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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

GIANINA MARIA PARRINO,

Defendant and Appellant.

A131815

(Lake County
Super. Ct. No. CR922190)

A jury convicted appellant Gianina Maria Parrino of dependent adult abuse likely to produce great bodily injury or death and assault by means of force likely to produce great bodily injury. (Former Pen. Code,¹ §§ 245, subd. (a)(1) [Stats. 2004, ch. 494, § 1, pp. 4040-4041], 368, subd. (b)(1) [Stats. 2004, ch. 893, § 1, pp. 6824-6826].) Sentence was suspended and she was granted probation, subject to a condition requiring her to serve a year in county jail. Parrino appeals, contending that (1) the assault charge was barred by the statute of limitations; (2) the trial court erred by admitting hearsay evidence of her purported confession; (3) defense evidence of a prior instance of the victim’s injury while intoxicated was improperly excluded; and (4) the imposition of two restitution fines constitutes multiple punishment. We affirm the conviction, including the sentence.

I. FACTS

On July 4, 2005, the Lake County Sheriff’s Office received a report that Stanley Krastins—a 39-year-old paraplegic who had no use of his legs and very poor vision—had

¹ All statutory references are to the Penal Code unless otherwise indicated.

been injured at his Clearlake Oaks home. Krastins was conscious and seated in his bed when Lake County Sheriff Sergeant Richard Ward arrived. He told the sheriff that his live-in caregiver—appellant Gianina Maria Parrino—had pushed him off his bed and thrown various objects at him, including a ceramic plate and a five-pound dumbbell weight. Krastins was bleeding from a quarter-size lump on the side of his head, with a small cut in the center of it. The plate and the weight were found on the floor. Neither had any blood or hair on it.

Medics suggested that Krastins go to the hospital for medical treatment, but he refused to do so. Krastins—who was an alcoholic—had been drinking that day but did not appear to be intoxicated to the sheriff, who knew him. Parrino also admitted to having a few beers.

When questioned, Parrino told the sheriff that she had been Krastins’s caretaker for three weeks. She was concerned that the amount of alcohol he consumed diminished his ability to care for himself. When she returned to the home after her day off, she saw Krastins’s father hand him a beer through a window.² She was angry about the father providing Krastins with alcohol and verbally confronted him about it. She told the sheriff that when she entered the home, she had found Krastins bleeding on the floor and called 911. Parrino denied having any physical altercation with Krastins.

Parrino was arrested and charged with assault and dependent adult abuse. (See former §§ 245, subd. (a)(1), 368, subd. (b)(1).) She continued to work for Krastins even after the incident, although she no longer lived in his home. Krastins felt that he needed her to be his caregiver. He reimbursed her for her bail money. Within two weeks, Krastins told Lake County officials that he did not want to press charges. He was obviously intoxicated when he changed his story about the July 4, 2005 incident. Parrino was interviewed again about this time and she again denied having any physical altercation with Krastins on the holiday.

² There was evidence at trial that Krastins’s bed was within an arm’s distance of the window.

Still, felony charges were filed, on which Parrino was arraigned in August 2005. In September 2005, she produced documents stating that Krastins wanted to drop all charges, which had been based on false reports. The district attorney's office conducted an investigation. Krastins told an investigator that Parrino had locked him in his home and hit him with the dumbbell. Although her actions were wrong, he sought to drop the charges. He wanted the matter to be over; he was in a wheelchair, and he did not want to have to go to court. A December 1, 2005 information was dismissed on February 8, 2008.

In June 2009, Lake County officials received a report that Parrino had struck the man with whom she had been living. A protective order issued barring her from using alcohol. (See former § 136.2 [Stats. 2008, ch. 86, § 1].) In May 2010, Parrino was found intoxicated. She was arrested for violating the court order and for being intoxicated in public.

Meanwhile, in February 2010, investigators again contacted Krastins, who was then willing to prosecute Parrino. By this time, his medical condition was more stable and he had been sober for a year and a half. He expected to be mobile and “to have a new lease on life” after upcoming surgery. In March 2010, a new complaint was filed based on the July 2005 incident, charging Parrino with dependent adult abuse in circumstances likely to produce great bodily injury or death; assault by means likely to cause great bodily injury; and two counts of misdemeanor dependent adult abuse.³ (§ 243.25; former §§ 245, subd. (a)(1), 368, subds. (b)(1), (c).)

In June 2010, Parrino pled not guilty to all charges. After a preliminary hearing, she was held to answer. On July 2, 2010—almost five years after the July 4, 2005 incident—a new information charged her with two felonies—dependent adult abuse likely to produce great bodily injury or death and assault by means of force likely to produce great bodily injury. (Former §§ 245, subd. (a)(1), 368, subd. (b)(1).)

Before trial, Parrino's motion in limine to exclude any reference to her three misdemeanor convictions for battery, cutting utility lines and vandalism in the

³ The misdemeanor counts were unresolved at the time of judgment.

prosecution's case-in-chief was granted. (See §§ 242, 591, 594; see also Evid. Code, § 352.) She was unable to exclude evidence of her efforts to persuade Krastins to withdraw his July 4, 2005 allegations against her, made shortly after that date.

Parrino was tried by a jury in March 2011.⁴ Krastins testified that he had told Parrino that he would cut back on his drinking. When she saw that his father had brought him a beer, she poured the can of beer on Krastins's head and was verbally abusive to him. She picked up a tray that sat next to his bed and threw it toward Krastins. She pushed him out of bed, tried to kick him, and hit him on the head with a five-pound weight. When she saw that he was bleeding, Parrino called 911.⁵ Krastins denied falling out of bed; he told the jury that his injury was the result of Parrino's attack.

Sergeant Ward testified that when he questioned her, Parrino denied having any physical altercation with Krastins. The victim's 85-year-old father, Roman Krastins, told the jury that he spoke with Parrino two or three days after the incident. She did not say anything to him about any physical altercation with his son. He admitted that his memory was not what it had been in 2005. Sergeant Ward then testified that when he interviewed Roman Krastins in July 2005, the elder Krastins reported to him that Parrino had admitted that she threw a weight during the July 4, 2005 incident.

Once the People rested, Parrino moved for acquittal on the assault charge on statute of limitations grounds, without success. (§ 1118.1.) Her theory of defense was that Krastins injured himself falling out of bed because he was intoxicated. Ultimately, the jury convicted her of both charges. (Former §§ 245, subd. (a)(1), 368, subd. (b)(1).) In April 2011, Parrino was placed on probation for three years, subject to various conditions, including serving a year in county jail and the assessment of two fines of \$800 each.

⁴ During trial, Parrino was intoxicated one day in court, with a blood-alcohol level of .024. The trial court observed her talking and gesturing in an inappropriate manner before the jury came in, but that she was well behaved when the jury was present. It denied a prosecution request to revoke Parrino's status as one released on her own recognizance.

⁵ The 911 call was played for the jury.

II. STATUTE OF LIMITATIONS

A. Pleading

Parrino contends the July 2, 2010 prosecution of the July 4, 2005 assault was barred by the statute of limitations because the People failed to plead and prove the timeliness of its prosecution. This was the basis of her motion for acquittal.⁶ The trial court took judicial notice of its own records that Parrino had originally been charged by a December 1, 2005 information for the same conduct and that this information had been dismissed on February 8, 2008. Those dates were recounted to the trial court by the courtroom clerk. Based on these records, the trial court ruled that the limitations period was tolled during the time that the earlier information had been pending, making the new information one that was filed within the three-year limitations period.

Parrino argues that the prosecution failed to plead the tolling facts in the second information. Although she did not raise a pleading issue in the trial court, she may raise that issue on appeal, because whether a prosecution was filed within the statutory limitations period is a jurisdictional issue. (*People v. Williams* (1999) 21 Cal.4th 335, 337-338; *In re Demillo* (1975) 14 Cal.3d 598, 601; *People v. Crosby* (1962) 58 Cal.2d 713, 725; *People v. Lynch* (2010) 182 Cal.App.4th 1262, 1271.) An accusatory pleading must allege facts showing that the prosecution is not barred by the applicable statute of limitations. If the limitations period provided by statute has run since the commission of the offense, then the information must allege facts to show when that period was tolled. (*In re Demillo, supra*, 14 Cal.3d at pp. 601-602 [defendant's absence from state]; *People v. Crosby, supra*, 58 Cal.2d at pp. 724-725 [same].) The People have the burden of proof to establish that the offense was committed within the applicable limitations period. (*People v. Crosby, supra*, 58 Cal.2d at p. 725.)

The July 2, 2010 information does not plead these facts. Thus, on its face, the prosecution was untimely. (See, e.g., *People v. Lynch, supra*, 182 Cal.App.4th at

⁶ Initially in the trial court, Parrino argued that the dependent adult abuse charge was also barred by the statute of limitations, but later, she conceded that it was timely filed. She does not raise this contention on appeal.

p. 1272.) However, the error was not prejudicial and does not require reversal of Parrino's conviction. The law does not require reversal or retrial for jurisdictional defects when they are cured as a matter of law on an undisputed record. (See *People v. Williams, supra*, 21 Cal.4th at p. 345.) The dates when her first proceeding was pending have been established as a matter of law, making the existence of an event tolling the limitations period an undisputed fact. In these circumstances, any failure to plead the facts relevant to the first proceeding is harmless. (See, e.g., *People v. Lewis* (1986) 180 Cal.App.3d 816, 821; see also *People v. Williams, supra*, 21 Cal.4th at pp. 345-346 [citing *Lewis* with approval]; *People v. Castillo* (2008) 168 Cal.App.4th 364, 376-377.)

B. *Proof*

Parrino also argues that the prosecution failed to prove that the assault charge was filed within the applicable statute of limitations. We disagree. The limitations period for felony assault is three years. (See former §§ § 245, subd. (a)(1), 801 [Stats. 1984, ch. 1270, § 2, p. 4335].) Time during which a prosecution of the same person for the same conduct is pending is not included in the limitations period. (Former § 803, subd. (b) [Stats. 2003-2004, 4th Ex. Sess., ch. 2, § 7, eff. Mar. 1, 2005].) The filing of an information commences the prosecution of an offense. (Former § 804, subd. (a) [Stats. 1998, ch. 931, § 358, pp. 6572-6573]; *People v. Terry* (2005) 127 Cal.App.4th 750, 764; see *People v. Castillo, supra*, 168 Cal.App.4th at p. 374.) The July 2, 2010 information was filed almost five years after the July 4, 2005 assault, but more than two years of that period was tolled during the pendency of the original case in this matter from December 2005 through February 2008. When we exclude the tolling period, we conclude that the July 2, 2010 information was filed within the three-year limitations period, as a matter of law.⁷ (See former § 803, subd. (b).)

Still, Parrino argues—without authority—that the issue should have been submitted to the jury for determination as part of the prosecution's case. Again, we must disagree. The issue was resolved in the prosecution's favor at the hearing, based on court

⁷ We reject Parrino's contention that there was insufficient evidence to support the trial court's finding.

records of which the trial court took judicial notice. (See Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).) When a trial court takes judicial notice of a matter, the underlying fact is established and no contrary evidence may be offered to dispute it. (See Cal. Law Revision Com. com., 29B pt. 1B West's Ann. Evid. Code (2011 ed.) foll. § 457, p. 276.) Given the undisputed facts, the issue before the trial court was a pure question of law. As there are no factual disputes for a jury to resolve, the trial court properly determined the legal question presented. (See *People v. Castillo*, *supra*, 168 Cal.App.4th at p. 374; *People v. Lewis*, *supra*, 180 Cal.App.3d at p. 821.)

III. EVIDENTIARY ISSUES

A. Admission of Evidence

Parrino raises two evidentiary claims of error. First, she urges us to conclude that the trial court erred by admitting hearsay evidence from Krastins's father of her purported confession. She reasons that the evidence could not be admitted as a prior inconsistent statement because Roman Krastins was not asked about the statement while he was on the witness stand and was not subject to recall at the time of admission of the statement. To admit the statement without these procedural safeguards violated her right to cross-examine an adverse witness and her due process rights, requiring reversal of her conviction.

At the time of trial, Roman Krastins was 85 years old. He testified that Parrino did not admit making a physical attack on Stanley Krastins when he spoke with her about the events of July 4, 2005 several days afterward. He told the jury that in 2011, his memory was as good as it had been in 2005. The elder Krastins was not asked about any statement that he may have given police during his testimony. When he completed his testimony, Roman Krastins was excused as a witness. Later, Sergeant Ward was recalled to the stand. He testified that when he interviewed Roman Krastins in July 2005, the elder Krastins told him that Parrino had admitted that she threw a weight, although she said that she did not mean to do so. This evidence was brought out before the jury over Parrino's hearsay objection. The trial court admitted the statement as a prior inconsistent statement.

Hearsay evidence of a prior statement that is inconsistent with a witness's trial testimony may be admitted to prove the truth of the matter asserted if the prior inconsistent statement is offered in compliance with Evidence Code section 770. (Evid. Code, § 1235; *People v. Cowan* (2010) 50 Cal.4th 401, 462.) Section 770 requires the exclusion of a prior inconsistent statement unless the witness was given an opportunity to explain or deny the statement; or has not been excused from giving further testimony. (Evid. Code, § 770.) We review a trial court's ruling on the admissibility of hearsay evidence for an abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151, which was disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 419-420.)

Parrino's claim of error on appeal assumes that Roman Krastins was no longer available for cross-examination about his prior inconsistent statement. (See Evid. Code, § 770, subd. (a).) The record does not support this assumption. Although the elder Krastins had been excused as a witness, the record does not indicate that he could *not* have been recalled. The trial court's overruling of Parrino's hearsay objection raises an inference that the witness *was* available for recall. Without some affirmative evidence that Roman Krastins was not available, Parrino cannot establish the fact underlying her claim of error on appeal—that she had no opportunity to recall and cross-examine him about the statement. (See, e.g., *People v. Cowan*, *supra*, 50 Cal.4th at p. 463.) Thus, it appears that the trial court acted within its discretion by admitting Sergeant Ward's testimony about Roman Krastins's prior inconsistent statement. (See, e.g., *People v. Guerra*, *supra*, 37 Cal.4th at p. 1113; Evid. Code, §§ 770, 1235.)⁸

B. *Exclusion of Evidence*

Parrino also contends that the trial court improperly excluded her evidence of a prior instance in which Krastins was injured while intoxicated. At trial, she sought to introduce evidence that there had been other instances when Krastins had inadvertently

⁸ Parrino is not precluded from raising this issue in a petition for writ of habeas corpus if she can demonstrate by competent evidence that Roman Krastins was, in fact, unavailable for recall at the time that Sergeant Ward testified.

injured himself while intoxicated, to establish her defense that this was what happened on July 4, 2005. (See Evid. Code, § 1103.) The trial court conducted an in camera hearing to determine whether Parrino’s proffered character trait evidence from two witnesses was admissible. One witness testified that he had never seen Krastins injure himself as a result of his intoxication; the other testified that Krastins once fell out of a chair while intoxicated, bruising himself. The trial court ruled that the evidence of a single act did not constitute character trait evidence of a propensity to injure oneself. It also ruled that if the proffered evidence did have some probative value, it was outweighed by the prejudicial effect—confusion and undue consumption of time—under Evidence Code section 352.

On appeal, Parrino argues that the exclusion of this evidence violated her statutory right to admit this evidence. We disagree. As Parrino only offered evidence of a single instance of injury resulting from intoxication, the evidence did not constitute evidence of a character trait under section 1103 of the Evidence Code. That provision allows admission of character evidence in the form of “evidence of specific *instances* of conduct” of a crime victim. (Evid. Code, § 1103, subd. (a), italics added.) The plain meaning of this plural usage is that a single instance cannot establish a trait or habit. Even if the single instance offered had some probative value, the trial court retained a broad discretion to exclude it because that minimal probative value was outweighed by the time required to bring this issue to the jury and the potential for confusing the jurors. (See *id.*, § 352.) Viewed through the prism of the abuse of discretion standard of review, the trial court’s exclusion of the proffered evidence was not arbitrary. It did not fall outside the bounds of reason or result in a manifest miscarriage of justice. (*People v. Williams* (1998) 17 Cal.4th 148, 162; see *People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Parrino also complains that the exclusion of this evidence—if proper under state statute—deprived her of her federal constitutional right to put on a defense. (U.S. Const., 6th Amend.) If a state statute prevents a criminal defendant from presenting relevant evidence, it implicates the Sixth Amendment right to present a defense and to confront

adverse witnesses. However, this does not necessarily render application of the statute unconstitutional. Trial courts retain a wide latitude to impose reasonable limits on a defendant's presentation of evidence in order to avoid jury confusion or other prejudice, or to exclude admission of evidence of marginal relevance. (See *Michigan v. Lucas* (1991) 500 U.S. 145, 149; *People v. Cudjo* (1993) 6 Cal.4th 585, 611; see also *Rock v. Arkansas* (1987) 483 U.S. 44, 55-56, fn. 11.) In most cases, the ordinary rules of evidence will not impermissibly infringe on a defendant's constitutional right to present a defense or otherwise impinge on his or her due process rights. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 58 [Evid. Code, § 1101 case]; see *People v. Cudjo, supra*, 6 Cal.4th at p. 611.) The exclusion of the proffered evidence under California statutory law did not deprive Parrino of her federal constitutional right to offer a defense.

IV. MULTIPLE PUNISHMENT

Finally, Parrino contends that the trial court's imposition of two restitution fines constituted multiple punishment. She argues that her two convictions were based on the same conduct, warranting only a single sentence. She assumes that the trial court imposed twice the fines it should have. In order to prevent multiple punishment, she asks us to halve each of the fines. (See §§ 654, 1202.44; former § 1202.4 [Stats. 2010, ch. 351, § 9].)

The probation officer recommended that Parrino be granted probation and be ordered to pay two restitution fines of \$800 each. The trial court followed this recommendation. It did not impose sentence for either of the convictions. Instead, as a condition of probation, Parrino was ordered to pay an \$800 restitution fine. (Former § 1202.4.) She was also ordered to pay an additional \$800 restitution fine, which was to be stayed unless her probation was revoked later. (§ 1202.44.) Parrino did not raise a multiple punishment objection to the imposition of these fines in the trial court.

When a criminal defendant is convicted of a crime, the trial court typically assesses a restitution fine in addition to any other penalty provided by law. (Former § 1202.4, subds. (a)(3)(A), (b).) When the defendant is convicted of a felony, the fine must be at least \$200 and not more than \$10,000. The trial court has discretion to set the

amount of the fine based on the seriousness of the offense. (Former § 1202.4, subd. (b)(1); *People v. Hanson* (2000) 23 Cal.4th 355, 362-363.) When the defendant is granted probation, the trial court must impose an additional probation revocation fine in the same amount as the section 1202.4 restitution fine. The probation revocation fine becomes collectable only if the defendant's probation is revoked. (§ 1202.44.)

Separate restitution fines may not be imposed for separate convictions committed in a indivisible course of conduct. A single criminal act may not be punished under more than one statute. (§ 654; *People v. Tarris* (2009) 180 Cal.App.4th 612, 628.) As the same criminal conduct—assaulting Krastins and injuring the dependent adult—formed the basis of both of Parrino's convictions, the statutory ban on multiple punishment precluded the trial court from imposing more than one sentence for both offenses. (See *People v. Tarris, supra*, 180 Cal.App.4th at p. 627.) Statutory fines constitute punishment within the meaning of the section 654 ban on multiple punishment. (§ 15, subd. 3; *People v. Hanson, supra*, 23 Cal.4th at pp. 361-363; *People v. Tarris, supra*, 180 Cal.App.4th at p. 628.)

Parrino argues that it appears that the trial court assessed half of each of the restitution and probation revocation fines for the assault and half for the dependent adult abuse conviction. In the case she cites in support of this contention, the trial court *expressly* imposed half of the fines attributable to one conviction and half for the other conviction. (See *People v. Tarris, supra*, 180 Cal.App.4th at p. 627.) In the matter before us, the trial court did not discuss the applicability of section 654, nor did it attribute all or part of the assessed fines to a specific conviction. The cited authority is factually distinguishable from the case before us.

The selection of the amount of a restitution fine within a statutory range is a matter for the trial court's discretion. (Former § 1202.4, subd. (b)(1).) The probation revocation fine must be set at the same amount. (§ 1202.44.) A single conviction may support a section 1202.4 fine as great as \$10,000 and a matching section 1202.44 fine in the same amount. (See former § 1202.4, subd. (b)(1); § 1202.44.) As the appellant, Parrino bears the burden of proving that the trial court's sentencing decision was an abuse of discretion.

(See *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) In the absence of a clear showing of an abuse of discretion, we presume that the trial court acted within its discretion. (See, e.g., *People v. Giminez* (1975) 14 Cal.3d 68, 72.) Applying this presumption, we conclude that Parrino has failed to meet her burden of proving that the trial court imposed part of each of the two fines for each conviction, rather than imposing it for one of them.

The judgment is affirmed.

Reardon, J.

We concur:

Ruvolo, P.J.

Baskin, J.*

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