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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,
v.
JOVAUGHN TIMMS,
Defendant and Appellant.

A130285
(San Francisco County
Super. Ct. Nos. 211638, 9000197,
9001924)

Defendant Jovaughn Timms was convicted by a jury of: domestic violence with a prior conviction (Pen. Code, § 273.5, subd. (e)(1); Count I);¹ misdemeanor assault (§ 240; Count II), as a lesser included offense of assault with force likely to cause great bodily injury; possession of MDMA (ecstasy) for sale (Health & Saf. Code, § 11378; Count III); misdemeanor violations of stay away orders (§ 166, subd. (c)(1); Counts IV, VII, VIII); attempting to dissuade a victim from testifying (§ 136.1, subd. (a)(1); Count V); and attempting to dissuade a victim from prosecuting a crime (§ 136.1, subd. (b)(2); Count VI). The court reduced Count VI to a misdemeanor and sentenced Timms to serve seven years in prison. Timms argues the trial court violated his rights secured by the Sixth and 14th Amendments to the United States Constitution because it excluded evidence offered to impeach the victim’s testimony. But the record does not fully support Timms’s claim that the evidence was excluded, and the portion that was excluded was minimally probative and cumulative. Timms also claims that his right to equal protection was

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

violated when he was denied enhanced presentence credits that became effective after he was sentenced. Our Supreme Court has held that denial of the enhanced credits to offenders similarly situated as Timms is not a violation of equal protection. Thus, we affirm.⁷

I. BACKGROUND

In April 2009, Timms was convicted of domestic violence (§ 273.5, subd. (a)) against the victim in this case, and was on probation at the time of the incident that supported the current conviction.

On the morning of December 14, 2009, Police Officers Whitney and Padmore were dispatched to an address in San Francisco to investigate a report of domestic violence. Timms was sitting on the sidewalk, and had been handcuffed by officers who arrived earlier on the scene. Paramedics were assisting the victim, who reported that Timms had hit her twice, once on the face and once on the chin. She had a bruise on the left side of her face, and was bleeding from her chin. Whitney and Padmore said she was crying, shaking, nervous, and afraid. Timms had no apparent injuries. The victim told Whitney that a stay-away order was in effect that prohibited Timms from having any contact with her. Whitney verified that a restraining order had been issued in Modesto to protect the victim from Timms.

When Padmore searched Timms, he recovered 198 blue pills from a plastic bag rolled up in sweatpants he was wearing under his jeans. One of the pills was tested and found to contain MDMA. An officer opined that, given their quantity, Timms possessed the pills for sale.

From December 14 to 21, Timms called the victim from jail 45 times. She accepted three of the calls, beginning with the 35th call, all on the night of December 20, and recordings of those three 15-minute conversations were played for the jury.

In these calls, Timms tried to persuade the victim not to testify at the preliminary hearing scheduled for December 31. In the first call, Timms said: “[D]on’t come to court, okay?” “What goes on in our house stay in our house” In the second call, he said: “They gonna try to subpoena you because I’m going . . . to the prelim . . . They

cannot arrest you . . . [b]ecause you are a domestic violence victim.” “So don’t worry about them subpoenaing you and trying to arrest you if you don’t show up, okay? That’s bullshit, okay? I’m not gonna lie to you, okay? I promise. So don’t do what you did last time. Don’t come to say anything, you hear me? . . . ¶ . . . ¶ It’s gonna fuck me up” “Just listen and don’t show up to court on the 31st, okay?” In the third call, he reiterated, “And they can’t do nothing if you don’t show up.”

The calls also incriminated Timms on the domestic violence charge. In first call, he said: “I’m sorry. . . . I fucked up” “Tell them you lied Tell them I didn’t hit you. You cut yourself with a razor” “Just please forgive me, okay?” In the second call, he said: “I gotta stop putting my hands on you.” “And I hurt you But you retaliated though the wrong way ¶ . . . ¶ You told on me. . . . I don’t deserve this, but I got what I had coming right?” The victim responded, “I deserve what you did? No.” Timms replied, “No, you don’t.” In the third call, he said: “I put my hands on you and you told. . . . ¶ . . . ¶ But . . . I trust myself . . . to understand I was wrong, regardless if you told on me or nothing. . . . I’m not supposed to put my hands on you.” The victim said: “I’m sorry that you hit me. You didn’t have to fucking hit me.” Timms response was: “But I’m saying . . . you shouldn’t have had no nigger in the [car], running the rail, doing all this . . . shit.” The victim later said, “But you hit me for no reason.” Again, Timms did not deny it.

The first call was also incriminating on the possession for sale charge. Timms said: “My little cousin was gonna buy the pills from me . . . I had a hell of a lot of shit, but they only gone one bag, though.” When the victim asked where the other bags were, Timms said, “I got . . . probably like another 500 pills. ¶ . . . ¶ in my ass”

The calls revealed that the victim was angry with Timms because she believed he had sex with another woman. Timms denied he had sex with the woman, and when he asked the victim why she had “hit that girl over the head with that flower pot,” the victim responded, “Yeah.” In all of the calls Timms told the victim that he wanted her to stay loyal to him and he would marry her. When he first mentioned putting “a ring on your finger,” the victim replied, “I can’t really believe that.” Timms was advised at the

beginning of each call that the calls were subject to monitoring and recording unless they were made to attorneys, physicians, or “religious advisors.” A voice also advised when a minute was remaining on each call. After the one-minute warning in the second call, Timms and the victim exchanged “I love you’s.” After the one-minute warning in the third call, the victim thanked Timms for calling and told him they were “back.”

Between January and April 27, 2010, Timms placed 271 more calls to the victim from jail, most of them were not accepted. Tapes of three of those conversations were also played for the jury.

In a call on January 30, Timms told the victim, “[Y]ou could say I don’t want to press any charge, I plead the 5th.” He instructed her, “You need to tell them that . . . I had an anxiety attack, I lied” In a conversation on February 9, Timms asked the victim, “You see how much money them fuckin’ pills is worth?” When she said, “No,” he said, “twenty thousand dollars.” He continued: “One of the bags, that was a big ass bag, right. It wasn’t . . . no hundred and ninety-eight pills in that bag right. A hundred and ninety-eight pills is like the size of an M&M bag. . . . The bag was way bigger than the M&M bag right? ¶ . . . ¶ If I’d a’ sold em’ for twelve dollars a pill it would’a been twenty-four hundred.” In a conversation on February 16, Timms asked the victim to write a “notarized letter” and “[t]ell em’ . . . it’s a lie man.” He again suggested that “you couldn’t cut yourself with a razor” He said, “Baby if you knew how to help me you could’a bailed me out already blood.” She responded: “I’m not gonna just bail you. I’m not gonna go back to the situation . . . with you and you putting your hands on me in front of my friends”

The victim testified that she lived with Timms in San Francisco in October and November of 2008, and then moved with him to Modesto. At first she could not remember Timms assaulting her in Modesto or whether a cigarette lighter was involved in the incident. She later said that she was “accidentally” burned on her chest with a lighter. She admitted knowing that Timms was convicted for the assault and ordered to stay away from her, but denied that she told police about the Modesto restraining order when Timms was arrested in San Francisco.

The driver's license recovered from Timms in that arrest bore the victim's San Francisco address, but she was equivocal about whether they were living together at the time. She first said that Timms visited but they were not living together. She later said that she did not know whether it would be "correct or incorrect" to say that they were living together. She "didn't know what to make of the situation. . . . I was basically on call for him . . . say he did come back, needed to change his clothes or something"

The victim initially did not remember what happened in the San Francisco incident. She then said that she and Timms brought a woman they knew named Camille to her house. Camille "had a lot of drugs on her." She "saw Camille maybe give the pills to [Timms], and . . . he didn't take the pills. And she had them, and she had them in her possession, or something like that." She said, "I guess I don't even know how he came in possession of the drugs." She denied telling the police that Timms was going to sell them. He had a large bag of indigo blue pills, but she "never blatantly said that he was going to sell the pills." She said, "I don't know what he was going to do with all those pills. . . . Sell them, give them away. Or maybe she was going to sell them"

Around midnight or 1:00 a.m. that night, she walked in on Timms and Camille having sex and was angry "[b]ecause [she] thought that he was my boyfriend." She claimed that Timms had proposed to her in December of 2008, and that they were engaged before the phone calls from jail when he talked about marrying her. She did not say anything when she first saw Timms and Camille having sex, she just left the house and drove around. When she returned they were still at the house. Timms hit her once in the face because she was "going off at the mouth" about how upset she was about his sex with Camille. She hit Camille over the head with a flower pot, but was not physically violent with Timms. She testified: "I was just . . . mad and angry. I don't know why I took it out on her. ¶ . . . ¶ And I'm not being light about it . . . some things are little bit too much for me to handle." She called the police three or four minutes after Timms hit her.

Timms introduced a portion of a telephone conversation with the victim on February 3, 2010. In it, Timms stated, "[Y]ou can make a letter and get it notarized,

right. And just tell them . . . that you lied.” The victim replied, “No. I can’t tell them I lied, because then they could bring charges on me.”

II. DISCUSSION

A. Impeachment of the Victim — December 8 Report

Timms argues that the trial court improperly excluded evidence of inconsistent statements the victim made to police recorded in a December 8, 2009 report about Timms’ behavior. Defense counsel offered the evidence to impeach the victim’s “credibility in general,” not her testimony concerning the charged crimes. He stated, “And I believe how the Inspector characterized it in the chronology was [the victim] changed her story; she changed her story again; and then she changed her story yet again.” When the prosecution moved to exclude any reference to the December 8 police report, the court said that it was inclined to exclude the evidence under Evidence Code section 352, but deferred ruling on the motion.

The victim was then cross-examined at some length about the December 8 report. When first asked, she said that Timms had taken her car, and she did not know “if I was going to get the car back; I didn’t know if that was the end of the relationship.” However, he returned the car that same day. When the subject was again broached, the victim said that she “vaguely” remembered talking to Inspector Murphy on December 9. She said: “I remember speaking with [Murphy], and she had needed to, like — she was trying to probe me for information, like cross-examining me and asking different questions, and things like that. And she just made — whatever information I was telling her, she just basically like discredited my whole thing with her, whatever she was working on. It was — just basically looked like it wasn’t even possible, because — I don’t know. I remember arguing with her. I remember having an argument with her, because she was trying to make me believe that I was telling her a lie.”

After the victim testified, the court stated that it had “reversed its original position to exclude the evidence [of the December 8 report] under 352,” and “allowed the cross-examination on that issue.” The court concluded that “we do have to resolve any conflict

in favor of the defendant and there was some substantial significant value to the testimony in this regard”

Timms argues that while “the court permitted limited cross on some of the factual predicates to the issue of inconsistency when [the victim] made her December 8 report . . . counsel was not permitted to call the officer who took the report or to impeach with the officer’s chronology when he wrote that the victim’s story was inconsistent.” However, Timms was given full leeway to cross-examine the victim on the details in the report, and there is no indication in the record that he tried to call any of the investigating officers as witnesses, presumably because the victim admitted that Officer Murphy did not believe her, which was the point the defense was trying to make. The court’s remarks did not suggest that the court would have excluded further evidence regarding the report. Thus, there is no support in the record for Timms’s argument that the court improperly excluded evidence of the December 8 report.

B. Impeachment of the Victim — Domestic Violence Arrests

Timms contends that the court erred in excluding evidence of the victim’s arrests for domestic violence, one for an incident involving him in June 2009 after he had been placed on probation in Modesto, and the other in 2002 involving another individual. During cross-examination, the victim admitted she was arrested for assaulting Timms. When defense counsel asked, “And what happened with that?” the court sustained the prosecution’s relevance objection. The court later explained that it excluded evidence of the victim’s domestic violence arrests because Timms was not claiming that he acted in self-defense.

Timms contends that evidence of the arrests should have been admitted because they reflected moral turpitude that bore on the victim’s credibility. He argues that exclusion of this evidence was an abuse of discretion, and a violation of his constitutional rights to confrontation and due process. We disagree. While the arrests could be taken to suggest the victim had a capacity for violence, her capacity was irrelevant to any of the charged crimes, including the domestic violence and assault counts because Timms made no claim that he acted in self-defense.

Even if the victim’s “willingness to do evil,” as Timms puts it, was relevant impeachment, the excluded evidence had virtually no probative value for a number of reasons. First, the evidence concerned arrests not convictions. Second, there was no question that the victim could be violent because she admitted hitting Camille over the head with a flower pot. Third, the jury learned that she had been arrested for assaulting Timms, and thus that she might have, at some point, been violent toward *him*. The evidence was merely the details of the incident involving Timms, and an arrest, remote in time, involving the victim and a different individual. In light of the defense offer that it tended to show the victim’s potential for violence, the excluded evidence was wholly cumulative.

Since the probative value of the arrests was at best minimal, the evidence was subject to exclusion under Evidence Code section 352, and a ruling on that ground would not have infringed Timms’s constitutional rights. (*People v. Cunningham* (2001) 25 Cal.4th 926, 998–999 [application of the ordinary rules of evidence does not generally implicate the right to present a defense; Evidence Code section 352 must yield to the due process right to a fair trial only when the evidence at issue has “*significant* probative value”]; see also *People v. Abilez* (2007) 41 Cal.4th 472, 503; *People v. Boyette* (2002) 29 Cal.4th 381, 427–428; *People v. Gurule* (2002) 28 Cal.4th 557, 620.)

Moreover, its exclusion was harmless under any standard. Timms did not need domestic violence arrests to impeach the victim because she effectively impeached herself with her equivocal testimony. Moreover, the case against Timms was overwhelming. He essentially convicted himself in his calls to the victim from jail.

There is no basis to reverse the convictions.

C. Conduct Credit

Timms was awarded 160 days of local conduct credit under sections 4019 and 2933 as they were in effect when he was sentenced on October 29, 2010. He seeks additional credit under section 4019 as it is now in effect, which by its terms applies only to crimes committed on or after October 1, 2011. (§ 4019, subd. (h).)

Timms argues that prospective application of the October 2011 amendment of section 4019 deprives him of his constitutional right to equal protection under *People v. Sage* (1980) 26 Cal.3d 498, and *In re Kapperman* (1974) 11 Cal.3d 542. He also says that *In re Strick* (1983) 148 Cal.App.3d 906, on which respondent relies, is distinguishable.

However, *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), rejected these same equal protection arguments against prospective application of January 2010 amendments to the credit scheme. “ “[T]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” ’ ’ (*Id.* at p. 328.) *Brown* was unable to show he was similarly situated as prisoners sentenced under the January 2010 amendments because “the important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows.” (*Id.* at pp. 328–329.) The court said that it found *Strick* persuasive on the point (*id.* at p. 329), and explained why *Sage* and *Kapperman* did not compel a contrary conclusion (*id.* at pp. 329–330).

Timm’s equal protection argument is untenable under the reasoning of *Brown*. (See *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9 [prisoners who served their pretrial detention before the current statute’s effective date, and those who serve their detention thereafter, are not similarly situated under the reasoning of *Brown*].)

III. CONCLUSION

The judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.