert witness] testimony [about the effects of methamphetamine use], and the fact that substantiating a heavy methamphetamine user, her perception would be skewed in some way,” but evidence of Nieto’s heavy methamphetamine use was already in the record and Nieto had been cross-examined on that subject. This evidence, because it was merely another vehicle for exploring Nieto’s reliability due to methamphetamine use, was cumulative of evidence already presented. The court’s refusal to enter into protracted proceedings to address the issues of privacy and admissibility in order to bring in what was at best cumulative evidence does not violate the Confrontation Clause. (*People v. King* (2010) 183 Cal.App.4th 1281, 1314-1315 [“There is no Sixth Amendment violation at all unless the prohibited cross-examination might reasonably have produced a significantly different impression of credibility”].)

² Although each contention raised on appeal appears to pertain only to one defendant, each defendant joined in the arguments of the other. We address each argument in the context of the defendant to whom that argument relates.

II. Section 12022.7 Sentence Enhancement

On count 3, the trial court imposed on Diaz sentence enhancements under both sections 12022.7, subdivision (a) and 12022.53, subdivision (d). Section 12022.53, subdivision (f), however, prohibits the imposition of an enhancement for great bodily injury as defined in section 12022.7 when an enhancement is also imposed pursuant to section 12022.53, subdivision (d). Accordingly, as the parties agree, the section 12022.7, subdivision (a) enhancement should have been imposed and then stayed. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1127-30.)

III. Sufficiency of the Evidence that Campos Committed Various Offenses

Campos contends that the evidence was insufficient to support his convictions for assaulting Nieto with a firearm, assault on Duran with a deadly weapon, attempted murder of Duran, and burglary because the victims and witnesses in the first bedroom were unable to identify him. “In reviewing a claim for sufficiency of the evidence, we must determine 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 or special circumstance beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence—that is, evidence that is reasonable, credible, and of solid value—supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.” (*People v. Jennings* (2010) 50 Cal.4th 616, 638–639 (*Jennings*).)

It is true that Nieto, Duran and Urzua did not identify Campos to the police or in court. However, Duran did identify Campos and Diaz as “those two guys [who] shot me” in a telephone call that was recorded and played for the jury. Moreover, in that same recorded telephone call, Duran reported that Campos justified his behavior in that he “just did it for [his] uncle.” Cardenas, who knew both men and encountered them immediately after the shooting when they kidnapped her, identified Campos as one of the two assailants. Multiple witnesses identified Diaz as the other man. Although Campos contends that “there was no evidence connecting him to the events that took place in the first bedroom,” evidence was presented that two armed men entered the house; assaulted Nieto; assaulted and shot Duran; and kidnapped Cardenas—and there was also evidence that the two men were Diaz and Campos. Contrary to Campos’s argument, he was linked to the incident in the first bedroom by more than his mere presence: evidence was presented from which the jury could conclude that he had entered the house, cut Duran with a knife in the first bedroom, and urged Diaz to shoot Duran. The evidence was sufficient to permit a reasonable jury to conclude that Campos was the other participant in the events immediately outside of and in the first bedroom and that he was guilty of the assaults, the burglary and the attempted murder. Campos has not established any error.

IV. Sufficiency of the Evidence of Kidnapping

Focusing on the days that Cardenas subsequently spent with Diaz and her failure to report that she had been kidnapped when she encountered the police, Campos contends there was insufficient evidence to support the kidnapping conviction because there was no evidence that he moved Cardenas by the use of fear without her consent. There was evidence, however, that Diaz threatened Cardenas with a knife and Campos pointed a gun at her inside the house; that Diaz then grabbed her by the hair and dragged her—Diaz in front, Cardenas in the middle, and Campos following behind—from the house to his truck; and that Campos drove them away against Cardenas’s will. This was sufficient evidence to permit the jury to conclude that they kidnapped Cardenas. (*People v. Bell*

(2009) 179 Cal.App.4th 428, 435 [elements of kidnapping are unlawful movement of a person by means of force or fear; absence of consent to the movement; and movement for a substantial distance]; *Jennings, supra*, 50 Cal.4th at pp. 638–639 [in a sufficiency of the evidence review a court views the evidence in the light most favorable to the prosecution and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt].)

DISPOSITION

With respect to defendant Louie Diaz, the sentence enhancement imposed on count 3 under Penal Code section 12022.7 is stayed. The clerk of the superior court is ordered to prepare an amended abstract of judgment reflecting this modification and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.