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

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
LEDONNE DRAKE,  
  
Defendant and Appellant.

C066414  
  
(Super. Ct. No.  
SF114913A)

The defendant beat up his live-in girlfriend. Convicted by jury of assault by means of force likely to produce great bodily injury and sentenced to 11 years in state prison, the defendant appeals. He contends the trial court erred by (1) admitting evidence of his prior domestic violence and (2) denying his motion to replace his appointed counsel. Neither contention has merit, so we affirm.

FACTS

The defendant's contentions on appeal require only a brief recitation of the facts.

In April 2010, the defendant lived with his girlfriend, Julie. He found underwear in the bathroom, and Julie denied that it was hers. She said it belonged to her friend Amber. They argued, with the defendant accusing Julie of lying about the underwear.

Later the same day, Amber came to the apartment, and Julie told her to claim her underwear. Amber refused, and they fought physically. Believing the police were coming, Julie and the defendant left the apartment.

Several hours later, Julie and the defendant returned to the apartment and again argued. The defendant hit Julie in the face and head numerous times, breaking and bloodying her nose, splitting her lip, and knocking teeth loose.

Julie called 911. Stockton Police officers arrived and found Julie bleeding from her nose and mouth, with several teeth knocked loose or out. The defendant was not there. Julie told an officer that the defendant had caused her injuries. However, later, on the defendant's urging, Julie went to the police department and said that she sustained her injuries in the fight with Amber.

After the assault, Julie allowed the defendant to live with her until he was arrested about a month later.

The defense was that Julie's injuries were sustained in the fight with Amber.

#### PROCEDURE

The district attorney charged the defendant by information with assault by force likely to produce great bodily injury

(Pen. Code, § 245, subd. (a)(1))<sup>1</sup> with an enhancement for great bodily injury involving domestic violence (§ 12022.7, subd. (e)). The information also charged the defendant with being a felon in possession of a firearm (§ 12021, subd. (a)(1)) and possession of methamphetamine for sale (Health & Saf. Code, § 11378). The information alleged that the defendant had a prior serious felony (§ 667, subd. (a)) and three prior prison terms (667.5, subd. (b)).

A jury convicted the defendant of assault by force likely to produce great bodily injury. However, the jury found the great bodily injury enhancement not true, and acquitted the defendant on the firearm and methamphetamine possession counts. The trial court found the prior serious felony and prior prison term allegations true.

The court sentenced the defendant to four years in state prison for the assault, doubled to eight years under the "Three Strikes" law. The court also imposed consecutive one-year sentences for the three prior prison terms. The total state prison term imposed was 11 years.

## DISCUSSION

### I

#### *Evidence of Prior Domestic Violence*

The defendant contends that the trial court abused its discretion and violated his due process rights by admitting

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<sup>1</sup> Hereafter, unspecified code citations are to the Penal Code.

evidence of his prior domestic violence under Evidence Code section 1109, which allows admission of evidence of prior domestic violence to show a propensity for such violence. We conclude that there was no abuse of discretion and no constitutional problem.<sup>2</sup>

*Background*

Before trial, the prosecution filed a motion seeking to use evidence of the defendant's prior domestic violence committed on December 11, 2003, as well as the fact of the defendant's 2004 felony criminal threats (§ 422) conviction for that incident. The defendant opposed the motion.

In the prosecution's trial brief, the prosecutor provided a brief summary of the domestic violence incident and a copy of a police report. Those sources revealed that defendant had been dating Deborah Howell for four years. When they had an argument and broke up, the defendant went to the home of Natasha Howell, Deborah's cousin, looking for Deborah. Deborah hid in a closet when she heard that the defendant was there. Reaching under his jacket as if he had a gun, the defendant said he was going to "pop" or kill Deborah. The defendant left the home when he was told the police were coming, but he telephoned to say that he

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<sup>2</sup> The defendant also argues that he was denied effective assistance of counsel because of counsel's possible failure to make the objection, based on Evidence Code section 352 and due process, more clearly. We need not consider this argument because the trial court properly admitted the evidence in any event.

would come back and smother the whole family if they told the police his name.

During a pretrial hearing, the court and counsel first discussed whether the prosecutor would be able to use the prior criminal threats conviction to impeach the defendant. Defense counsel argued that allowing evidence of the conviction would add to the prejudicial effect of the evidence of the domestic violence. The trial court stated that the probative value of the conviction outweighed the prejudicial effect and allowed evidence of the conviction as impeachment.

After considering the evidence, the trial court reversed its decision concerning evidence of the conviction because it was not clear that the victim of the criminal threats was Deborah, but instead was her cousin Natasha. Concluding that the incident constituted domestic violence for the purpose of applying Evidence Code section 1109, the court considered whether it should be excluded pursuant to Evidence Code section 352. The court found that the incident was not "unduly old," was probative, and was not unduly prejudicial. It therefore granted the prosecution's motion to admit the evidence under Evidence Code section 1109.<sup>3</sup>

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<sup>3</sup> The defendant attempts to use the trial testimony of Deborah and Natasha Howell to establish the facts relevant to this contention. However, we consider only the evidence before the court when the motion was granted. (*People v. Tolliver* (2008) 160 Cal.App.4th 1231, 1237, fn. 9.)

*Applicable Law*

Evidence Code section 1109, subdivision (a)(1) provides in relevant part: “[I]n 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.”

The defendant contends the prior domestic abuse evidence should have been excluded because it was inflammatory and prejudicial. He relies in part on Evidence Code section 352, which provides: “The court in its discretion may 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 “prejudice” referred to by Evidence Code section 352 does not refer to damage “‘that naturally flows from relevant, highly probative evidence’” (*People v. Zapfen* (1993) 4 Cal.4th 929, 958), but instead to “evidence that poses an intolerable risk to the fairness of the proceedings or reliability of the outcome.” (*People v. Booker* (2011) 51 Cal.4th 141, 188.) Evidence Code section 352 gives the trial court discretion to weigh possible prejudice against the probative value of evidence. “The admissibility of evidence of domestic violence is subject to the sound discretion of the trial court, which will not be disturbed on appeal absent a showing of an abuse of

discretion. [Citations.]” (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.)

“Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s).” (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.)

Highly probative evidence, though damaging to the defendant, does not violate due process. (*People v. Kelly* (2007) 42 Cal.4th 763, 787.)

#### *Analysis*

The defendant asserts that the trial court abused its discretion by admitting the prior domestic violence evidence because it was too inflammatory. To the contrary, although the prior incident concerned serious threats, the level of actual violence was far greater in the instant offense. Accordingly, it was not too inflammatory.

The evidence of the prior domestic violence was probative because it established the defendant’s propensity for domestic violence. Accordingly, the trial court did not abuse its discretion in admitting the evidence.

As for the defendant’s contention that his federal due process rights were violated, we see no merit. The evidence was probative and not unduly prejudicial. Therefore, admission of

the evidence did not violate the defendant's federal due process rights. (*People v. Kelly, supra*, 42 Cal.4th at p. 787.)

The defendant's contentions concerning the prior domestic violence evidence are without merit.

## II

### *Motion to Replace Appointed Counsel*

During trial, the defendant made a *Marsden* motion to replace his appointed counsel.<sup>4</sup> He claimed that there was a breakdown in the attorney-client relationship because defense counsel failed to tell him about a plea offer. The trial court denied the motion. On appeal, the defendant renews his argument. We find there was no abuse of discretion in denying the *Marsden* motion.

### *Applicable Law*

““When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.” [Citation.]

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<sup>4</sup> *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

The decision whether to grant a requested substitution is within the discretion of the trial court; appellate courts will not find an abuse of that discretion unless the failure to remove appointed counsel and appoint replacement counsel would 'substantially impair' the defendant's right to effective assistance of counsel. [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 681, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

#### *Background*

The trial court held a hearing on the defendant's *Marsden* motion. Defendant stated that "there was a deal on the table and my lawyer never told me about the deal after arraignment in superior court . . . ." He also complained about other matters, such as cross-examination of witnesses, but he does not pursue those complaints on appeal.

The trial court questioned the defendant, defense counsel, and the prosecutor about the plea deal. The prosecution offered the defendant a four-year deal before the preliminary hearing. The deal was communicated to the defendant, and he rejected it. The defendant and defense counsel disagreed about whether the four-year deal was available after the preliminary hearing. Defense counsel recalled that it was withdrawn after the preliminary hearing, but the defendant insisted that it was still on the table.

The trial court summoned the prosecutor to respond to questions about the offer. She stated a four-year offer was made before the preliminary hearing, which the defendant

rejected. The prosecutor believed that she had left the offer open at the pretrial conference, but that she withdrew it when trial started. Defense counsel, however, reminded the prosecutor that she (the prosecutor) was not present for the pretrial conference and that the prosecution did not supply a pretrial conference statement to the defense. The prosecutor concluded: "Well, Your Honor, it looks like as though I may not have filed a pre-trial conference statement. So, at best, what I did was let [defense counsel] know -- at best, let her know that the four-year offer was available before trial. But the conversations that I had were that the defendant was not interested in pleading to anything at all, period, end of sentence. And we had that discussion just about every court date that we have been together. So I haven't continued to extend offers because there is no reason to."

The defendant stated, in response to questioning from the court, that he never said that he wanted to plead guilty. Finally, defense counsel said that the defendant had "always expressed to me he was not going to accept any offer."

The trial court found that defense counsel was providing competent representation and that there was no breakdown in the attorney-client relationship, so it denied the *Marsden* motion.

#### *Analysis*

On appeal, the defendant contends that trial counsel violated the professional obligation to inform him of the offer. There are several problems with this contention.

First and foremost, contrary to the defendant's assertions, it is not at all clear that defense counsel knew that the prosecutor intended to leave open the four-year offer after the preliminary hearing. It appears that the prosecutor intended to do that, but defense counsel apparently did not know that the prosecutor intended to leave the offer open. Therefore, factually, the defendant's contention that trial counsel violated a professional obligation to inform him of the offer is unsupported.

Second, the defendant, during the *Marsden* hearing, claimed to know that the prosecution's offer was still on the table after the preliminary hearing. However, he rejected the offer before the preliminary hearing and there is no evidence he tried to accept the offer, which he claimed to know was still on the table, after the preliminary hearing.

And third, before trial, the defendant proclaimed his intent not to accept any offer. That he may have changed his mind during trial is of no moment because the four-year offer had been withdrawn.

Since (1) the violation of the professional obligation is the basis for the defendant's argument that the trial court abused its discretion in denying the *Marsden* motion and (2) the defendant has failed to establish this premise, the defendant's contention that the trial court abused its discretion is without merit.

DISPOSITION

The judgment is affirmed.

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NICHOLSON, Acting P. J.

We concur:

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BUTZ, J.

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DUARTE, J.