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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH JEROME RAY,

Defendant and Appellant.

C066448

(Super. Ct. No.  
CM030757)

A jury convicted defendant Kenneth Jerome Ray of infliction of corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a); count 1). The jury acquitted him of a second count of the same offense occurring on another date as well as all lesser offenses. In bifurcated proceedings, the court found two strike priors and two prior prison term allegations to be true.

Sentenced to state prison for 26 years to life, defendant appeals. He contends (1) the trial court's instruction on prior uncharged domestic violence violated his right to due process,

(2) the trial court erred in admitting certain evidence in rebuttal and should have declared a mistrial, and, to the extent the issue is forfeited, counsel rendered ineffective assistance, and (3) the trial court erred in admitting evidence of text messages sent by defendant to the victim. We affirm the judgment.

#### FACTS

The victim met defendant on May 19, 2006, and within a month, defendant was living with the victim and her son. On April 2, 2007, the victim and defendant argued. Defendant wanted the victim to drive him to his brother's house. After she pulled the car out of the driveway, defendant took the keys out of her hand and threw her mailbox at the windshield of her car, causing no damage. He then took the keys and her mailbox with the mail in it and ran down the street. She cried for help, but did not call the police because defendant had threatened her and her family. Karen Duval heard the victim and called 911. Upon arrival, the police saw defendant walking away from the residence. The victim was upset and told the police that she wanted defendant to leave but she did not tell the police what had happened. The victim did tell her friend, Jill Burns.

On February 13, 2008, during an argument, defendant pushed the victim and she fell on the driveway, breaking her wrist. Defendant yelled, "Get up, fat bitch." She cried in pain. They continued the argument in the house. Defendant pushed her again

and she hurt her back. She did not call the police, fearing defendant.

On February 14, 2008, the victim told a doctor in defendant's presence that she broke her wrist when she slipped and fell on tile around the swimming pool. She wore a hard cast and then a wrist brace and was unable to work for approximately three months. The victim did not tell Burns because she would tell the victim's family who would in turn report it to the police. The victim's mother was married to a former sheriff's department employee.

On May 5, 2008, defendant sent the victim a text message, apologizing for breaking into her house. On May 8, 2008, defendant sent the victim several text messages, one ended with "spreadin' [sic] it." The victim interpreted the message to mean that defendant had put drugs around the victim's house as he previously had done so someone like her former spouse would find them which would have been detrimental to her rights to visitation with her son. Another text message said, "Did you think that you would go unnoticed?" The victim did not know what the text was about. Another referred to her drug use. In one text, defendant referred to the victim's former spouse and said, "[I]t's about to get real ugly." The victim understood that message to be a threat. Defendant texted that he would have T-shirts made concerning the victim's drug use and have people wear them while standing around her mother's car or in the parking lot at the school of the victim's son. Defendant sent another text that his harassment was not going to stop

until May 19th, their anniversary. On cross-examination, the victim explained she saved defendant's May 2008 text messages which she considered threatening in case "anything ever happened." She admitted they had exchanged more text messages between May 2006 and March 2009.

On May 19, 2008, defendant and the victim went to a casino to celebrate their anniversary. They drank alcohol and used marijuana and cocaine. After having sex, they argued and defendant started to leave. The victim yelled at him to stay and he punched her in the nose, stomach and mouth, breaking one of her teeth. She did not call the police or security or show her injuries to anyone at the casino. She saw a dentist two days later. She lied to the dentist and to Burns and Tina Apodaca, another friend, about how the tooth was damaged to protect defendant. She later told the dentist the truth about the tooth. (Count 2, acquitted.)

At 7:00 a.m. on March 9, 2009, defendant called the victim at her house and told her that his grandmother died. She was upset that defendant had stayed out all night and told him that their relationship was over. Defendant replied, "'This is not about you.'" Later the same day, the victim went to the home of defendant's sister and told defendant that the relationship was over. They began to argue and defendant threatened to "smash" her face. She agreed to take him to her house so he could get some clothes after he promised not to hit her.

In the car, they started arguing. When defendant saw that she was not going toward her house, he said, "You stupid bitch.

What are you doing?" When she stopped the car at a liquor store to get something to drink, she received a call from Apodaca. After the call, the victim returned to the car and headed to her house. When defendant started yelling at her, she was too scared to go to her house. At an intersection, defendant jumped out of the car and ran toward the victim's house. She drove to the house, beating defendant there, and called Apodaca, asking her to come to the house. The victim was concerned that defendant would take something of hers. When defendant arrived, he beat on the door. She felt sympathetic toward defendant because of his grandmother's death. He promised that he would not hit her and she let him in.

As he rushed into the house, he knocked boxes over and grabbed items. They started to argue. He grabbed her by her wrist and punched her three or four times in the face. He then hit her in the stomach. When she fell to the ground, he kicked her in the head, side, and buttocks. He stopped when his friend, Jeffery Robinson, drove up. Defendant left, taking the mailbox and the mail, and yelling at the victim, "I'll be back. It's a wrap." She interpreted the words as a threat.

The victim told Apodaca, who arrived within minutes, about the beating, but she did not tell the police. Apodaca and her cousin took photographs of the victim's injuries over the next three days. The victim had a bruise on her jaw line, underneath her nose, on her right eye, a lump on top of her head, damage to her ribs, and bruising to her arms. (Count 1, convicted.)

At the end of May 2009, defendant drove slowly by Apodaca's house where the victim was staying. Pursuant to an agreement with Apodaca if defendant ever came by, the victim called the police, telling them what had happened.

On behalf of defendant, Lorraine Ray, defendant's sister-in-law, testified that the victim was "pretty controlling over the relationship and pretty demanding." Ray saw the victim hit defendant during an argument shortly before the couple broke up. In 2008, the victim, who was very upset, went to Ray's house, banging on doors, looking for defendant. Ray said defendant was not there. In fact, he was in the house, avoiding the victim. At that time, the victim was not supposed to be on Ray's property. Ray claimed that the victim had said quite a few times that defendant would regret it if he ended their relationship.

Vicky Martinez, defendant's friend, saw the victim strike defendant in the face. Martinez claimed the victim was ready to fight her.

The victim denied saying, "If he leaves me, he's going to live to regret it." She admitted that she had slapped defendant on the arm after he had pushed her.

The defense presented evidence that defendant was on parole. Defendant testified that he had a felony conviction in 1984 and three felony convictions in 1987. He admitted sending text messages to the victim in May 2008. Defendant claimed that the victim threatened to keep his business equipment unless he spent time with her. He texted the victim because he did not

want to confront her nor did he want his brothers to hear him talking with her on the telephone. Defendant explained his text, "Are you stupid? Or do you need me to send your friends to get my shit?" Defendant testified that he and the victim both had "dirty mouths." When he texted, "Five, four, three, two" and got to "one," he ignored her. Defendant claimed that he did not plan to have people in T-shirts stand by her mother's car and business and her son's school. Defendant testified that the text about being in her house and "spreadin' [sic] it" was a lie and that he was trying to blackmail her so she would return his belongings.

Defendant admitted sending the text about not stopping until their anniversary date. He explained that on May 19 he was going to go to his parole officer and tell him that the victim had his belongings. His parole officer had offered to go to defendant's house if he needed help. When he threatened to go to his parole officer, defendant claimed the victim returned his belongings. Defendant also claimed that when he apologized for threatening to go to his parole officer, they reconciled. While the victim performed oral sex on defendant in the casino hotel room, he accidentally kned her in the mouth, damaging her tooth.

By March 2009, defendant's relationship with the victim had deteriorated. When he learned his grandmother died, he did not visit the victim for three days which angered her. He claimed he helped the victim with projects to get the house ready before she had to move.

On March 9, 2009, defendant met the victim at his sister's house. He agreed to help the victim pack up the house for the move. They left his sister's house and drove around. The victim asked him where he had been and he gave vague answers. The victim went to a liquor store and returned to the car with a drink. She continued interrogating him. When the car stopped at an intersection, he got out and started walking towards her house. When he got to her house, she was already there and let him inside the house to help her move. Instead, he walked to the front room, picked up his bags and went outside. He did not plan on helping her. He denied ever touching her in the car or at her house. He left with his friend. He claimed that some members of her family did not approve of him. He admitted that he took the mailbox that had been in front of her home.

Defendant claimed that in September 2007, the victim hurt her wrist when she slipped after grabbing at his jacket as he left with friends. He denied ever striking the victim and denied driving by Apodaca's house. He claimed the victim knocked out his tooth and smashed mailboxes that belonged to him. He admitted the victim bought his clothes, a car, some of the paint he used in his business, and the first two mailboxes that he painted.

On May 4, 2009, defendant told a parole officer that the last time that he had seen the victim was on March 6 or 7, 2009, and denied any contact with her on March 9, 2009.

The victim testified that she was afraid of defendant at times in the relationship but she loved him and wanted to help

him. She helped him start his business. She also helped him with his schoolwork. On one occasion, when she could not remember how to do a math problem, defendant went from room to room, setting paper on fire and threatening to burn down the house. She was jealous of other girls spending time with and contacting defendant. She pushed him when he was screaming at her during a miscarriage and on another occasion, she slapped defendant on the arm.

The victim stayed with defendant because she loved him, he would apologize, and she thought he could change. Defendant called her belittling names, criticized her clothing and physical appearance, threatened to embarrass her, and threatened her if she reported the violence. Her friends got tired of seeing her with bruises and told her to leave him. He sometimes blamed her for the violence.

#### DISCUSSION

##### I

With respect to the prior uncharged incidents of domestic violence, the trial court instructed the jury on propensity evidence in the language of CALCRIM No. 852.

Defendant contends "[i]t was a prejudicial violation of due process for the court to instruct the jury that it could use two prior episodes of alleged domestic violence, proved merely by the preponderance of the evidence, as a direct link in the chain of evidence establishing [his] guilt as to the charged offenses." He claims the question is "whether the state can use propensity evidence *at all* to prove that a defendant was likely

to have committed the charged offenses, unless the predicate facts -- the uncharged offenses -- are proved beyond a reasonable doubt." (Original italics.) Although recognizing case law which stands for the proposition that use of propensity evidence in sex and domestic violence cases (*People v. Falsetta* (1999) 21 Cal.4th 903, 917-918 (*Falsetta*); *People v. Fitch* (1997) 55 Cal.App.4th 172; *People v. Johnson* (2000) 77 Cal.App.4th 410, 412, 417) and the instructions thereon (*People v. Reliford* (2003) 29 Cal.4th 1007, 1009, 1012-1016 (*Reliford*); *People v. Reyes* (2008) 160 Cal.App.4th 246, 252-253) do not violate due process, defendant claims that his contention has "never been properly addressed."

We reject defendant's contention. The issue he raises has been rejected by the California Supreme Court (*People v. Virgil* (2011) 51 Cal.4th 1210, 1259-1260; *Reliford, supra*, 29 Cal.4th at pp. 1009, 1012-1016; *Falsetta, supra*, 21 Cal.4th at pp. 917-918) and we reject it here. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

## II

Defendant next contends the trial court prejudicially erred by allowing the prosecution to present evidence of battered women's syndrome.<sup>1</sup> He claims the trial court should have

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<sup>1</sup> As the People note, Evidence Code section 1107 was rewritten in 2004, changing the statute's language from expert witness testimony on "battered women's syndrome" to expert witness testimony on "intimate partner battering and its effects."

declared a mistrial on its own motion, citing *People v. Jones* (1970) 7 Cal.App.3d 48 (*Jones*), and counsel rendered ineffective assistance by failing to ask for a mistrial or some other remedy, thereby undermining confidence in the verdict.

Defendant is wrong again.

Defendant acknowledges his counsel did not object before the victim testified in rebuttal about the deterioration of the victim's relationship with her family and friends due to her relationship with defendant, he belittled and criticized her, and he threatened her not to report his acts of violence against her. Eventually, his counsel lodged an unspecified objection (prosecutor asked victim about her custody arrangement with her former spouse), argued at a bench conference and later that the evidence of specific acts was not rebuttal evidence, and that certain matters, such as the change in the victim's family relationship and control in terms of clothing, were not relevant or were too prejudicial under Evidence Code section 352. The prosecutor responded by claiming the defense had portrayed the victim as controlling, manipulative, vindictive and aggressive when, instead, "the shoe was on the other foot," had attacked her credibility, and had presented evidence of her character for violence, all of which could be rebutted. The prosecutor stated she was going through the "power [and] control wheel" without using such language in her questioning and did not need an expert. Defense counsel "strenuously" objected to presentation of the "power and control" theory in rebuttal. The court observed rebuttal was "limited to the points raised by the

defense" and was not the appropriate time for evidence of the "cycle" of "power and control," stating notice was required. The court commented that other instances had not been presented in limine. The court also instructed the prosecutor to inform defense counsel and the court before the victim retook the stand if there were "other acts of violence" so that the court could analyze them under Evidence Code sections 1103 and 352. The court further noted the victim's testimony about defendant "lighting things on fire" seemed to be "spontaneous" and other information was covered on direct in the prosecutor's case-in-chief. No further action was taken with respect to evidence already presented. The court instructed the prosecutor to confer with the victim "to be more certain as to how she's going to respond to [the prosecutor's] questions."

Defendant's reliance upon *Jones* is misplaced. In *Jones*, the defendant objected and moved to strike inadmissible hearsay. The trial court indicated it was willing to grant a mistrial. The defendant conferred with counsel and decided to proceed. The trial court struck the answer and admonished the jury. On appeal, the defendant claimed the trial court should have granted a mistrial on its own motion. *Jones* held the error, if any, was cured by the trial court's admonition, noting the testimony was stricken but corroborative, and the defendant and his counsel decided to proceed. (*Jones, supra*, 7 Cal.App.3d at pp. 53-54.)

"[O]nce a criminal defendant is placed on trial and the jury is duly impaneled and sworn, a discharge of the jury

without a verdict is equivalent to an acquittal and bars retrial unless (1) the defendant consents to the discharge or (2) legal necessity requires it. [Citations.]” (*Larios v. Superior Court* (1979) 24 Cal.3d 324, 329; *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712-713 (*Curry*)). “In California, legal necessity for a mistrial typically arises from an inability of the jury to agree [citations] or from physical causes beyond the control of the court [citations], such as the death, illness, or absence of judge or juror [citations] or of the defendant [citations]. A mere error of law or procedure, however, does not constitute legal necessity. [Citations.]” (*Curry, supra*, 2 Cal.3d at pp. 713-714.) “Under *Curry*, even ‘palpably prejudicial errors’ in evidentiary rulings do not give rise to legal necessity for declaring a mistrial without the defendant’s consent.” (*Larios v. Superior Court, supra*, 24 Cal.3d at pp. 331-332.)

We reject defendant’s claim the trial court should have declared a mistrial on its own motion. Assuming error, an admonition would have cured any harm had counsel requested one.

To establish ineffective assistance of counsel, defendant must demonstrate his counsel’s performance was deficient and he suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) To demonstrate prejudice, defendant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” and that “[a] reasonable probability is a probability sufficient

to undermine confidence in the outcome. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 215 (*Williams*)).

Defendant cannot demonstrate that had defense counsel objected sooner, a more favorable result would have occurred. "Whether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence.'" (*Williams, supra*, 16 Cal.4th at p. 215.) The record must affirmatively disclose the lack of a rational tactical purpose for the challenged omission. (*Ibid.*)

Defense counsel objected when the victim was asked about her custody arrangement with her former spouse. Defense counsel may have refrained from objecting to the victim's earlier testimony because an objection would have drawn attention to such testimony. (See *Williams, supra*, 16 Cal.4th at p. 215 ["counsel may have decided not to object to [witness's] testimony about defendant's fear of gang retaliation because an objection would have highlighted the testimony and made it seem more significant, especially in light of the general [gang] rivalry . . . with which the jury was already familiar"].) Here, defense counsel was in a position to see the jurors' reactions to the earlier testimony and may have concluded such testimony had no impact on the jurors. Further, the trial court noted that some of the testimony had been presented on direct in the case-in-chief so such evidence was cumulative, and there was no impact on the jury hearing it again. Defendant argues

defense counsel should have moved for a mistrial or some other remedy. If error, any prejudice could have been cured by an admonition or instruction to the jury, not a mistrial. Again, counsel may not have wished to highlight the evidence.

### III

Finally, defendant contends the trial court prejudicially erred in admitting text messages he sent to the victim in May and June 2008 which were selected and saved by the victim from the "hundreds" of text messages exchanged between them. For the third time, defendant is wrong.

The prosecutor offered the messages to show defendant's threats and manipulation and to corroborate the victim's testimony. The prosecutor said the messages were all that could be retrieved from one phone and the other phone was "dead." Defense counsel objected on relevance grounds and argued the messages were more prejudicial than probative, given the "nature of the language [and] the tone." Defense counsel claimed the text messages were not admissible evidence but only "bad words, bad language, hostile language." He complained there were more text messages over the course of the relationship but he did not have access to those and to focus on just short time frames made them more prejudicial than probative. In overruling defense counsel's objections (except as to one, racially-charged message), the court concluded the messages shed light on the state of the couple's relationship on May 19, 2008, the date of the alleged domestic violence charged in count 2 (upon which the jury subsequently acquitted defendant). The trial court found

the messages were admissible under Evidence Code section 1220, more probative than prejudicial, and defense counsel could cross-examine the victim concerning the range of communication.

Defendant argues on appeal that the trial court should have excluded the text messages as more prejudicial than probative despite his acquittal on count 2. He makes this claim because, he says, there was no context for defendant's text messages to the victim, a larger sample would have shown the normal discourse between them, there was a real danger defendant's messages portrayed him as disparaging the victim, and the jury would have used the messages as improper character evidence, creating more than an abstract possibility the jury tried the case on defendant and not the facts. He concedes, "[s]tanding alone, the erroneous admission of the texts may not require reversal under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836," but when considered with the other errors he has raised, the error requires reversal.

In any event, the text messages defendant sent were in May (33 messages) and June (1 message) 2008 and related to the May 19, 2008, domestic violence charge, count 2. A statement offered against a party declarant is an exception to the hearsay rule. (Evid. Code, § 1220; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1049.) Thus, defendant's own hearsay statements were admissible. As the trial court determined, his text messages (except the one excluded by the trial court) reflected the state of the couple's relationship at the time, corroborated the victim's testimony about his demeaning treatment of her, and

were more probative than prejudicial. We find no error and no abuse of discretion in admitting the text messages. (*People v. Carpenter, supra*, at pp. 1049-1050.)

Even assuming error from the admission of the text messages, defendant cannot establish prejudice, just as he essentially concedes. The erroneous admission of evidence warrants reversal only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d at p. 836; *People v. Venegas* (1998) 18 Cal.4th 47, 93.)

Given the strong evidence supporting defendant's act of domestic violence in March 2009 (count 1), it is not reasonably probable he would have received a more favorable result on count 1 if the jury had not heard the victim's testimony regarding the text messages which related to count 2. The victim's credibility was at issue. She delayed reporting the 2008 incident. With respect to the March 2009 incident, Apodaca arrived at the victim's home shortly after defendant had physically abused the victim. Apodaca took photos of the victim's injuries and was successful in persuading the victim to report the incident within a relatively short period of time after the incident occurred. The victim also described other incidents of domestic violence, admitted as propensity evidence, which already portrayed defendant in a negative light. The text messages would have had little effect on the jury with respect to count 1. Moreover, defense counsel cross-examined the victim

about the text messages. He established there were more messages from May 2006 to March 2009 than those introduced into evidence and the victim saved just the ones presented in the event she needed them. As already noted, we reject defendant's claim of cumulative error, to the extent he raises the claim, having found no error and, thus, no prejudicial error.

DISPOSITION

The judgment is affirmed.

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NICHOLSON, Acting P. J.

We concur:

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ROBIE, J.

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BUTZ, J.