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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

CATHERINE LEE BROWN,

Defendant and Appellant.

B230164

(Los Angeles County Super. Ct.
No. KA089064)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed.

Renée Paradis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Catherine Lee Brown was convicted by jury in count 1 of inflicting corporal injury to a former cohabitant in violation of Penal Code section 273.5, subdivision (a).¹ The jury found true an allegation that defendant personally used a deadly or dangerous weapon, a knife, in the commission of the offense as defined in section 12022, subdivision (b)(1). In count 2, defendant was convicted of assault with a deadly weapon. The jury found not true allegations that defendant inflicted great bodily injury in counts 1 and 2.

After defendant's motion for new trial was denied, the trial court sentenced defendant to four years in state prison. Defendant raises two issues in her timely appeal. First, she argues the trial court committed reversible error by excluding evidence of a sadomasochistic relationship between herself and the victim and evidence of the victim's prior acts of violence. Second, the court abused its discretion by denying defendant's motion for new trial and imposing judgment before discovering a letter from a juror regarding potential misconduct. We affirm.

FACTS

Prosecution

John McEntire had been in an off-and-on dating relationship with defendant prior to October 2, 2009. That evening they went to dinner to celebrate her birthday, where they each had "a couple of beers" and defendant had a specialty alcoholic drink. They returned to defendant's apartment after dinner. They both had more beer and a shot of Goldschlager, a drink with a high alcohol content. Because he was "buzzed" and tired, McEntire went to bed.

McEntire was about to fall asleep when defendant entered the bedroom, climbed on top of him, and playfully bit him on the left breast. McEntire was not interested in her

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

amorous advances and pushed her off of him. Defendant was angry, yelling hateful things. Defendant took swings at McEntire, who tried to grab her wrist to control her arms, because she struck him on the face and chest. He tried to put defendant down on the bed, but she got up and came at McEntire again. McEntire called her names but did not hit her.

They moved through the apartment as McEntire tried to get away from her. McEntire said he was going to leave and went to the bedroom to pack his things. Defendant came to the bedroom doorway, pulled a knife from behind her back (which she had obtained in the kitchen) and stabbed him in the left abdomen. She “drug the knife underneath” McEntire’s heart and sliced his arm in the process of taking the knife away. He was treated at the hospital, receiving 16 stitches on the inside and another 16 on the outside of the wound. McEntire hit defendant with an open hand when taking the knife from her after being stabbed in the abdomen. He had not threatened defendant that night or tried to stop her from using the phone or leaving.

McEntire had on a prior occasion hugged defendant, and a few days later, she went to the doctor and was diagnosed with a broken rib. McEntire accepted responsibility for that injury, although he does not know for a fact if he caused the injury. The police had been called to defendant’s apartment once before when McEntire and defendant were having an argument after they consumed alcohol, but there was no physical violence.

Dr. Chris Pastor, an emergency room physician, treated McEntire for slashing wounds to his hand and forearm and a stab wound to the left flank. The wounds were cleaned and sutured. The stab wound to the left flank did not reach an organ or the abdominal cavity.

Defense

Defendant's mother, Lillian Brown, observed bruises on defendant's body on the day after the incident, which she photographed. Her daughter did not tell her where the bruises came from.

Ricardo Rocha was a neighbor of defendant on October 2, 2009. Their apartments had a shared wall. He heard a fight, which escalated when he heard a man yelling "bitch" and "shut up, bitch." Defendant yelled, "Stop. Please stop." Rocha heard the sound of metal banging in the kitchen and defendant saying in a scared voice, "Please stop. No, don't leave" and "Stop. You're hurting me." Rocha picked up a little toy bat to go help defendant but officers were coming up the stairs so he stopped. A month later, Rocha gave a statement to a private investigator and then to two officers. He told the police the male voice said, "Bitch, what is your problem" and "What," in a shocked tone. He had seen bruising on defendant's body prior to this incident but did not know the cause. He and his wife had called 911 in the past and tried to call 911 this time to report the fight.

Amber Hinojosa, a medical assistant, saw defendant for a follow up exam for high blood pressure on October 16, 2009. She noticed bruising on defendant's thighs. Defendant was very upset, tearful, and shaking.

Defendant testified she had been in a relationship with McEntire for ten months on October 2, 2009, which was her birthday. They had lived together part of the time and he had some belongings in her home. She smelled marijuana on McEntire when he came over that day. They each had one beer before dinner at the restaurant. At dinner, McEntire had another beer and more than half of a beer ordered by defendant. They also shared a specialty cocktail. They stopped on their way back to her apartment at a drug store, where McEntire, who is a cross-dresser, purchased a female wig to be worn with his black dress.

Defendant and McEntire both had two beers and two shots of Goldenschlager when they returned to her apartment. Both of them were "buzzed." McEntire went into the bedroom to lay down, while defendant was on the living room couch. After 20-30

minutes, defendant went to the bedroom to see what McEntire was doing. She took his arm and asked him to stay awake with her, because it was her birthday. McEntire became very angry, got off the bed, and pushed her toward a dresser. McEntire slapped her three times in the face and kept saying, "What the fuck's your problem, bitch? You fucking cunt. You whore." McEntire threw her onto the bed and held her down by the wrists. She struggled and freed herself, running from the bedroom into the kitchen, trying to get out the back door of the apartment.

McEntire pulled her back. She picked up the phone to call 911, but McEntire slammed it down. Phone records showed a call to 911 at 11:47 p.m. She called 911 before seeing blood, although blood is shown on a photo of the phone. McEntire threw her headfirst onto the stove. As she tried again to get out the back door, McEntire pulled her by her pajama top. She thought he was going to kill her. McEntire had hurt her before, breaking her rib, but she stayed with him out of love and because he did not want her to leave. McEntire had forced her to participate in sadomasochism in the past.

Defendant yelled for McEntire to stop hurting her, but he was not going to let her out the back door, so she chose to defend herself. She removed a knife from the knife block and told McEntire to leave and go back to his parents. She did not intend to cut him and only intended to get him to leave. McEntire fought with her over the knife, which made her believe he would kill her. She did not stab him or intend to stab him, nor did she see him cut. Defendant was cut on her right finger. McEntire must have been cut during the struggle for the knife.

Defendant picked up the knife because she thought he was going to kill her. She thought showing it to him would make him stop and leave. She was in fear for her life. She admitted saying she was responsible because this would not have happened if she had not asked him to stay awake.

Although the police told her not to contact McEntire, she did exchange text messages with him. She asked him not to press charges against her and said she was sorry because she felt like it was her fault and she deserved to be punished for the crime. She was not upset that he went to sleep on her birthday. Although McEntire slapped her

hard three times on the side of her face, the next day in a text message she asked him to come over so she could take care of him. Defendant had no explanation for why photos of her face showed no bruising.

After the time McEntire broke defendant's rib when they argued, he would push her into a wall, knock her down, and scream at her. He threatened to kill her. McEntire was very upset when the police were called on an earlier occasion because he was on probation. He threatened to kill her. Anytime they got into an argument, it became physical.

Recalled as a witness, McEntire testified they did purchase a black wig, but he could not recall when. Defendant did not pick up the phone to call 911 during the incident. He denied hitting, beating, or threatening to kill her in the past.

DISCUSSION

Exclusion of Evidence

Defendant argues it was reversible error to exclude her proffered evidence concerning a sadomasochistic relationship between her and McEntire and evidence of prior assaults and threats by McEntire. Defendant contends that the trial court ultimately made the correct decision to instruct the jury on the concept of self defense, and given that ruling, "it is difficult to see how evidence of antecedent threats can be excluded on that basis."

A. Background

At a pretrial hearing, the trial court ruled inadmissible cross-examination of McEntire about "the sexual history of the parties unless defendant, in fact testifies and can show the relevance of that in regards to her resorting to deadly force and what her psychological makeup was at the time as a result of the sexual activity." The court

emphasized that the parties' prior history was only relevant if it caused defendant to feel her life was in danger in this case.

After jury selection, the prosecutor asked the trial court to "revisit" the issue of the "s and m activities and pictures," believing it was being admitted as character evidence. The court corrected the prosecutor, again explaining that its relevance was to self-defense. The court continued to express doubt about admitting "photographs of any of the devices" and reserved judgment on the issue. "The issue is not the devices themselves, the issue is whether, in fact, he demands a certain type of sex or form of sex that -- and she is reluctant to participate, that he is quick to visit violence or threats of violence on her."

Defense counsel attempted to produce evidence on the subject of the parties' sexual relationship during trial, but the trial court ruled the evidence irrelevant. However, the court permitted defendant to testify McEntire had forced her to participate in activities which she did not want to participate in, but sustained an objection to a question asking for the type of activities. Defendant also testified that McEntire forced her to participate in sadomasochistic activities by screaming, pushing, and hurting her. The court sustained an objection to a question about the devices used in the activities, requiring defendant to first testify about the charged incident. After hearing defendant's testimony describing the incident, the court ruled her defense was an accident, not that she stabbed McEntire in self-defense. At the conclusion of the trial, the court instructed the jury on self-defense, reasoning the instructions were necessary because of defendant's testimony that she picked up the knife in self-defense, but also instructed on accident, which was her explanation of the stabbing.

B. Standard of Review

All relevant evidence is admissible. (Evid. Code, § 351.) Relevant evidence is all evidence "including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of

consequence to the determination of the action.” (Evid. Code, § 210.) A trial court has wide discretion in determining the relevance of evidence. (*People v. Hamilton* (2009) 45 Cal.4th 863, 913; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1174; *People v. Carter* (2005) 36 Cal.4th 1114, 1166–1167.)

“A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means” (*People v. Foss* (2007) 155 Cal.App.4th 113, 126.) An appellate court must have an adequate record before it can determine if an error was made. (*Id.* at p. 127.) For this reason, the proponent of evidence that was ruled inadmissible in the trial court must make an offer of proof sufficient to create an adequate record for appellate review. (*Ibid.*) “Failure to make an adequate offer of proof precludes consideration of the alleged error on appeal. (*Pugh v. See’s Candies, Inc.* (1988) 203 Cal.App.3d 743, 758.)” (*People v. Eid* (1994) 31 Cal.App.4th 114, 126.)

C. Analysis

To the extent defendant complains of exclusion of evidence of sadomasochistic activities between her and McEntire, the record presented fails to establish prejudicial error. No offer of proof was made in the trial court regarding what the proffered evidence entailed. The record contains no description of sadomasochistic devices. This court has no means of assessing whether the evidence had any relevance to the defense. The references in the trial record to sadomasochistic activities and devices are insufficient for meaningful appellate review.

The remaining issue is whether the trial court abused its discretion in excluding evidence of prior acts of violence committed by McEntire upon defendant. We hold

there was no abuse of discretion. As the court explained, defendant's testimony established that she picked up a knife to defend herself in response to McEntire's threatening conduct. Based on this testimony, the court instructed on self-defense so the jury would understand defendant's right to arm herself with the knife for protection pursuant to Judicial Council of California Criminal Jury Instructions (2010-2011) CALCRIM Nos. 3470 (right to self-defense), 3471 (right to self-defense in mutual combat or initial aggressor), 3472 (self-defense may not be contrived), and 3474 (no self-defense if danger ceases to exist or attacker disabled). Defendant could not explain in her testimony how the stabbing occurred, other than to suggest it was accidental during the struggle over the knife with McEntire. Accordingly, the court instructed on accident as defined in CALCRIM No. 3404.

Neither in the trial court nor on appeal has defendant explained how prior acts of violence would have added anything to her defense. Introduction of this evidence certainly had the potential of diverting the jury's attention from the pertinent issues and consuming an undue amount of time. The trial court's decision to focus the evidence on the circumstances of the charged offense was not arbitrary or capricious.

Assuming the trial court's rulings were erroneous, the errors were nonprejudicial. The court permitted testimony that McEntire was a cross-dresser, he and defendant had engaged in sadomasochist activities, McEntire had broken her rib in the past, the police had been to her residence on another occasion in response to a fight between them, and McEntire had angrily responded to defendant on other occasions. "Ordinarily, when testimony to which an objection is made and sustained later is admitted into evidence, the harm resulting from its original exclusion is removed. [Citations.]" (*People v. Contreras* (1962) 201 Cal.App.2d 854, 858.) This is such a case.

Juror Misconduct²

Defendant's second contention is that the trial court abused its discretion because it did not realize a juror had sent a letter suggesting there was jury misconduct, and the court did not disclose the existence of the letter until a restitution hearing, eight days after judgment had been pronounced.

The trial court did not abuse its discretion. At the time of sentencing, the court was not aware of the juror's letter. The court disclosed the letter at the restitution hearing eight days later, but correctly observed it lacked jurisdiction to grant a new trial because judgment had been imposed. This was correct. (*People v. Smyers* (1969) 2 Cal.App.3d 666, 668.)

Even had the trial court read the juror's letter at the time of the motion for new trial, the motion would have necessarily been denied. As this court recently held, an unsworn document is insufficient as a matter of law to support a finding of jury misconduct. (*People v. Bryant* (2011) 191 Cal.App.4th 1457, 1468-1469.) Defendant cannot establish prejudicial error based upon the trial court's belated discovery of an unsworn document. (Cal. Const., art. VI, § 13.)

² We also address the issue of juror misconduct in a separate order filed in defendant's petition for writ of habeas corpus.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.