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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. JERRY ANDERSON, Defendant and Appellant.	B279986 (Los Angeles County Super. Ct. No. TA136487)

APPEAL from a judgment of the Superior Court of Los Angeles County. Pat Connolly, Judge. Affirmed.

Ava R. Stralla, 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, Shawn McGabey Webb and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jerry Anderson was convicted of one count of torture (Pen. Code,[1] § 206), one count of injuring a cohabitant (§ 273.5, subd. (a)), one count of making criminal threats (§ 422) and one count of false imprisonment by violence (§ 236). The jury found true the allegations that defendant personally inflicted injury on his cohabitant under circumstances involving domestic violence (§ 12022.7, subd. (e)) and personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)). The trial court sentenced defendant to life in prison for the torture conviction plus nine years for the criminal threats conviction and related enhancements. Punishment for the remaining convictions was stayed pursuant to section 654.

Defendant appeals, contending there is insufficient evidence to show he harbored the requisite intent for torture and further contending the trial court erred in failing to instruct the jury on battery and/or aggravated battery as lesser included offenses of torture. The manner of defendant's attack on the victim is substantial evidence from which a reasonable jury could infer that defendant intended to cause extreme pain and suffering and defendant's statements during the attack are substantial evidence from which a reasonable jury could infer that defendant acted with the intent to persuade the victim to speak and to obtain revenge on her. Simple and aggravated battery are not lesser included offenses of torture under either the statutory or accusatory pleading tests and the trial court did not err in failing to instruct the jury sua sponte on those offenses. We affirm the judgment.

BACKGROUND

Defendant and L.T. began dating in 2015. They lived with three roommates, Qynice Patterson, Albert Henderson, and L.T.'s uncle.

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1 Further undesignated statutory references are to the Penal Code.

Defendant repeatedly accused L.T. of cheating on him with other men. She denied it.

On February 1, 2015, defendant and L.T. bought a six-pack of malt liquor, a fifth of vodka, and a can of Four Locos to drink while watching the Super Bowl that day. Defendant started drinking around 2:00 p.m. L.T. saw defendant drink two bottles of Smirnoff Ice. She believed he also drank a fifth of vodka because the bottle was empty.

Shortly before the Super Bowl started at 3:30 p.m., defendant had a phone conversation with his mother which lasted about 10 minutes. He then came into the bedroom, where L.T. was watching television. He said, "My mom was right." Defendant then pushed L.T. as she lay on the bed. L.T. was shocked. She kicked him away, but he pushed her again. After a few more pushes and kicks, defendant said to L.T. that she was cheating on him. She replied, "No." Defendant did not appear drunk, but he did not usually show signs of intoxication when he drank.

Defendant hit L.T. with his fist on her right eye. He continued to "sock" her on her face and accuse her of cheating. After about an hour of being punched, L.T. falsely said that she had cheated on defendant, in the hope that he would stop hitting her. Defendant did not stop. He became angrier and started to swear. He continued to hit her in the head, and also on her chest. Defendant also hit her on the arms with a Smirnoff bottle.

After "a while," L.T. was able to escape from the room and yell for help. Defendant grabbed her and started dragging her back into the bedroom. L.T. fell down in the doorway, with her legs in the hall and her upper body in the room.

Unbeknown to L.T., Henderson heard yelling, came out of his room, and saw L.T. on the floor with defendant standing over her. However,

Henderson believed that L.T. was drunk and that defendant would take care of her. Henderson went back into his room. Henderson estimated that this occurred at about 5:00 p.m.

When L.T. refused to move her legs inside the bedroom, defendant picked up a small wooden chair and began hitting her on the back. L.T. moved her legs and defendant shut the door. He resumed punching her. By this time, L.T. had blood all over her face. Defendant told her to wash her face. She went into the bathroom. Defendant followed her and continued to punch her as she washed her face. He accused her of cheating and called her a bitch.

They went back into the bedroom. L.T. covered her face with a pillow and begged defendant to stop hitting her. He punched her on the sides and top of her head where it was not covered by the pillow. At one point, defendant threatened to kill her by stabbing her in the throat with a kitchen knife. L.T. begged defendant not to kill her.

Defendant told L.T. to take a shower and clean up. L.T. went into the shower. Defendant followed her and continued to hit her. He said that it was her fault that she would never get to see his children again. He also said that she was so obese no one would ever love her. He punched her in the stomach and said that if she were pregnant she would not have the baby.

L.T. passed out in the shower. When she regained consciousness, defendant was not in the bathroom or bedroom. She went to Henderson's room and banged on the door. Patterson was in the room with Henderson. According to Patterson, L.T.'s face was swollen, bruised and bloody and she appeared terrified. Patterson called 911.

L.T. was taken to the hospital by ambulance between 10:00 and 11:00 p.m. Her face was extremely swollen. Both eyes were swollen shut for

eight days. She could not open her left eye fully for four or five months. She developed scarring on her arms and back. A scan showed that L.T. had a fracture in her nasal bone, but the age of the fracture could not be determined from the scan.

L.T. spoke with a law enforcement officer at the hospital, described what had happened to her and said that defendant had been drinking. At trial, L.T. estimated that defendant had hit her at least 100 times and that his attack had lasted two to three hours.

Sheriff's deputies took photographs of L.T.'s bedroom and bathroom. The walls and floor and had blood on them, as did L.T.'s pillow and bed and her discarded bra and shirt.

L.T.'s cousin retrieved L.T.'s belongings, including her cell phone, from the apartment. L.T.'s cell phone contained numerous communications from defendant, some of which were sent after defendant's attack.

In a Facebook message to L.T. sent the day after the attack (February 2), defendant wrote: "I don't remember everything that happen but your not answering your phone to tell me, I am worried about you and what I have possibly done, I love you so much and I never wanted that to happen, I should have listen to you, I don't know what to think I have not slept or eaten in three days, I have been trying to stay strong and I don't know who know about the situation, I am just afraid right now cause I don't know what is next how you feel or whats coming all I know is that I love you and I would never hurt you and one bad decision created a mess one giant mess. If I know you your taking advantage of this situation. funny who you fall for!"

In a voicemail message left on L.T.'s phone on February 3, defendant said: "I've been trying to get you to answer your phone so I can find out what

happened sweetheart. You know I told you what happened on the message earlier. And I want to know if you're ok or not. I don't know, you know, what's going on. I'm trying to get back but I just want to make sure everything's ok because I don't want to run into, you know, the law or your family or something like that. You know, um, I can't even remember what happened, and I need to ask you the stuff that happened. Because all I know is that I woke up with blood on my shirt and stuff like that. And I want to know what happened. I want to know if you're ok or not, and I need you to answer the phone."

At trial, the prosecution introduced evidence of two prior acts of domestic violence by defendant. D.L., defendant's wife since 2008, testified that in 2010 defendant choked her until she passed out. When she regained consciousness, defendant was gone. D.L. filed a police report. J.J., defendant's wife from 2000 to 2006, described several attacks by defendant during their marriage. The most severe attack occurred in 2006. In that incident, defendant, who had been drinking, punched J.J. on her arms, stomach and ribs, stomped on her and dragged her through their house. He repeatedly threatened to kill her. This lasted for about three hours. Finally, J.J. called for her son, Tyrone. Tyrone came downstairs. Defendant was distracted by Tyrone, and J.J. was able to flee to a neighbor's residence. Her scalp was swollen for weeks and she lost a clump of hair. She had bruises all over her body.

Defendant testified in his own defense at trial. He testified that he drank heavily on Super Bowl Sunday. He spent some time on his computer, then left the house to get more alcohol. The next thing he remembered was waking up downtown. He noticed he had some blood on his shirt. He thought he had gotten into a fight while he was blacked out. He called L.T.

but she did not answer. He went to the apartment but the locks had been changed. He never attempted to restart a relationship with L.T. Defendant did not realize L.T. had been beaten until he was arrested a year later. He did not believe he hit her because his hands were not sore the next day.

Defendant testified that police from Inglewood were trying to frame him and that L.T. was being paid to lie about what had happened. He claimed that all the Facebook messages were fabricated. He claimed he never hurt D.L. and only "tussled" with J.J.

DISCUSSION

I. Sufficiency of the evidence

Defendant contends there is insufficient evidence to prove he had the specific intent required for the offense of torture. He contends such a conviction violates his state and federal constitutional rights to due process. There is substantial evidence to support the conviction.

A. Law

"'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f 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." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]'" (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

Torture requires "the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." (§ 206.) "[R]evenge, extortion, and persuasion are self-explanatory. Sadistic purpose encompasses the common meaning, '"the infliction of pain on another person for the purpose of experiencing pleasure."'" (*People v. Massie* (2006) 142 Cal.App.4th 365, 371.)

"The intent with which a person acts is rarely susceptible of direct proof and usually must be inferred from facts and circumstances surrounding the offense. [Citations.]" (*People v. Massie, supra,* 142 Cal.App.4th at p. 371.)

B. Analysis

L.T.'s testimony and the photographs of her injuries are sufficient evidence to establish that defendant intended to cause extreme pain and suffering. She testified he hit her about 100 times, mostly in the face. Her eyes had swollen shut by about the middle of the beating. She begged him to stop. She bled quite a lot.

"[A] jury may infer intent to cause extreme pain from a defendant who focuses his attack on a particularly vulnerable area, such as the face, rather than indiscriminately attacking the victim." *(People v. Burton* (2006) 143 Cal.App.4th 447, 452.) Further, defendant's use of a bottle and a chair to hit L.T. resulted in scarring, and scarring is strong circumstantial evidence of intent to inflict severe pain and suffering. (*Ibid*.) Thus, the jury could reasonably have inferred defendant intended to cause L.T. extreme or severe pain and suffering.

L.T.'s testimony also provides sufficient evidence to establish defendant beat her for the purposes of revenge or persuasion. Defendant accused her of cheating as he was beating her. When she (falsely) admitted she had cheated, defendant said he would stop beating her if she told him the date. This supports an inference he was beating her to persuade her to admit she was cheating. Once L.T. gave defendant a (fabricated) date, he became angrier than before and continued to hit her. This supports an inference he was beating her for purposes of revenge as well.

Defendant contends the evidence showed he was in an explosive (or drunken) rage and lacked the intent required for torture. Defendant's two- or three-hour-long attack on L.T.'s face, punctuated by breaks, is not suggestive of an explosive rage. (See *People v. Massie, supra*, 142 Cal.App.4th at p. 373 [attack which lasted for a significant period of time and included breaks during which defendant had time to reflect on his behavior was not a brief explosion of violence].) Assuming for the sake of argument that there was also evidence to support an inference the attack resulted from an explosion of rage, this would not require reversal. (See *People v. Nelson, supra,* 51 Cal.4th at p. 210 [judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding].)

Defendant also contends the injuries inflicted in this case were not as severe as those in other cases. "Section 206 expressly eliminates the pain of the victim as an element of the offense. In addition, all that is required as to the nature of the injury is 'great bodily injury,' i.e., 'a significant or substantial physical injury.' (§ 12022.7, subd. (e).) Abrasions, lacerations, and bruising can constitute great bodily injury. [Citation.]" (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1042.) The fact that "other victims of torture may have suffered more than the victim in this case sheds no light on the

sufficiency of the evidence of defendants' intent to cause [the victim] severe pain and suffering." (*Id*. at p. 1043; see *People v. Rundle* (2008) 43 Cal.4th 76, 137–138, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 ["Reviewing the sufficiency of evidence, however, necessarily calls for analysis of the unique facts and inferences present in each case, and therefore comparisons between cases are of little value."].)

Since we have determined that "a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15, of the California Constitution." (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

II. Instruction

Defendant contends the trial court erred in failing to instruct the jury sua sponte on battery and aggravated battery, which he characterizes as lesser included offenses of the charged crime of torture. The trial court did not err.

A. Applicable law

"Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117.)

"The elements test is satisfied when "'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense." [Citation.]' [Citations.]" (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) "Under the accusatory pleading test, a lesser offense is included within the greater charged offense "'if the charging allegations of the

accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed." [Citation.]' [Citations.]" (*Lopez,* at pp. 288–289.)

In applying the accusatory pleading test, we do not look to the language of the pleading as a whole. We do not consider enhancements (*People v. Sloan* (2007) 42 Cal.4th 110, 114) and "we consider *only* the pleading for the greater offense." (*People v. Montoya* (2004) 33 Cal.4th 1031, 1036, original italics; see *People v. Moon* (2005) 37 Cal.4th 1, 25 [we look to how "the accusatory pleading describes the greater offense"].)

B. Analysis

Simple and aggravated battery are not lesser included offenses of torture under the elements test. Battery is "any willful and unlawful use of force or violence upon the person of another." (§ 242.) Aggravated battery occurs when the battery results in serious bodily injury. (§ 243, subd.(d).) "The statutory definition of torture does not require a direct use of touching, physical force, or violence, but instead is satisfied if the defendant, directly or indirectly, inflicts great bodily injury on the victim." (*People v. Lewis* (2004) 120 Cal.App.4th 882, 888.) "For example, torture exists not only where there is direct infliction of injury, but also where injury results from enforced deprivation, such as withholding food and water, causing starvation." (*Id.* at p. 887.) "Thus a defendant may commit torture without necessarily committing a battery." (*Id.* at p. 888.) Simple and aggravated battery are not lesser included offenses of torture under the elements test.

Simple and aggravated battery are also not lesser included offenses of torture under the accusatory pleading test. The pleading in this matter alleges the offense using the language of section 206; it does not add any factual details specific to this case.

Defendant urges us to consider the allegations of counts 2 and 3 as well as the count 1 torture allegations because "all three counts were part of the reality of the continuous course of conduct that occurred." The accusatory pleading test is narrow. We do not consider enhancements (*People v. Sloan, supra,* 42 Cal.4th at p. 114) and "we consider *only* the pleading for the greater offense." (*People v. Montoya, supra,* 33 Cal.4th 1031, 1036, original italics; see *People v. Moon*, *supra*, 37 Cal.4th at p. 25 [we look to how "the accusatory pleading describes the greater offense"].)

Even assuming for the sake of argument that battery or aggravated battery were lesser included offenses of torture and that there was sufficient evidence to support an instruction on one or both of those offenses, there is no reasonable probability that defendant would have obtained a more favorable outcome if the instructions had been given and so any error in failing to instruct on those offenses was harmless. (See *People v. Breverman* (1998) 19 Cal.4th 142, 164-178 [*People v. Watson* (1956) 46 Cal.2d 818 standard of review applies to court's failure to instruct on lesser included offenses].)

Defendant's defense was that he beat L.T. in "an intoxicated explosion of violence" and so did not have the requisite "intent of revenge, extortion, persuasion, or sadistic purpose" for torture. The jury was instructed on defendant's claim that he was voluntarily intoxicated and acted out of an explosion of violence and so did not actually form the specific intent required for torture. The jury was also instructed on the lesser related offense of causing injury to a cohabitant and on the accompanying allegation that defendant inflicted great bodily injury in the commission of that offense. The intoxication instruction made clear that voluntary intoxication was not a defense to "domestic battery causing a traumatic condition" or to the "allegations that the defendant personally inflicted great bodily injury during

the commission" of the domestic battery. Thus, the jury had the option of acquitting defendant of the torture charge but still convicting him of "domestic battery." The jury chose to convict defendant of both offenses, indicating that they did not believe his intoxication defense. Defendant does not offer any explanation of why the result would have been different if the jury had been offered the additional option of convicting him of battery or aggravated battery. None is apparent.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

CHAVEZ, Acting P.J.

HOFFSTADT, J.

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