Filed 9/13/12 P. v. Kelly CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SHIKIIRA KELLY, Defendant and Appellant.	A132600 (San Francisco City & County Super. Ct. No. 213809)

Defendant was found guilty of assault with a deadly weapon after she stabbed her sister with a knife. Defendant, who claimed she acted in self-defense, contends the trial court abused its discretion and denied her due process by excluding evidence of five incidents showing her sister's propensity for violence. Finding no prejudicial error, we affirm.

I. BACKGROUND

Defendant was charged by information with attempted murder (Pen. Code,[1] §§ 664/187, subd. (a); count I) and assault with a deadly weapon (§ 245, subd. (a)(1); count II). The information further alleged defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)) and used a deadly weapon (§ 12022, subd. (b)(1)).

On June 17, 2010, defendant's sister, Shayna, arrived at her mother's house in San Francisco with her five-year-old niece. Defendant answered the door and allowed her

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

into the house. Shayna first greeted her two nieces, who were on the upper floor of the house, then proceeded downstairs to a bedroom closet.

Shayna testified she was kneeling in the closet when she felt something sharp poke her neck. In response she turned and saw defendant standing over her with a knife, pointed down. Shayna asked defendant what she was doing and defendant yelled, "Bitch, you tried to have me and my son killed."[2] Defendant then jumped on top of Shayna and began stabbing her. While attempting to retreat further into the closet Shayna kicked defendant in the stomach, causing her to back away and run out of the house. Shayna then ran to a neighbor's house to get help. She suffered stab wounds to her left forearm, left thigh, right hand, and the back of her right arm, but there was no wound on her neck. Defendant was arrested shortly after the incident approximately a block and a half away from the home.

The police interviewed defendant approximately three hours after the stabbing occurred. Defendant explained Shayna had attacked her repeatedly in the days leading up to the incident, picking on her and slapping drinks out of her hand. Defendant stated these incidents, coupled with Shayna searching through a closet on the day in question, caused her to feel "fed up," and she "just went after her." When the officer asked whether Shayna had attacked defendant on the day of the stabbing, she admitted Shayna had not attacked her, explaining she was just tired of "being targeted by her."

At trial defendant contended she acted in self-defense. Defendant claimed Shayna had attacked her frequently, with "[k]nives, broken bottles, whatever she can get her hands on." According to defendant, their mother had recently broken up such a fight and told Shayna she could not be in the house if she was "trying to use weapons on" defendant. Defendant testified she was staying at her mother's house because she was threatened in her own home by one of Shayna's male friends who had choked her, broken her hand, and threatened to kill her and her son, while Shayna watched and did nothing.

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[2]A niece told police officers she heard her aunts arguing in the downstairs bedroom and heard defendant say, "You ruined my life and you ruined my son's life."

Defendant testified Shayna was not kneeling when defendant attacked her, but was standing up circling her, as if she were "sizing me up." She said Shayna frequently acted this way before she attacked defendant. Defendant assumed Shayna was armed because Shayna had frequently attacked her with weapons, and she swung the knife in self-defense when Shayna ran at her.

The sisters' cousin, Jill Hyatt, testified defendant was "very, very frightened" of Shayna, and allowed defendant to stay at her house for four days after the choking incident. Hyatt said defendant was terrified to go back to her mother's for fear of seeing Shayna. Defendant told her Shayna "cuts people," and is "very dangerous." Hyatt also testified about Shayna's reputation for violence in the community.

Robert Kelly, defendant and Shayna's father, also testified about Shayna's propensity for violence. Kelly stated he witnessed Shayna attack defendant with a weapon so many times he had lost count, but estimated he had seen her attack defendant 10 to 15 times. He described one specific event where Shayna had attacked defendant with a knife a month or two before the stabbing occurred.

Prior to the commencement of trial, the prosecution and defendant had filed cross-motions in limine to determine the admissibility of evidence of five incidents purportedly demonstrating Shayna's propensity for violence under Evidence Code section 1103, subdivision (a). Defendant contended these events were also admissible to prove she reasonably feared her sister and believed Shayna had a weapon on the day of the stabbing.

The first three incidents occurred at least 10 years before the current incident. In 1999, Shayna threatened one of her sisters with a broken beer bottle. Later that year, Shayna was arrested for bringing a box cutter to school. In another incident at school, in 2000, Shayna was arrested and declared a ward of the court when she pushed another girl to the ground for refusing to hand over her Walkman.

The fourth incident occurred in 2008, when Shayna was arrested after a fight with another woman. Police officers broke up the fight and asked both parties to leave the

scene. Although the other woman cooperated, Shayna continued yelling in an effort to provoke another fight. Shayna was subsequently arrested, but no charges were brought.

The fifth incident occurred months after the stabbing, when Shayna threatened to stab the manager at a fast food restaurant for denying her access to the restroom. According to the police report, Shayna brandished a pocketknife with the blade unexposed and said, "I will stab you."

The court granted the prosecution's motion and excluded all evidence surrounding the five incidents under Evidence Code section 352. The trial court excluded the first three events because they were too remote in time to be probative. The court excluded the 2008 fight on the ground that conduct not resulting in a criminal conviction is inadmissible under the section 352 balancing test. The court did not explain its decision to exclude evidence of the fifth incident.

The jury found defendant not guilty of attempted murder, but guilty of the lesser offense of assault with a deadly weapon, and found the allegation of serious bodily injury to be true. Defendant was sentenced to five years in prison.

II. DISCUSSION

Defendant contends the trial court abused its discretion and violated her due process rights to a fair trial by excluding evidence of the five incidents of violent conduct by Shayna.

A. *Admissibility of Evidence of Victim's Acts to Show Character for Violence*

Evidence Code section 1103, subdivision (a) authorizes the defense in a criminal case to offer evidence of the victim's character to prove his or her conduct at the time of the crime charged. Consequently, in a prosecution for a homicide or assaultive crime where self-defense is raised, evidence of the violent character of the victim is admissible to show the victim was the aggressor. (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446.)

However, "a defendant's evidence of self-defense is subject to all the normal evidentiary rules," including Evidence Code section 352. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) Section 352 grants the trial court discretion to exclude evidence if

the court determines its probative value is "substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"We review a challenge to a trial court's choice to admit or exclude evidence under [Evidence Code] section 352 for abuse of discretion." (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.) A trial court's exercise of discretion under Evidence Code section 352 "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.)

B. *Exclusion of Evidence Regarding Victim's Three Juvenile Violent Incidents*

Defendant contends evidence of Shayna's juvenile incidents was improperly excluded because it established a "long and continuous pattern of engaging in violence and using weapons" when coupled with later incidents.

There is no bright line rule as to how much time must pass between incidents to be considered too remote under Evidence Code section 352, but it is recognized evidence loses relevance as time passes. (*People v. Shoemaker*, *supra*, 135 Cal.App.3d at pp. 446–447.)

In *People v. Gonzales* (1967) 66 Cal.2d 482, 488, two groups of men took part in a knife fight which left one man dead and another severely injured. The defendants were convicted of first degree felony murder because a victim's wallet was taken after the fight. (*Id.* at p. 486.) The defendants claimed evidence demonstrating the victim's propensity for violence was improperly excluded because it had significant probative value to prove their self-defense claim. (*Id.* at p. 499.) The Supreme Court affirmed the trial court's holding that evidence of the victim's reputation for violence seven years earlier "was too remote to have significant probative value as to present character," but evidence of the victim's current reputation for violence would have been admissible. (*Id.* at p. 500.)

Here, we conclude the court did not abuse its broad discretion in excluding evidence of Shayna's violent juvenile history. These incidents occurred 10 and 11 years before the stabbing of Shayna took place. The trial court could properly find these incidents too remote in time to be probative of Shayna's existing character. Contrary to defendant's argument, Shayna's juvenile incidents do not establish a "continuous pattern of engaging in violence and using weapons," when evaluated with the two later events. The first three incidents occurred in a span of approximately one year and the next incidents did not occur until eight and ten years later.

C. *Exclusion of the 2008 Incident*

Defendant argues Shayna's 2008 arrest following an altercation with another woman should have been admitted because it demonstrated Shayna's propensity for violence and would have corroborated defendant's claim she reasonably feared Shayna.

The trial court appears to have incorrectly relied on *People v. Gutierrez* (2009) 45 Cal.4th 789 (*Gutierrez*) to justify exclusion of evidence arising from the 2008 fight. In *Gutierrez,* the defendant was convicted of two counts of murder and one count of attempted murder. The court upheld the trial court's exclusion of one of the victim's prior battery convictions. Relying on *Gutierrez,* the trial court here stated any conduct that does not result in a criminal conviction is automatically inadmissible. However, a claim of self-defense was not raised in *Gutierrez.* Instead the court held the victim's prior battery conviction was irrelevant to an alibi defense. (*Id.* at p. 828.)

Contrary to the trial court's holding, *Gutierrez* provides no basis for excluding an incident as a matter of law merely because it did not result in a conviction. As long as the evidence was relevant to the defense, the trial court was required to weigh prejudice against probative value under Evidence Code section 352, regardless of whether the conduct resulted in an arrest or a conviction. Although the trial court mentioned section 352, it improperly excluded the incident as a matter of law, without conducting the requisite balancing test, and we are precluded from weighing probative value against prejudice in the first instance on appeal. (*People v. O'Shell* (2009) 172 Cal.App.4th 1296, 1309.)

D. ***Exclusion of the Subsequent Threat to the Restaurant Manager in 2010***

Defendant contends evidence of a subsequent incident in which Shayna threatened to stab the manager of a fast-food restaurant was improperly excluded, because the probative value outweighed the prejudicial impact. Without explanation, the court excluded the 2010 incident as more prejudicial than probative, stating only, "The one that postdates [the incident], the October 11th, 2010, also should be excluded."

As discussed above, Evidence Code section 1103 permits a defendant to present evidence of a complaining witness's subsequent acts of violence to prove the victim was acting in accordance with her violent character. Subsequent acts, as well as prior acts are admissible because " 'a man's trait or disposition a month or a year after a certain date is as evidential of his trait on that date as his nature a month or a year before that date; because character is a more or less permanent quality and we may make inferences from it either forward or backward.' " (*People v. Shoemaker*, *supra*, 135 Cal.App.3d at p. 447.) Nonetheless, because the normal rules of evidence still apply, this evidence can be excluded under Evidence Code section 352. (*In re Christian S.*, *supra*, 7 Cal.4th at p. 783.) While " 'the trial [court] need not expressly weigh prejudice against probative value—or even expressly state that [it] has done so' " (*People v. Lucas* (1995) 12 Cal.4th 415, 448), the record must affirmatively show that the trial court did weigh prejudice against probative value (*People v. O'Shell*, *supra*, 172 Cal.App.4th at p. 1310). Here there was no such showing. The trial court completely failed to engage in a section 352 weighing process.

E. Harmless Error

Even though the trial court never determined whether the probative value of the 2008 and 2010 incidents outweighed the prejudicial impact, any error was harmless because it is not reasonably probable a result more favorable to defendant would have occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Defendant was permitted to testify and present evidence of Shayna's propensity for violence and weapons use to persuade the jury that Shayna was the aggressor. Both Robert Kelly and Jill Hyatt testified about Shayna's numerous attacks on defendant,

Shayna's general reputation for violence and weapons use, and defendant's resulting fear. Any evidence that was improperly excluded was only cumulative of Kelly's and Hyatt's testimony. Further, defendant undercut the credibility of her claim of self-defense by admitting to police after her arrest that Shayna had not attacked her; defendant was just "tired of . . . being targeted by her."

Defendant contends the exclusion was prejudicial because the excluded evidence would have discredited Shayna's testimony that she had "never attacked [her] sister with a weapon. [¶] That's the honest to God truth." Because defendant was not involved in any of the five incidents, the excluded evidence would not have contradicted Shayna's testimony.

Nor was defendant precluded from refuting the prosecution's argument that she did not fear Shayna. The court admitted testimony from three defense witnesses that demonstrated defendant's fear of Shayna. Additionally, the excluded incidents did not involve defendant, and would have provided little evidentiary value of her mindset on the day of the stabbing.

Defendant argues the jury's question, "May we draw any conclusions regarding the fact that there were no police reports admitted regarding Shayna, i.e., were they inadmissible?,"[3] indicates the jury may have returned a more favorable verdict had additional objective evidence been presented corroborating Shayna's violent character. The jurors' question, however, sought police reports corroborating the testimony of the trial witnesses' accounts of Shayna's violence, not police reports of other incidents. None of the excluded evidence corroborates any specific aspect of the defense testimony.

Lastly, defendant suggests the fact the jury found her not guilty of attempted murder indicated the jurors did not believe the prosecution's whole case, but did not have enough evidence to support defendant's self-defense claim without the introduction of this evidence. A not guilty verdict on one charge does not mean the jury did not believe

[3] The trial court's response to this question was: "You should only consider the evidence that was presented in this courtroom."

the prosecution's theory on another charge. The precluded evidence provides little additional support to her claim of self-defense. The evidence only confirms the general assertion that Shayna has a violent reputation, not that defendant acted to protect herself on this occasion.

F. *Defendant's Right to Due Process Was Not Violated*

Defendant contends the exclusion of this evidence violated her right to confrontation and her due process right to present a complete defense. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324.) However, " '[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' " (*People v. Jones* (1998) 17 Cal.4th 279, 305; see *In re Christian S.*, *supra*, 7 Cal.4th at p. 783.) The exclusion of evidence from these incidents did not prevent defendant from demonstrating Shayna engaged in violent conduct and sometimes brandished weapons. There was accordingly no denial of the right of confrontation nor infringement of defendant's right to present a defense.

III. DISPOSITION

The judgment of the trial court is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Dondero, J.