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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.

ROBERT VERNON DOSS,

Defendant and Appellant.

A132346

(Contra Costa County
Super. Ct. No. 05-100761-6)

Appellant Robert Vernon Doss received a four-year grant of probation upon (1) his conviction by a jury of willfully inflicting corporal injury on his cohabitant, Kristi Florence, and (2) the sustained allegation that he had another such conviction within seven years prior to commission of the charged offense. (Pen. Code, § 273.5, subds. (a), (e).) On appeal, appellant maintains that the foundation for impeaching witness Kristi Florence was lacking; his trial counsel provided ineffective assistance; and the court erred in overruling a hearsay objection. We affirm.

I. FACTUAL BACKGROUND

A. April 2010 Events

On April 16, 2010,¹ Florence lived with appellant, her “boyfriend, fianc[é],” in a condominium complex in Hercules. They had lived together for two and a half years.

Around 7:30 that morning, she was in the bathroom combing her hair. Appellant came into the bathroom, yelling and screaming, and slapped her in the face, causing the brush to fall. He pushed Florence to the ground and hit her in the head and face several

¹ All dates are in the 2010 calendar year.

times with the hairbrush. Florence was fearful and, clothed only in her bra and underwear, ran to her car and drove to another area of the complex to get away from appellant.

On April 19, Police Officer Joshua Evans responded to a report of a verbal dispute at the Hercules address. Approaching the residence, he heard a female yelling and screaming loudly. Florence's cousin let him in. Appellant was talking on a cell phone in the dining room. Florence came out of the hall and the two got into a shouting match. Officers separated them and ordered Florence to return to the bedroom.

Officer Evans talked with Florence. He noticed a large (approximately four inches), dark bruise on her right forearm. Florence indicated she had another, lifted her skirt and revealed an approximately three-inch colored bruise on her right hip. She also pointed out an injury to the little toe of her right foot.

Florence was crying, almost hysterical. After she calmed down the officers photographed the injuries. Florence told Officer Evans that appellant caused the injuries on April 16 and described what happened. After taking the verbal statement he asked her to provide a written statement, which she did.

Florence said she was afraid of appellant and asked for assistance in filling out an emergency protective order. She wanted to press charges and filled out a complainant's arrest form.

Police Detective Robert Pesmark conducted the follow-up investigation. Florence showed him the bathroom where the incident occurred. She pointed out a hairbrush that "was used during the incident." It had a solid wood handle, was approximately four inches long and weighed about a pound.

B. Florence's Preliminary Hearing Testimony

At the preliminary hearing, Florence claimed not to recall the events of April 16. In response to questions about the incident and her verbal and written statements to the police officers, she said: "I don't really remember"; "I don't remember or I don't recall the whole incident verbatim"; "I don't recall really what happened. I just know that it was just an intense morning"; "I don't really recall the whole incident"; "I said I don't

remember”; “I don’t really recall that incident”; and “I don’t really recall the incident. [¶] . . . [¶] . . . I don’t recall what happened. [¶] . . . [¶] . . . I’m not saying it’s inaccurate. I just don’t remember.” When showed photos of the bruises she sustained, Florence continued: “I don’t really recall what happened” and “I had two bruises, but I don’t recall what led up to the bruising.” Finally, she said that taking a look at her written statement would not refresh her recollection.

Florence testified that appellant was her fiancé and she “would rather have Mr. Doss out to take care of his family.” Further, “[w]hatever happens to him happens to me,” so she did not want to see anything happen to him as a result of the April 16 incident.

Thereafter, defense counsel cross-examined Florence.

C. Trial Testimony

1. Florence’s Preliminary Hearing Transcript Read at Trial; Officer Testimony

Florence was subpoenaed but failed to appear to testify in court. The district attorney’s office made a showing that it exercised adequate due diligence in attempting to locate the witness. The court issued a bench warrant and permitted the prosecution to proceed via the preliminary hearing transcript. Defense counsel objected that she could not effectively cross-examine Florence because her preliminary hearing testimony “consisted essentially of her saying that she had no recollection of anything happening ever.” The prosecutor countered that Florence willfully failed to remember.

The court conducted an in camera hearing, and thereafter found that Florence was “being deliberately evasive with, frankly, both counsel. She doesn’t remember anything about what happened, which is a little hard to believe. So I think that’s fairly obvious.” The court continued: “The criteri[on] is whether or not there was an opportunity to cross-examine. I did note that the cross-examination was extremely brief. I also recognize you didn’t have a lot [to] work with there, in terms of testimony on direct to cross-examine, but there was very little inquired about, for probably a variety of reasons. But I think the opportunity was there, frustrating as it might have been for everybody involved, and I think it meets the criteri[on].”

Officer Evans and Detective Pesmark testified for the People.

2. Domestic Violence Expert Testimony

Detective Shawna Sommers of the sheriff's office testified as an expert in the area of domestic violence. She explained that there is no typical domestic violence victim, but the risk is highest for women between the ages of 20 and 24 and the risk of victimization is three times higher for women of lower economic background. Based on her personal experience, she stated probably 85 percent of domestic violence victims stay with their abusers. There are many reasons why the domestic violence victim does not leave the relationship: financial, because the abuser is the breadwinner; control, where the victim's only friend is the abuser; the victim loves the abuser; they have children together; there is a family or religious influence; or the batterer convinces the victim it will not happen again. Domestic violence victims want the abuser to receive counseling or some help, but generally do not want the abuser to be held accountable for the crimes.

Sommers also explained that the cycle of violence occurs in three phases: the initial, tension-building phase; the explosive phase which includes an abusive incident; and then the honeymoon phase, in which the abuser may promise it will not happen again, go to counseling, and apologize. Sommers stated it was not uncommon for a victim in the honeymoon phase to go back to the abuser. Further, while in a honeymoon phase, the victim, when called to testify in court, might minimize or completely recant the violent episode. Detective Sommers testified that the victim's original statement to the police would be more reliable than later minimization in court. At that time they are reacting out of fear, possibly anger, and are speaking the truth "like an excited utterance, like a spontaneous statement."

II. DISCUSSION

A. Legal Framework

Former testimony against a party is admissible provided the party was also a party to the proceeding in which the testimony was given, and "had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (Evid. Code, § 1291, subd. (a)(2).) Admissibility of the former testimony

generally “is subject to the same limitations and objections as though the declarant were testifying at the hearing” (*Id.*, subd. (b).)

Evidence Code sections 1235 and 770 except from the hearsay rule a witness’s prior statement that is inconsistent with his or her testimony in the present hearing, provided the witness is given the opportunity to explain or deny the statement, or the witness has not been excused from giving further testimony in the action. Consistency may be implied in situations where the witness’s claim of lack of memory amounts to deliberative evasion. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220; *People v. O’Quinn* (1980) 109 Cal.App.3d 219, 224.)

We review a trial court’s decision to admit or exclude hearsay evidence for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

B. *Analysis*

Appellant first maintains that the statements the prosecutor elicited from Florence at the preliminary examination were not inconsistent with any prior statements she purportedly made to the police. This is so, he asserts, because the core of the questions consisted of asking whether she recalled telling the police certain things, to which she consistently answered “[n]o.” Thus, according to appellant, “[t]he only impeachment of that testimony would be to show that she in fact did recall something she may have said.” In other words, the questions posed did not “present the witness with the foundational facts necessary to render an inconsistent statement related by a later witness admissible.”

It is true that the prosecutor frequently asked Florence whether she recalled certain aspects of what happened on April 16, or whether she recalled saying certain things in her written statement or directly to the police. However, that is not all that transpired.

For example, the prosecutor also asked, “[I]s it true . . . that in your written statement to police officers . . . , you said that after you were in [the] bathroom combing your hair the defendant came [in] yelling at you at the top of his lungs?” to which she replied: “I won’t say . . . that’s necessarily true. I don’t really remember.” And again: “[I]n that statement . . . , you stated Mr. Doss came into the bathroom yelling at you at the

top of his lungs, correct?” Answer: “It’s a possibility. I’m not sure. I don’t remember or I don’t recall the whole incident verbatim.”

Later, this direct question was posed: “[I]s it an accurate statement to say that Mr. Doss, after pushing you to the floor, continued to yell at you and pick up your brush and start hitting you in the face and on your head with it?” Response: “I don’t really recall the incident.”

The prosecutor also asked direct questions about the photographs an officer took on April 19. Queried the prosecutor: “Are those photos of injuries that you stated to the officer you sustained at the hands of the defendant when he struck you with the hairbrush . . . ?” Answered Florence: “I don’t recall saying that.” And further: “How did you arrive at those injuries, then?” Answer: “I don’t really recall what happened.” “[H]ow [did] you arrive at the large bruising . . . on your forearms as depicted in People’s 2 for identification . . . ?” Answer: “I’m not sure.” Continuing: “Would you say [the photographs] are a fair and accurate representation of what the bruising looked like on you on April 19th, 2010?” Response: “No. I had a bruise. I had two bruises, but I don’t recall what led up to the bruising.” And finally: “[Y]ou pointed out to officers an injury on your foot that you claimed that you sustained from this incident with the defendant on April 16th, 2010, correct?” Response: “It’s a possibility. I don’t recall.”

From this it is apparent that witness Florence was presented with the foundational facts necessary to render a prior inconsistent statement admissible under Evidence Code section 1235.

Appellant also complains that Florence was never given an opportunity to explain or deny the statements because she was not asked whether she made them, only whether she could recall making them. From the above it is apparent that the prosecutor prompted Florence to recount the events of April 16. Sometimes the question was phrased as “do you recall,” but other times direct questions were asked. Florence had the opportunity to explain or deny the key factors: She told police officers in a written statement that appellant came into the bathroom yelling at her at the top of his lungs; after pushing her to the floor, appellant continued to yell and hit her in the face and head with the brush;

she told police officers that the photos depicted injuries she sustained at the hands of appellant when he struck her with the hairbrush; the photos accurately represented what the bruising looked like on April 19; and she showed officers an injury on her foot that she claimed stemmed from the April 16 incident with appellant.

Appellant also asserts that his trial counsel was ineffective in failing to object to numerous “do you recall” questions and to Officer Evans’s impeachment testimony.

To succeed on a claim of ineffective assistance of counsel, the defendant must demonstrate that (1) counsel’s performance was deficient, using an objective standard of professional reasonableness; and (2) the deficient performance prejudiced the defendant, the prejudice inquiry asking whether there was a reasonable probability that counsel’s conduct had an adverse effect on the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Huggins* (2006) 38 Cal.4th 175, 248.)

Here it was reasonable for defense counsel to make the tactical decision that objecting to the form of the prosecutor’s questions would be futile. The prosecutor would most likely rephrase the question, and, as demonstrated above, the prosecutor asked other appropriate questions as well. Further, the trial court had already deemed that Florence was deliberately evasive. Her willful refusal to remember the April 16 incident provided a sufficient foundation to impeach her with her prior statements to Officer Evans. Appellant specifically charges that trial counsel should have objected when the prosecutor asked Evans whether Florence pointed out the toe injury as having been caused by the April 16 incident, arguing that the question called for hearsay and improper impeachment. It was not improper impeachment, and thus not improper hearsay, because Florence evaded questioning on the point, stating she did not recall pointing out to officers a foot injury that she sustained as part of the incident.

Finally, appellant maintains the trial court erred in overruling a hearsay objection to Detective Pesmark’s testimony that Florence pointed to a hairbrush (which he described) and said it was the brush appellant used during the incident. In her preliminary hearing testimony, Florence was asked if appellant, after pushing her to the floor, continued yelling at her, picked up the brush and started hitting her in the face and

head. Again, Florence evaded the questioning, saying she did not recall the incident. Further, she was unavailable to testify at trial. Therefore, her statement to the detective was a prior inconsistent statement and inadmissible under Evidence Code sections 770, 1235 and 1291.

III. DISPOSITION

We affirm the judgment. As there were no individual errors, we reject appellant's claim of cumulative error.

Reardon, J.

We concur:

Ruvolo, P.J.

Rivera, J.