

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH ROBERT HORVATH,

Defendant and Appellant.

C063198

(Super. Ct. No. 07F11009)

APPEAL from a judgment of the Superior Court of Sacramento County, Elena J. Duarte, Judge. Affirmed.

Mark David Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, David A. Rhodes and Robert C. Nash, Deputies Attorney General, for Plaintiff and Respondent.

The facts of this case are horrendous. For six years, defendant and his wife tortured, beat, and maimed L., who was the great-niece and adopted daughter of defendant's wife. The rationale for these acts was twisted. The great-aunt thought defendant had molested L., and she would beat L. until the girl

falsely admitted he had molested her. At that point, defendant would take over the abuse. The years of abuse ended when L. ran away from home, fearing defendant and the great-aunt would make good on their threat to kill her and bury her in the backyard.

There are two appellate issues. One, was there sufficient evidence of defendant's specific intent to maim L.'s ears, lips, and arm to support his three convictions of aggravated mayhem? Defendant argues there was not because the evidence showed he intended only to "attack indiscriminately" rather than maim. We disagree because a defendant's specific intent to maim a body part can be inferred from the repeated systematic abuse to that body part over time.

Two, did the instruction on motive reduce the People's burden of proof because it conflicted with the instruction on torture? Defendant argues that it did because the jury here could have conflated motive and the intent required for torture. We disagree, but suggest a revision to the pattern jury instruction on motive, CALCRIM No. 370.

FACTUAL AND PROCEDURAL BACKGROUND

L. was 17 years old at the time of trial. When she was younger, her great-aunt adopted her and her siblings, and the children moved to Texas to live with her.

When L. was nine, the great-aunt married defendant. Since that time, L. "ha[d] been getting hit a lot." The abuse began when the great-aunt "started accusing [defendant] of molesting [L.]" The accusation was baseless, but stemmed from defendant helping L. with her homework or telling her she was pretty. The

great-aunt repeatedly would beat L. until L. said defendant had molested her. At some point, the great-aunt enlisted defendant's help in these beatings, provoking him by forcing L. to repeat in front of him the baseless accusation of molest.

When L. was about 14, she, her siblings, defendant, and the great-aunt moved to Sacramento. The great-aunt pulled L. out of school before she finished her freshman year because "[L.] had scars all over."

When the family was in Sacramento, the great-aunt's brother and girlfriend visited from Texas. Early one morning, the girlfriend saw that the mobile home in the backyard was "moving." The girlfriend asked the great-aunt what was going on, and the great-aunt responded, "[Defendant] is out there whipping that bitch's ass." Soon afterward, defendant emerged from the trailer holding a "two by four" with his "face real red." The girlfriend insisted she be let inside the trailer, and the great-aunt complied. "There was blood everywhere. Dried blood, new blood, old blood, bloody clothes" Behind a curtain was L. She looked "very frail" and "very scared." She was "bloody," had a "swollen" lip, and "her hair was pulled out [of] her head." The girlfriend asked the great-aunt, "Why? What's the reason?" The great-aunt said it was because defendant had "messed with her sexually, and she was angry with [L.]"

The next evening, the girlfriend saw the great-aunt and defendant beating L. in the kitchen of the house. At first, it was just the great-aunt. She was beating L. with a "two by

four," while simultaneously accusing L. of "want[ing] to be with [her] husband" and trying to get L. to admit it. When L. admitted it, the great-aunt called defendant to the kitchen and told him that L. was "still saying . . . you had [a] sexual relationship with her." Defendant became "angry and irate." The great-aunt made L. repeat the false accusation in front of defendant. Defendant then "[h]it[] [L.] everywhere imaginable." He "hit [her] in the head with at fist like he was fighting a man." He grabbed her and "body slammed" her to the cement floor and then kicked her in her ribs and rear end with steel-toed boots. After they finished beating her, they locked her in a closet and nailed it shut. The next day, the great-aunt pulled L. out of the closet, forced one of L.'s sisters to beat her some more, and then locked L. back in the closet.

In her years of being abused, L. was locked in the closet between 50 and 100 times. Of those times, defendant instigated the confinement 10 to 20 times. The closet was dark, and there was not enough room for her to stretch her legs, so she had to squat. The longest period of confinement was two to three weeks. If she tried to come out, the great-aunt and defendant would beat her.

Once, when L. tried to come out of the closet, the great-aunt "closed the door on [L.] and it caught [L.'s] lip." Thereafter, defendant "always . . . hit [her] in [her] lip [and] that caused [her lip to] split." He also kicked her lips with his steel-toed boots. She ended up with "very deep" cuts and scars all over her lips and four missing teeth.

In addition to a disfigured lip and mouth, L. had a disfigured arm and ears. L.'s ears were both severely scarred by defendant and her great-aunt "repeatedly . . . hit[ing her ears] with [wooden] sticks." L.'s arm was disfigured when defendant "choke slamm[ed] her." They were in the kitchen and defendant accused her of "mess[ing] up the trucks [defendant used in his lawn care service] [be]cause they weren't running." Defendant picked her up by the neck, squeezed her neck, then "body slammed" her on the ground against the floor. Defendant did not take her to the hospital. She was not able to bend or straighten her arm, and it was still stuck at about a 90-degree angle. During the same incident, defendant also hit her, but L. thought it was the body slam that broke her arm. The arm was also where defendant repeatedly beat her using both sides of a hammer.

The last time defendant beat L. with a hammer was Halloween 2007. He used "[t]he side you use to hammer the nail" to hit her on the head "hard" and "left a scar." The rationale for this beating was she had "messed up the truck[s]." The same day, the great-aunt stabbed L. in the left thigh and then locked her in the closet.

While the rest of the family was out trick-or-treating, L. decided to run away. One of her sisters was going to be leaving for Germany to serve three years in the Army, and without that sister (who had often protected L.), L. was afraid something might happen to her. The great-aunt and defendant had both threatened to kill L., and defendant added he would bury her

under the mobile home. L. took his threat seriously. She broke out of the closet and left a note for the great-aunt. L. wrote she "wouldn't get [the great-aunt] in trouble," "[defendant] didn't molest [her]," "[she] didn't tear up any of [the great-aunt's] stuff," and [she] wo[uld]n't tell on [the great-aunt.]" L. eventually called a teen safe house and was picked up at a local McDonald's.

L. was taken to the emergency room. The medical director of the child abuse and neglect center (who was a pediatrician) was called in to examine L. because this was a "highly unusual case." L.'s lips had "very deep" cuts and scars all over that were in various stages of healing. This disfigurement was caused by trauma consistent with being kicked in the mouth by a pair of boots. L.'s left arm had such an "extensive fracture" that L.'s surrounding muscles and tendons had calcified. These injuries could have been caused by a large person "forcefully throwing the child to the ground, and piling on top of [her] in a body slam." L.'s hands also had multiple broken bones. L.'s ears were "very scarred and distorted." The disfigurement was likely caused by trauma, some of which had occurred within a few days or weeks and some which were much older. This trauma was called "boxer's ear" and referred to the "type of trauma one generally sees on" somebody "who gets repetitive b[low]s to the ear." L. also had many scars and injuries on her back that were caused by "loop" objects that were used to inflict trauma.

Based on this evidence, a jury found defendant guilty of torture, aggravated mayhem, infliction of corporal punishment or

injury on a child, criminal threats, assault with a deadly weapon, and false imprisonment. He was sentenced to prison for three life terms. He timely appeals.

DISCUSSION

I

There Was Sufficient Evidence To Support The Intent Element Of Aggravated Mayhem

Defendant contends there was insufficient evidence to support the intent element of his three aggravated mayhem convictions. We begin by explaining the law and then address each of defendant's arguments that pertain to the body parts he maimed.

A

The Law On Aggravated Mayhem

"A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body." (Pen. Code, § 205.)

"Aggravated mayhem requires the specific intent to cause the maiming injury. [Citations.] 'Evidence that shows no more than an "indiscriminate attack" is insufficient to prove the required specific intent.' [Citation.] "'Furthermore, specific intent to maim may not be inferred solely from evidence that the injury inflicted actually constitutes mayhem; instead, there must be other facts and circumstances which support an inference

of intent to maim rather than to attack indiscriminately.”””
(*People v. Assad* (2010) 189 Cal.App.4th 187, 195.)

B

L.'s Ears And Lips

Count two was for disfiguring L.'s ears. Count four was for disfiguring her lips. On appeal, defendant argues the disfiguring of L.'s ears and lips was the product of "indiscriminate attack[s]" and therefore, there was insufficient evidence of a specific intent on his part to disfigure L.'s ears and lips. Defendant is wrong because the evidence showed a systematic beating of L.'s ears and lips over time, which supported an inference defendant intended to maim those body parts.

According to L., her ears were disfigured by defendant and her great-aunt "repeatedly . . . hit[ting her ears with] wooden sticks." The medical director who examined L. was of the opinion the disfigurement was caused by trauma, some of which had occurred within a few days or weeks and some which were much older.

According to L., her lips were disfigured by defendant and her great-aunt repeatedly hitting and kicking her lips. Specifically, her great-aunt "closed the [closet] door on [her], and it caught [her] lip." "[A]fter that," defendant repeatedly hit her lips and kicked her lips with his steel-toed boots. The medical director noted "very deep" cuts and scars all over L.'s lips that were in various stages of healing. She was of the

opinion the disfigurement was caused by trauma consistent with being kicked in the mouth by a pair of boots.

Defendant argues the problem with this evidence is that the blows to L.'s ears and lips were "part and parcel" of larger, indiscriminate "[attacks] consisting of blows to all parts of her body." Defendant's argument misconstrues the meaning of an "indiscriminate attack."

The idea that an indiscriminate attack is insufficient to prove the specific intent required for aggravated mayhem originated in two California Supreme Court cases -- *People v. Anderson* (1965) 63 Cal.2d 351 and *People v. Sears* (1965) 62 Cal.2d 737, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, footnote 17. (*People v. Ferrell* (1990) 218 Cal.App.3d 828, 835.)

In *Anderson*, the defendant inflicted over 60 wounds and cuts "over the [victim's] entire body from the head to the extremities" in one afternoon. (*People v. Anderson, supra*, 63 Cal.2d at p. 356.) Our Supreme Court held there was insufficient evidence of specific intent to commit mayhem because the evidence showed only "an indiscriminate attack" and "explosion of violence." The evidence "c[ould]not independently uphold a verdict based on the precise premise that defendant entertained the specific intent to commit mayhem." (*Id.* at pp. 359-360.)

In *Sears*, the defendant "struck [the victim] several times with a steel pipe; one of the blows resulted in a laceration of the lip; another, a laceration of the nose." (*People v. Sears*,

supra, 62 Cal.2d at p. 745.) Our Supreme Court held, "such evidence does no more than indicate an indiscriminate attack; it does not support the premise that defendant specifically intended to maim his victim." (*Ibid.*)

In contrast to the facts of *Anderson* and *Sears*, in a recent case decided by this court, we upheld an aggravated mayhem conviction where the attack consisted of three beatings over two days, with time in between each occurrence. (*People v. Assad, supra*, 189 Cal.App.4th at pp. 195-196.) Specifically, the defendant bound his son's hands and feet to a metal bed post and "struck him several times on his back and legs using a wooden garden stake and a short piece of garden hose that had a metal nozzle on one end. After a short break, defendant did it again." (*Id.* at p. 191.) The defendant also "bit most of [the son]'s fingertips," one at a time. (*Ibid.*) The next day, the defendant bound his son's hands and feet to the bed post again, but this time beat the front of his body. (*Ibid.*) There was also evidence the defendant had been beating him for several years. (*Id.* at p. 195.)

In rejecting the defendant's argument there was insufficient evidence of aggravated mayhem, we explained as follows: "[E]ven if the initial beating, despite its severity, could be considered 'indiscriminate' [citations], the jury reasonably could have found that the succeeding attacks were not." (*People v. Assad, supra*, 189 Cal.App.4th at p. 195.) Defendant had been beating his son for years, and this time he beat his son three times over two days and ensured his son could

not escape by binding his feet. (*Ibid.*) "These facts and circumstances, when viewed together with those showing that [the son]'s injuries actually constituted mayhem [citation], allowed the jury to infer that defendant intended to permanently disfigure [the son] during the beatings." (*Id.* at p. 195.)

Similar to *Assad* and in contrast to *Anderson* and *Sears*, the facts here show *over time*, defendant *repeatedly* beat L.'s ears and lips (in addition to beating other parts of her body), causing the maiming injuries. The facts and circumstances allowed the jury to infer defendant intended to permanently disfigure L.'s ears and lips during the beatings.

Specifically, L.'s ears were disfigured by defendant and her great-aunt "repeatedly . . . hit[ting her ears with] wooden sticks." Some of the scars were recent and some were much older. Similarly, L.'s lips were disfigured by defendant and her great-aunt repeatedly hitting and kicking her lips, sometimes with steel-toed boots. The scars all over L.'s lips were in various stages of healing.

Any reasonable person would know that the systematic beating of a person's ears and lips over time with wooden sticks, fists, and steel-toed boots would cause permanent disfigurement. Defendant no doubt knew this in light of the evidence that L.'s scars on these body parts were of varying ages, leading to the inference the disfigurement took place over time. Based on these facts and circumstances, there was sufficient evidence defendant intended to maim L.'s ears and lips.

C

L.'s Arm

Count three was for disfiguring and "render[ing] [L.'s] arm useless." Defendant argues that the injury happened either when defendant "dropped [L.] to the floor"¹ or inflicted "hammer blows . . . with extraordinary force." As to "dropp[ing]" L. to the floor, he claims there is "no evidence at all to support a finding of specific intent to break the arm." As to beating L. with a hammer, he claims "there is in fact no detail to support a conclusion of specific intent."

L. testified and the People argued to the jury the injury to L.'s arm resulted from defendant body slamming L. to the ground. Specifically, according to L.'s testimony, her left arm was injured when defendant picked her up by the neck, squeezed her neck, then "body slammed" her on the ground. Defendant did not take her to the hospital. She was not able to bend or straighten her left arm, and it was still stuck at about a 90-degree angle. During the same incident, defendant also hit her, but L. thought it was the body slam that broke her arm. In accord with this testimony, the People argued defendant maimed L.'s arm when he "body slamm[ed]" her and "denied her medical treatment."

¹ L. used the terms "dropped," "body slammed," and "choke slammed" to describe defendant's actions that caused her disfigured arm.

This evidence, combined with evidence defendant had beaten L.'s arm with a hammer, constituted substantial evidence defendant had the specific intent to cause the maiming injury. Defendant body slammed L. on the floor, causing her arm to break. The arm was a part of L.'s body defendant also had beaten using both sides of a hammer. This repeated abuse to her arm over time supports an inference defendant specifically intended to maim L.'s arm rather than to attack her indiscriminately.

II

The Instruction On Motive

Did Not Lessen The People's Burden Of Proof

Defendant contends the instruction on motive given here (stating the People were not required to prove defendant had a motive to commit any of the charged crimes) reduced the People's burden of proof because it conflicted with the instruction on torture given here (stating the jury had to find that defendant "intended to cause cruel or extreme pain and suffering for the purpose of revenge, persuasion, or for any sadistic purpose").²

To support this argument, defendant relies on *People v. Maurer* (1995) 32 Cal.App.4th 1121. There, the defendant was charged with misdemeanor child annoyance, which required proof the defendant was "'motivated by an unnatural or abnormal sexual

² The pattern jury instruction on torture, CALCRIM No. 810, also mentions "extortion." We will discuss the pattern jury instruction later in our discussion.

interest'” (*Maurer*, at pp. 1125-1126.) The jury was also instructed that motive was not an element of the crimes charged. (*Id.* at p. 1126.) The appellate court held that the trial court erred by not excepting the misdemeanor child annoyance offenses from the motive instruction. (*Id.* at p. 1127.) The distinction between the words “motivation” and “motive” was of little practical significance and the two instructions presented the jury with “conflicting terms.” (*Ibid.*)

The same is not true here. The jury instruction on torture spoke in terms of “intent[.]” Specifically, the instruction on torture stated that to prove the defendant was guilty of torture, the People must prove: “When inflicting the injury, the defendant *intended* to cause cruel or extreme pain and suffering for the purpose of revenge, persuasion, or for any sadistic purpose.” (Italic added.) “Someone acts with a sadistic purpose if he or she *intends* to inflict pain on someone else in order to experience pleasure for himself or herself.” (Italics added.) “[M]otive” and “intent” are not the same. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) “Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice.” (*Ibid.*) Our Supreme Court has explained that when the motive instruction is given, it does not relieve the People of its burden of proving the defendant’s requisite intent. (*People v. Cash* (2002) 28 Cal.4th 703, 739.) In *Cash*, which involved a robbery-murder special circumstance, the

appellant argued that the motive instruction relieved the People of their burden to prove he possessed the required intent to rob when he killed the victim. (*Cash*, at pp. 714, 738.) Our Supreme Court rejected the argument, explaining as follows: "The trial court instructed the jury that to find the existence of the robbery-murder special circumstance, it 'must find the murder was committed in order to carry out or to advance the commission of the crime of robbery,' and that 'the special circumstance is not present if the defendant's intent is to kill and the related felony of robbery is merely incidental to the murder.' In sum, the instructions as a whole did not use the terms 'motive' and 'intent' interchangeably, and therefore there is no reasonable likelihood the jury understood those terms to be synonymous. [Citation.]" (*Id.* at p. 739.)

This case is more similar to *Cash* than to *Maurer*. As in *Cash*, defendant here argues the motive instruction lessened the People's burden of proof. But also as in *Cash*, the jury here was instructed it could not convict defendant of the crime (here torture, in *Cash* robbery-murder special circumstance) unless it found the defendant possessed the requisite intent. Unlike in *Maurer*, none of the instructions here equated motive with intent. And there is no indication the jury here understood the terms "motive" and "intent" to be the same. For these reasons, we reject defendant's argument the instruction on motive reduced the People's burden of proof.

While rejecting defendant's argument that the instruction on motive reduced the People's burden of proof, we believe there

could be potential for confusion between the motive instruction and the "for the purpose of" revenge or persuasion aspect of the intent element of torture. Regarding this element, the pattern jury instruction on torture, CALCRIM No. 810, states the following: "When inflicting the injury, the defendant intended to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." "Someone acts with a *sadistic purpose* if he or she intends to inflict pain on someone else in order to experience pleasure himself or herself." "Someone acts for the purpose of *extortion* if he or she intends" Including the word "intends" in the definition of "sadistic purpose" and "extortion" makes it less likely a jury would confuse motive, which does not have to be proved, with an intent element, which does have to be proved. However, because the definition expressly ties intent to "sadistic purpose" and "extortion" but not to "revenge" or "persuasion," there could be the potential for a jury to be confused when the motive instruction is given. To a layperson, "revenge" or "persuasion" might be considered motives, rather than simply aspects of the intent element of the crime of torture. Thus, from the layperson's perspective, there may be little practical difference between motive and "for the purpose of" aspect of the intent element, especially when the instruction does not expressly connect the word "intent" to the words "revenge" or "persuasion," but does expressly connect the word "intent" to "sadistic purpose" and "extortion."

Given this potential for confusion, we suggest a modification to the pattern jury instruction on motive, CALCRIM No. 370, that a trial judge could use to expressly exclude the crime of torture from the motive instruction. This would recognize the difficulty reasonable jurors may have in distinguishing between motive and all of the torture purposes, whether tied to the intent to cause pain and suffering.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

HULL, Acting P. J.

MURRAY, J.