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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY EUGENE GOETHE, JR.,

Defendant and Appellant.

C066382

(Super. Ct. No.
09F05669)

Defendant Gary Eugene Goethe, Jr., was convicted of inflicting corporal injury on a former cohabitant (Pen. Code, § 273.5). The victim did not appear at trial; she was declared unavailable and her testimony at the preliminary hearing was read to the jury. The trial court also admitted evidence of a subsequent act of domestic violence by defendant against the same victim through the testimony of the responding officer and a tape of the victim's 911 call.

Defendant contends the admission of the officer's testimony violated his confrontation rights under the Sixth Amendment

because the victim's statements to the officer were testimonial as there was no ongoing emergency. He further contends the trial court abused its discretion in admitting the evidence over his Evidence Code section 352 objection. We disagree with defendant's contentions and shall affirm.

FACTS

Defendant and Stephanie V. (S.V.) have two children together. They lived together until May 2009 when she "put him out." After that, S.V. was "sort of" dating Vincent Pattio.

The Offense of Conviction

On the night of May 31, 2009, Pattio was at S.V.'s house, along with her children and defendant's cousin. S.V. was in her bedroom when she heard a commotion and went to the living room. Defendant was inside at the front door. Defendant and S.V. got into an argument about Pattio's presence. Defendant punched S.V. and she fell to the ground. While she was on the ground defendant hit her and tried to kick her. He had "a lock on" her hair. Her braids in back were "ripped off."

S.V. got up and defendant's brother entered. Defendant fought with Pattio and defendant's brother also threw a few punches. Another of defendant's brothers came in, and Pattio was thrown into the wall and knocked out.

When S.V.'s mother, sisters, brother, and a friend arrived, she called the police. She told the 911 operator she and her boyfriend were jumped and her boyfriend had been knocked out. She had a lump on her head, and her arm and side were injured. S.V. said she wanted to press charges.

Defendant and his brothers, as well as Pattio, left before the police arrived.

When the police arrived, S.V. was shaking, yelling, and appeared about to cry. She had a half-inch cut to her left cheek and complained of pain in her ribs. Pictures were taken of the back of her head, her right shoulder, right arm and right side of her neck to document injuries. There was an eight-inch hole in the drywall in the living room.

S.V. was taken to the emergency room, but did not want to wait. She later went to her own doctor who gave her a neck brace. Her arm was in a sling for two weeks.

In subsequent interviews with a defense investigator, S.V. told different stories of what happened that night. In September, approximately four months after the incident, she told an investigator from the Public Defender's office she did not remember being hit, kicked, or knocked down by defendant. She did not remember her hair being pulled. At the preliminary hearing held in March 2010, she explained these responses by saying she was tired at the time and did not want to be bothered.

The following January, S.V. told the investigator she had lied to the police because she was mad at defendant. She was hoping he would find out about Pattio and she had called him that day to come get his stuff. She claimed she was in defendant's face with her fingers, cussing and calling him names. She pushed him. Then defendant and Pattio wrestled; she got punched trying to break up this scuffle. At the preliminary

hearing, she explained she told that story to the investigator because defendant was her children's father and she did not want them to see him do time in jail.

Defendant's cousin who was there that night testified at trial that she let defendant in after he knocked. S.V. yelled at him that she could do what she wanted and sleep with whom she wanted. Defendant was about to leave when S.V. swung at him. S.V. continued to swing at defendant and hit him. Defendant then hit S.V. The cousin did not see defendant kick or punch S.V.; he was not the aggressor. She did not see defendant pull S.V.'s hair. The cousin did not tell this version to the police that night because she was scared and sad and just wanted to go home.

The Subsequent Offense

On March 5, 2010, a few days before the preliminary hearing, S.V. called the police to her apartment in West Sacramento. In the recorded 911 call, S.V. said defendant was banging on her door and trying to kick it in. She said he had a "bat or something" and was really dangerous.

When the police arrived, they detained defendant on the front porch after he tried to run. There was damage to the front door. Inside, there was blood on the floor and S.V. had a blood-soaked towel wrapped around her right hand. An adult male (Torrance Buggs) and a toddler were present.

S.V. was upset, scared, and appeared to be in pain. The officer asked what happened. She said her ex-boyfriend (defendant) came to the apartment and banged and kicked the

door. She was scared and got a knife. Defendant forced the front door open, entered, and took the knife from S.V. He swung the knife at her and cut her right hand. There was a three-inch cut to the tip of her index finger and a cut on her palm.

S.V. later told an investigator that she had cut herself while trying to take the knife from defendant.

A friend of defendant's testified S.V. called him several months before trial. S.V. told this friend that she had been cut taking the knife from defendant. According to the friend, S.V. was angry that people said defendant stabbed her because she had never said that.

A detective with the family abuse unit, who had no involvement in this case, testified as an expert about counterintuitive behavior by victims of domestic violence. Often the victim wants the abuser back and does not cooperate with the prosecution. The victim might minimize the abuse or recant by providing a different explanation of what happened or claiming not to remember the abuse. The victim might lie and claim she never said the abuser abused her. The expert did not give any specific opinions regarding this particular case.

DISCUSSION

I

Admission of Uncharged Incident:

Confrontation

A. The Hearing

In the midst of trial, the trial court held a hearing to determine the admissibility of Officer Mahaffey's testimony

about the March 2010 domestic violence incident. At this hearing, Mahaffey testified he responded with another officer to an apartment. He saw a male run from the front porch. He went around the back of the building while the other officer went to the front. When Mahaffey came around the side, the male, later identified as defendant, had been detained and was cooperating. The front door and the deadbolt lock had been damaged.

Inside, Mahaffey contacted a woman with a blood-soaked towel around her right hand. She was upset, scared, out of breath, almost crying, and appeared to be in pain. There was quite a bit of blood on the floor. A man and a toddler were also present.

Mahaffey tried to calm S.V. down and asked her what happened. S.V. was trying to stop the bleeding and kept saying her hand hurt. In addition, her child was walking through the blood on the carpet. S.V. did not respond until Mahaffey got her calmed down and focused. She first said she needed an ambulance. Paramedics were outside and Mahaffey radioed for them to come in. Mahaffey asked what happened and in a minute or two, S.V. told Mahaffey the basic events of that night. Her ex-boyfriend was knocking, pounding, and kicking the door. She was scared and got a knife for protection. Defendant kicked the door open. He entered; he took the knife from her and swung it towards her. He hit her in the right hand.

During the interview the officer took out a notepad. S.V. first gave the general information and then Mahaffey asked detailed questions to follow up. The entire interview lasted

five to ten minutes. Mahaffey continued to ask questions as S.V. was treated by paramedics.

B. The Trial Court's Ruling

After the defense filed a motion opposing the statement's admission on hearsay and Sixth Amendment grounds, the trial court denied the motion to exclude Mahaffey's testimony. The court found the testimony was properly classified as an exception to the hearsay rule--a spontaneous declaration under Evidence Code section 1240.¹ This ruling was based on the court's observations that although Mahaffey said he calmed S.V. down, he did not describe a calm situation. He described a woman who bleeding profusely and being attended to by paramedics; she was concerned about the blood and her child. The statements occurred so close to the startling occurrence, there was no opportunity to fabricate and the statements were reliable. Mahaffey got the essential information in a minute or two while he was still assessing the situation and determining if defendant was properly detained.

The court further found that the circumstances surrounding the statement constituted an in-field emergency and not an investigation.²

¹ Defendant does not challenge this portion of the trial court's ruling on appeal; accordingly, we do not analyze the propriety of the trial court's application of Evidence Code section 1240 to the facts of this case.

² Although the trial court failed to address defendant's Sixth Amendment challenge to the victim's statement separately from

C. Analysis

Defendant contends the trial court erred in admitting Mahaffey's testimony. He contends admission of this testimony violated his confrontation rights because S.V.'s statements to Mahaffey were testimonial. He asserts there was no ongoing emergency; S.V. related past events, defendant had been detained, and there was no further danger to S.V. He further contends the conversation did not relate to her medical needs and it had sufficient formality because a deliberate falsehood in response to police questioning might be a criminal offense.

In *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*), the United States Supreme Court held use of an out-of-court statement that is testimonial in nature is prohibited by the Sixth Amendment's Confrontation Clause whether or not the statement is inherently reliable or meets an established exception to the hearsay rule unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford, supra*, 541 U.S. at pp. 68-69 [158 L.Ed.2d at p. 203].) The *Crawford* court did not define "testimonial," but noted that "[s]tatements taken by police officers in the course of interrogations are also

his hearsay challenge, this particular finding clearly pertains to defendant's claim under *Crawford*, see discussion *post*.

testimonial under even a narrow standard." (*Crawford, supra*, at p. 52 [158 L.Ed.2d at p. 193].)

In *Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2d 224] (*Davis*), the court clarified what is meant by testimonial statements. It explained: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis, supra*, 547 U.S. at p. 822 [165 L.Ed.2d at p. 237], fn. omitted.)

The high court most recently considered whether statements to police officers are testimonial in *Michigan v. Bryant* (2011) ___ U.S. ___ [179 L.Ed.2d 93] (*Bryant*). The court noted: "The basic purpose of the Confrontation Clause was to 'target[t]' the sort of 'abuses' exemplified at the notorious treason trial of Sir Walter Raleigh. [Citation.] Thus, the most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial. [Citation.] Even where such an interrogation is conducted with all good faith, introduction of the resulting statements at trial can be unfair to the accused if they are untested by cross-examination. Whether formal or

informal, out-of-court statements can evade the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial. When, as in *Davis*, the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." (*Bryant, supra, ___ U.S. at p. ___ [179 L.Ed.2d at p. 107].*)

Our Supreme Court has interpreted *Bryant* to require consideration of a number of factors to determine the primary purpose with which a statement is given by a declarant and obtained by a police officer. (*People v. Blacksher* (2011) 52 Cal.4th 769, 813 (*Blacksher*).) *Blacksher* identified these factors: (1) "The court must objectively evaluate the circumstances of the encounter along with the statements and actions of the parties" to determine "the *primary* purpose of both officer and declarant." (*Blacksher, supra, 52 Cal.4th at pp. 813-814, original italics.*) (2) The court must objectively "consider whether an "ongoing emergency"" exists, or appears to exist, when the statement was made." (*Blacksher, supra, at p. 814.*) (3) "Whether an ongoing emergency exists is a 'highly context-dependent inquiry.'" An emergency may exist even after the initial threat to the victim is over depending on the type

of weapon involved. (*Ibid.*) (4) "The medical condition of the declarant is a relevant consideration, as it bears on both the injured declarant's purpose is speaking and the potential scope of the emergency. [Citation.]" (*Ibid.*) (5) "A nontestimonial encounter addressing an emergency may evolve, converting subsequent statements into testimonial ones." (*Ibid.*) (6) "Finally, regardless of the existence of an emergency, the informality of the statement and the circumstances of its acquisition are important considerations." (*Id.* at p. 815.)

Considering the factors identified in *Blacksher*, we agree with the trial court that S.V.'s initial statement to Mahaffey describing the incident was not testimonial. The police responded to a call that the father of the caller's children was trying to kick in her door and was dangerous. When they arrived, one man was outside and quickly detained. A second man was inside with the distraught and bleeding woman. While in hindsight, one can say with a fair amount of certainty that the emergency was over, it did not necessarily appear that way to either S.V. or Mahaffey. Nothing indicates S.V. knew defendant had been apprehended and until he conducted the limited investigation that his conversation with the bleeding and distraught victim entailed, Mahaffey could not be certain of defendant's role in the crime; defendant could have been the sole assailant, an accessory, or merely a spectator.

S.V. was bleeding and in pain. Her medical condition indicated her purpose in speaking was not testimonial, but to seek help. Indeed, she began by demanding an ambulance. It is

true that Mahaffey was not questioning her for medical purposes--he left that inquiry to the paramedics--but S.V.'s condition established an urgency in determining if any threat continued.

As noted in *Blacksher* and *Bryant*, a conversation can evolve from responding to an emergency to testimonial. That appears to be the case here as Mahaffey at some point took out a notepad and asked detailed follow-up questions about exactly where things happened and the names of persons. Significantly, however, the outline of the incident--the facts Mahaffey testified to at trial--were elicited at the beginning of the statement in response to Mahaffey's initial inquiry, "what happened?"

Finally, the lack of formality indicates the statement was not testimonial. Mahaffey described a chaotic situation. S.V. was concerned about her injuries, the blood in the house, and her child. Mahaffey had to calm her down and get her to focus to answer his questions. This disorganized questioning is distinguishable from the formal, recorded jailhouse interview in *Crawford*. (*Crawford*, *supra*, 541 U.S. at pp. 38, 53, fn. 4 [158 L.Ed.2d at pp. 184-185, 194].)

II

Admission of Uncharged Incident:

Evidence Code Section 352

Defendant contends the trial court abused its discretion in admitting evidence of the uncharged March 2010 incident. He contends the uncharged incident was dissimilar to the charged crime because it involved a weapon, loss of blood, and a more

serious injury. He further contends the probative value of this evidence was weakened because it was hearsay and the declarant's credibility could not be evaluated. Finally, he contends the admission of this evidence was prejudicial because the March 2010 incident was more serious than the offense at issue.

Evidence Code section 1109, subdivision (a)(1) provides: "Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

Evidence Code section 352 gives a court discretion to exclude evidence "if 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."

"The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense."

[Citation.] [Evidence Code] [s]ection 1109 was intended to make admissible a prior incident 'similar in character to the charged domestic violence crime, and which was committed against the victim of the charged crime or another similarly situated person.' [Citation.] Thus, the statute reflects the legislative judgment that in domestic violence cases, as in sex crimes, similar prior offenses are 'uniquely probative' of guilt in a later accusation. [Citation.] Indeed, proponents of the

bill that became section 1109 argued for admissibility of such evidence because of the 'typically repetitive nature' of domestic violence. [Citation.] This pattern suggests a psychological dynamic not necessarily involved in other types of crimes. [Citation.]" (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531-532, fns. omitted.)

Here, the considerable similarity between the two offenses supports finding the psychological dynamic discussed in *Johnson*.³ In both, defendant made a forced and unwelcome entry into S.V.'s home when a new boyfriend was present. When she argued with or resisted defendant, he assaulted her. While defendant used a knife in the second incident, and inflicted more serious injuries, the prejudicial effect of this fact is weakened because he did not bring the weapon with him, and thus did not plan a more serious assault. Moreover, defendant's actions in the charged offense were similarly serious; S.V. testified that in addition to hitting her and pulling her hair, defendant tried to kick her when she was on the ground. The presence of the knife did not make the March 2010 incident unduly prejudicial.

Evidence of the March 2010 incident was sufficiently trustworthy. Her statement was corroborated by the 911 call, and Mahaffey's testimony about her distraught condition, her apparent pain, and her bloody hand.

³ At sentencing, the court noted defendant's positive contributions to society in working with children in sports and that defendant's violence appears "to be confined to the relationship with this particular woman."

Further, as the trial court found, the 2010 incident was extremely probative, of both consciousness of guilt and dissuading a witness, as it occurred only a few days before S.V. was to testify against defendant at the preliminary hearing. Defendant objects that the People did not argue this theory at trial, but nothing prevents the trial court from considering all aspects of probative value in making its ruling on admissibility under Evidence Code section 352.

"The rule is settled that the trial court's discretion to exclude or admit relevant evidence under Evidence Code section 352 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the [evidence] is admitted or excluded.' [Citation.]" (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532.) This ruling does not present an abuse of discretion under Evidence Code section 352.

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.

