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

THE PEOPLE,

Plaintiff and Respondent,

v.

CURTIS ATKINSON III,

Defendant and Appellant.

C067381

(Super. Ct. No. 10F04797)

Defendant Curtis Atkinson III killed his father. The death was unintentional. Defendant's father was an alcoholic. While staying at defendant's apartment, he became heavily intoxicated and started a physical fight after defendant removed his bottle of whiskey. Defendant's father was known for becoming violent when intoxicated and knew how to handle himself in a fight. After a few blows were exchanged, defendant placed his father in a chokehold, believing this would subdue him without causing injury. He was wrong. Defendant released the hold after his father stopped fighting. He then realized his father's breathing was labored, called 911, and administered CPR until paramedics arrived. His father died of asphyxia caused by neck compression.

Defendant was charged with voluntary manslaughter and convicted by jury of the lesser-included offense of involuntary manslaughter. He was sentenced to three years in state prison. He claimed self-defense at trial. In support of this defense, defendant sought to adduce testimony from his mother and cousin regarding seven specific instances of his father's prior violent conduct under Evidence Code section 1103.¹ The trial court allowed each witness to testify that defendant's father had a reputation for being violent when intoxicated and also allowed defendant's mother to testify to the facts of one violent incident that occurred seven years before trial. However, the trial court excluded testimony regarding the other six violent incidents under section 352 because they occurred more than 10 years before trial. As the trial court explained, anything outside the "ten-year range" is "just going back too far" and "starts to loose [*sic*] some of its probative value" when balanced against the need to prevent "undue consumption of time."

Defendant objected to the trial court's ruling, arguing that it deprived him of his constitutional right to present a defense. He renews this argument on appeal. We agree and reverse his conviction. As we explain, where self-defense is raised in a homicide case, evidence of the aggressive and violent character of the victim is admissible and may be proven by specific acts of violence committed by the victim. (§ 1103.) And while "[s]ection 352 permits the trial judge to strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption," these dangers must "substantially outweigh the probative value of the evidence. This balance is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744.) Thus, "section 352 must bow to the due process right of a defendant to a fair trial and his right

¹ Undesignated statutory references are to the Evidence Code.

to present all relevant evidence of significant probative value to his defense.” (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599.) We conclude the trial court abused its discretion in determining the probative value of the excluded testimony was substantially outweighed by the danger that the presentation of this evidence would take too long. And because this error undermines our confidence in the verdict, we must reverse defendant’s conviction.

FACTS

On July 21, 2010, defendant and Melanie Toney decided to go to the river to celebrate Toney’s birthday. Defendant and Toney had two children together and were seeing each other periodically following their break-up the previous September. Defendant’s father, Curtis Atkinson II (Atkinson), agreed to watch the children at defendant’s apartment while defendant and Toney were at the river. Atkinson was an alcoholic, but promised not to drink while watching the children.

Defendant and Toney brought some beer to the river. They each drank around a dozen beers over the course of seven to eight hours. Toney also drank some vodka. On the way back to the apartment, they went to the store and bought a bottle of whiskey and some clams for Toney’s birthday dinner. When they arrived home, defendant steamed the clams for Toney and cooked steak for the rest of the family. Atkinson, who had remained sober while watching the children, began to drink whiskey at dinner.

After dinner, defendant put the children to bed and then retired to the master bedroom with Toney. Atkinson stayed up in the living room and continued to drink, but promised that he would “keep his drinking to a minimum [because] the kids were in the house.” At some point, Atkinson began yelling at the television. Defendant got up, opened the bedroom door, and asked his father to “keep it down.” Atkinson apologized and said that he would. Defendant went back to sleep. A short time later, defendant was again awakened by his father’s yelling. Defendant opened the door and said: “Hey, man,

you are going to wake up the kids.” His father again apologized. Defendant returned to bed, but could not go back to sleep. When Atkinson began yelling a third time, defendant went into the living room and told him that he had broken his promise about keeping the drinking to a minimum. Defendant then took his father’s drink, poured it down the kitchen sink, brought the whiskey bottle into the bedroom, and returned to bed.

Atkinson was “really drunk” and defendant hoped that removing the whiskey would cause him to finally go to sleep. Instead, as defendant was falling asleep, his father came down the hallway “grumbling” about defendant’s relationship with Toney and pounded on the bedroom door until it opened and slammed into the dresser. Atkinson then went to the side of the bed where Toney was sleeping and demanded “in a very aggressive manner” to be taken home. Defendant got up and ran to the other side of the bed to protect Toney. With an arm around his father, defendant led him out of the bedroom, explaining that he “needed to [lie] down” because “he was drunk” and “didn’t know what he was doing.”

In the hallway, Atkinson planted his feet, grabbed defendant, and began throwing punches. Defendant did the same. One punch that defendant landed gave him “a sick feeling in [his] stomach because,” as defendant explained, “it was one of those punches that you could tell hurt.” At this point, not wanting to hurt his father, defendant “decided that wrestling would probably be a better way to take control of the situation.” The two men began to grapple. Atkinson went down, but “popped up” and rushed defendant, who placed him in a side headlock and was carried into the wall by his father’s momentum. After being thrown into the wall a few times, defendant managed to take his father to the ground and placed him in a rear chokehold. While defendant had his father under control at that point, he testified that his father was still “fighting like all hell.”

Toney, who could hear the fight from the bedroom, came out after it had been quiet for “three to five minutes” and saw that defendant had his father in the chokehold.

She asked him three times what he was doing. After the third time, defendant answered: “Shut up, he is still fighting.” Not seeing any movement on the part of Atkinson, Toney responded: “You need to stop, you are going to hurt him.” She then went back into the bedroom. Defendant confirmed in his testimony that his father was no longer “banging around in the hall[way]” when Toney came out of the bedroom, but maintained that his father’s “body posture [was such that] he was ready to pop up” and that he believed “there was a great potential for the fight to resume.”

Defendant released the chokehold when he was sure his father had stopped fighting and caught his breath for a couple minutes. Atkinson was not moving and his breathing sounded labored. Defendant then pulled his father into his lap and tried to wake him up, repeating: “Come on, old man. It’s time for you to go home. Wake up.” Atkinson did not respond. At this point, “three to five minutes” after Toney had returned to the bedroom, she came out and saw defendant with his father in his lap. Defendant told Toney they needed to call 911. Toney handed him the phone and said he was the one who needed to call. Defendant called 911 and performed CPR until paramedics arrived. Atkinson died of asphyxia.

At trial, defendant asserted that he acted in self-defense. In addition to the circumstances surrounding his father’s death, recounted above, defendant testified that Atkinson was “really loved in the family” and was “somebody that everybody looked up to,” but that he was also “violent with the people he was closest to,” especially when he was drinking. Defendant testified that his father had physically abused him “lots of times” during his life, and that he had also assaulted other family members, friends, and strangers. Defendant explained that his father was “feared” and “renowned” for being a “tough guy, somebody who got into a lot of street fights.” Defendant also testified that, in March 2009, Atkinson moved into the apartment for about three weeks and routinely came home drunk. One night, he came home “pretty beat up” and “told [defendant] that

he had been in a bar fight,” but was too drunk to coherently explain what had happened. Defendant had also heard about an incident that occurred before Atkinson moved into the apartment, in which Atkinson said he got into a fight with a man named Kevin while the two were “out drinking” and “significantly” injured the man. On another occasion, Atkinson was drunk and pulled a pocket knife on defendant and his brother.

Defendant explained that, based on prior experiences with his father, he was “very much afraid” during the fight. Defendant knew that Atkinson was “an experienced fighter,” and that he “could really hurt” defendant if he was not subdued. But defendant also explained that the punch he landed in the hallway caused him to believe he was going to hurt his father if he continued to throw punches. His solution was to place his father in a chokehold, believing this would subdue him without causing injury. This maneuver was not foreign to the family. Defendant testified about an incident in which he and his uncle were wrestling and he placed his uncle in the same chokehold. When his uncle “tapped” and said that he was choking, defendant released the hold and his uncle “flipped over with a big grin on his face” and placed defendant in the same chokehold. Defendant’s uncle, Jeffrey Atkinson, testified and confirmed the story. He also confirmed that Atkinson “had a reputation for being violent when he had too much to drink.”

Defendant’s mother, aunt, and cousin also testified. They each confirmed that Atkinson had a reputation for being violent when intoxicated. Defendant’s aunt, Deana Payne, explained that when sober, Atkinson “was one of the greatest guys you would know,” but when drunk, “he was your worst nightmare.” Defendant’s mother, Faith Emery, explained that he “was the nicest guy when he was sober, but he was a Jekyll & Hyde when he was drunk, and everybody knew it. [¶] . . . [¶] He’d be standing talking to you one minute, be the nicest guy in the world, and then the next minute, he would be beating you up, and it didn’t have to be just me, it was anybody.” Defendant’s mother

also testified to one specific incident that occurred seven years before trial. When she went to Atkinson's house to talk to him about defendant, he was intoxicated and violently assaulted her. As she explained: "He got mad and came after me. I run [*sic*] out the front door. He pulled me by my ponytail, hit me in the head with his fist. And then as I was headed toward my car, he threw a trash can at me."

DISCUSSION

I

Exclusion of Prior Incidents of Violence

Defendant contends the trial court violated his constitutional rights by excluding testimony from his mother and cousin concerning six specific incidents of his father's prior violent conduct. We agree.

A.

Additional Background

The People moved to exclude evidence of Atkinson's prior violent conduct "based on the remoteness of the claimed conduct." As relevant to this appeal, the prior incidents of violent conduct sought to be introduced are the following. Defendant's cousin, Elizabeth Dahl, was to testify concerning two such incidents. In the first, while Atkinson was married to Emery between 1979 and 1985, he became violent to the point that he "demolished" his trailer." In the second, Dahl "saw [Atkinson] get into a bar fight with a guy named 'John' in the 1990's and saw [Atkinson] hit John's head into the wall several times." Defendant's mother, Emery, was to testify about five violent assaults committed by Atkinson. In the first, about seven years before trial, Emery went to Atkinson's house to talk to him about defendant. He was intoxicated and became violent, pulling her ponytail, punching her in the head, and throwing a trash can at her. In the second, about 14 years before trial (when defendant was 17 years old), Atkinson was intoxicated and "punched [defendant] in the face" for "being mouthy." In the third, about 18 years before

trial (when defendant was 13 years old), Atkinson was working on his van and defendant handed him the wrong wrench. Atkinson threw the wrench at defendant, hitting him in the ankle. In the fourth, about 26 years before trial (when defendant was five years old), Emery told Atkinson she was moving to Florida and taking defendant with her. Atkinson pulled her hair and punched her two or three times. In the fifth, when defendant was very young, Atkinson was intoxicated and threw a coffee cup at Emery “because he didn’t like what [she] said.” Emery also would have testified that Atkinson beat her “once every two or three months” during this time period.

During the initial hearing on the motion to exclude these incidents of violent conduct, the People cited *People v. Gonzales* (1967) 66 Cal.2d 482 (*Gonzales*) and argued the remoteness of the prior acts made them irrelevant. The People also argued that these incidents should be excluded under section 352 because the probative value was substantially outweighed by the probability their admission would necessitate undue consumption of time or create the danger of undue prejudice, of confusing the issues, or of misleading the jury. Defense counsel distinguished *Gonzales* and argued that, despite the remoteness of some of the prior incidents, they were relevant and highly probative of defendant’s state of mind when he placed his father in the chokehold. Defense counsel also estimated she could present the testimony regarding these prior incidents in “a couple of hours.” The trial court deferred ruling on the motion.

Prior to Dahl’s testimony, the trial court entertained further argument and ruled that Dahl would be allowed to testify that Atkinson had a reputation for being violent when intoxicated, but she could not testify about either the incident in which Atkinson demolished his trailer or the incident in which he got into a bar fight and hit another man’s head into the wall several times. These incidents were excluded under section 352 because they occurred more than 10 years before trial. As the trial court explained: “[S]ome of . . . what you are offering in terms of things that happened a long time ago;

starts to lose some of its probative value just due to the passage of time. [¶] . . . [¶] . . . As I said before, my gut has been sort of for anywhere until about a ten-year range or so. I think that on balancing things, it's about where I would land. [¶] . . . [¶] It's just going back too far, and I think it starts to loose [sic] some of its probative value, and I balanced it against other -- undue consumption of time." Prior to Emery's testimony, the trial court ruled she would also be allowed to testify that Atkinson had a reputation for being violent when intoxicated. Emery would be allowed to further testify about the incident that occurred seven years before trial, in which Atkinson pulled her hair, punched her in the head, and threw a trash can at her. However, the remaining incidents were excluded under section 352 because they occurred more than 10 years before trial.²

B.

Section 1103

With certain exceptions, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (§ 1101, subd. (a).) One such exception is found in

² As the Attorney General points out, the trial court also mentioned that Emery did not see Atkinson punch defendant in the face when he was 17 years old. However, Emery need not have seen the punch in order to testify about the incident. Emery testified during the section 402 hearing that she came into the room after the punch and took defendant to the dentist because it knocked his teeth loose. Thus, she had personal knowledge of the condition of defendant's face when she walked into the room. And if defendant told her Atkinson punched him in the face when she walked into the room, such a spontaneous statement would be admissible hearsay under section 1240. The trial court also mentioned that the incident involving the wrench "did not feel part of the same pattern," i.e., Atkinson becoming violent while intoxicated, but instead, this seemed to be a situation in which Atkinson was simply "frustrated." However, while Atkinson's "pattern" of becoming violent while intoxicated is important to establish that he was the aggressor in the fight that led to his death, any violent act perpetrated against defendant is relevant to defendant's state of mind.

section 1103.³ This provision “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 charged crime. Consequently, in a prosecution for a homicide or an assaultive crime where self-defense is raised, evidence of the violent character of the victim is admissible to show that the victim was the aggressor.” (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446, fn. omitted.) Such evidence may be “in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct.” (§ 1103, subd. (a); *People v. Wright* (1985) 39 Cal.3d 576, 587.)

In addition to being admissible to show that the victim was the aggressor, evidence of the victim’s violent character, if known to the defendant, “has a material bearing on the degree and nature of [the defendant’s] apprehension of danger.” (*People v. Smith* (1967) 249 Cal.App.2d 395, 404.) This is important because self-defense will justify a homicide only where the defendant “actually and reasonably believe[s] in the need to defend” against “imminent harm” (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082), and “any right of self-defense is limited to the use of such force as is reasonable under the circumstances.” (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065.) However, although the test is objective, “a jury must consider what ‘would appear to be necessary to a reasonable person in a similar situation and with similar knowledge. . . .’ [Citation.] It judges reasonableness ‘from the point of view of a reasonable person in the position of defendant’ [Citation.] To do this, it must consider all the ““facts and circumstances

³ Section 1103, subdivision (a), provides: “In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. [¶] (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1).”

. . . in determining whether the defendant acted in a manner in which a reasonable man would act in protecting his own life or bodily safety.’” [Citation.]” (*People v. Humphrey, supra*, 13 Cal.4th at pp. 1082-1083, italics omitted.) Thus, the jury must “take into consideration all the elements in the case which might be expected to operate on [the defendant’s] mind’ [Citation.]” (*Id.* at p. 1083; *People v. Minifie, supra*, 13 Cal.4th at p. 1065.)

Without question, the victim’s prior violent conduct is a circumstance that would operate on the defendant’s mind in determining the nature of the threat and the amount of force necessary to defend against it. And where the defendant claims knowledge of such violent conduct, he is entitled to present corroborating testimony from individuals who either witnessed or were the alleged victims of the prior violent conduct. (See *People v. Davis* (1965) 63 Cal.2d 648, 656-657 [where defendant claimed knowledge of prior violent acts committed by the deceased, he was entitled to bolster self-defense claim by presenting corroborating testimony from deceased’s prior alleged victims].)

Here, because defendant claimed self-defense, evidence of Atkinson’s prior violent conduct was admissible under section 1103 to prove he was the aggressor in the fight that led to his death. And because defendant claimed to have been aware of his father’s prior violent conduct during the fight, this evidence was also admissible to prove defendant’s state of mind. In particular, this evidence would have bolstered his claim that he reasonably believed in the need to defend against imminent harm and that he used a reasonable amount of force under the circumstances.

Nevertheless, the Attorney General argues that the specific instances of prior violent conduct sought to be admitted in this case were properly excluded under sections 350 and 352 because of their remoteness. We turn to these sections now and conclude the evidence was improperly excluded from the trial.

C.

Section 350

Section 350 provides: “No evidence is admissible except relevant evidence.” Evidence is relevant if it has “any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (§ 210.) Conversely, irrelevant evidence is evidence “having no probative value; not tending to prove or disprove a matter in issue.” (Black’s Law Dict. (8th ed. 2004) p. 848, col. 1.)

Citing *Gonzales, supra*, 66 Cal.2d 482, the Attorney General argues that the specific incidents of violence excluded by the trial court were “too remote to have any present probative value.” We disagree. In *Gonzales*, the defendants, Gonzales and Alarcon, were convicted of first degree murder and robbery following a knife fight in a railroad yard. The prosecution’s theory of the case, which was supported by substantial evidence, was that the defendants and two minors were walking across the yard when they decided to rob three men, including Lujano and Ontiveros, who were crossing the yard from a different direction. Gonzales pulled a knife. As did Lujano. Nearly everyone involved received knife wounds during the ensuing fight, but the most severe wounds were inflicted upon Lujano and Ontiveros. After taking Lujano’s wallet, the defendants fled from the yard. Ontiveros died from his injuries. (*Gonzales, supra*, 66 Cal.2d at pp. 484-486.) The defense theory was that the defendants did not intend to rob Lujano at the time the fight broke out. Instead, they were defending themselves from the aggression of Lujano’s group, Lujano’s wallet fell out of his pocket during the fight, and one of their minor companions picked up the wallet as they ran from the yard. (*Id.* at p. 490.)

Our Supreme Court reversed the defendants’ convictions based on the erroneous and prejudicial admission of certain extrajudicial statements made by Alarcon. (*Gonzales, supra*, 66 Cal.2d at pp. 495-497.) For purposes of guidance on remand, the

court also addressed three additional issues raised by the defendants. One of these issues was whether the trial court erroneously excluded the testimony of a probation officer who would have testified that, seven years earlier, he had conducted an inquiry into Lujano's reputation for violence and had concluded that such a reputation existed. (*Id.* at pp. 499-500.) The trial court excluded the testimony for two reasons. First, the probation officer did not live in the community and had no direct knowledge of Lujano's reputation. Second, the officer's seven-year-old conclusion as to Lujano's reputation was "too remote to have significant probative value as to present character." (*Id.* at p. 500.)

Our Supreme Court upheld the trial court's decision to exclude the testimony, explaining: "Defendants therefore rely upon the well-known rule that when evidence of self-defense has been produced 'the accused may introduce evidence of the reputation of the deceased for turbulence and violence.' [Citations.] However, even assuming that a rational extension of this rule would permit the introduction of reputation evidence as to one not the deceased, and further assuming that, as defendants argue, a determination of reputation by one whose duties require objectivity of him is at least as reliable as an assessment made by a member of the community — still defendants offer no argument against the trial court's determination, in the exercise of its discretion, that evidence relating to Lujano's reputation *seven years before* the acts in question was too remote to have present probative value." (*Gonzales, supra*, 66 Cal.2d at p. 500.) The court also pointed out that the trial court, "at the time it sustained the prosecution's objection, told defendants that if they could produce a witness 'who would testify as to the reputation in the community of . . . Lujano within a time much more recent as to the events we are concerned with, a very different approach would be taken by the Court.' However, no other witnesses as to Lujano's reputation were produced by the defense." (*Ibid.*)

The Attorney General argues that because the specific violent acts excluded by the trial court occurred "well beyond the seven years which the Supreme Court determined to

be too remote to be of present probative value” in *Gonzales*, they must also lack present probative value in this case. We disagree for two reasons. First, in *Gonzales*, the only evidence of Lujano’s violent character was evidence that he had a reputation for being violent seven years before the fight occurred. As we explained in *People v. Shoemaker, supra*, 135 Cal.App.3d 442, “the time of character evidence ‘. . . as a question of Relevancy, is simple enough Character at an earlier or later *time* than that of the deed in question is relevant only on the assumption that it was substantially unchanged in the meantime, *i.e.*, the offer is really of character at one period to prove character at another, and the real question is of relevancy of this evidence to prove character, not of the character to prove the act.’” (*Id.* at p. 447, quoting Wigmore, Evidence (3d ed. 1940) § 60, p. 463.) Accordingly, evidence that Lujano had a reputation for violence seven years before the fight was evidence that he *then* had a violent character; but without evidence that this violent character was substantially unchanged in the meantime, the evidence was not probative of his character at the time of the fight. Here, a number of witnesses testified that Atkinson’s reputation for becoming violent when intoxicated continued until his death, defendant testified to an incident that occurred less than two years before the fight, and Emery testified to an incident that occurred about seven years before trial. While the violent incidents excluded by the trial court are more remote than the evidence at issue in *Gonzales*, occurring more than 10 years before the fight, they are nevertheless probative of Atkinson’s character at the time of the fight because the more recent evidence demonstrates that Atkinson’s character remained the same throughout his life.

Second, in *Gonzales*, there was no evidence that either defendant knew about Lujano’s violent reputation. Thus, the only use of the evidence of his reputation was to prove he had a violent character and likely acted in conformity with that character at the time of the fight. Here, defendant testified that he had an intimate understanding of his

father's violent character. It was this understanding, according to defendant, that caused him to be in reasonable fear for his safety and use the chokehold as the most reasonable means of neutralizing the threat. Accordingly, to the extent the excluded violent incidents informed defendant's understanding of the nature of the threat his father posed, they were probative of his state of mind. This is so regardless of whether they were also probative of Atkinson's character at the time of the fight. Moreover, because the excluded evidence corroborated defendant's testimony concerning his father's violent character, it was also probative on the issue of his credibility. (See *People v. Davis*, *supra*, 63 Cal.2d at p. 657; *People v. Rowland* (1968) 262 Cal.App.2d 790, 796-797.)

D.

Section 352

We now turn our attention to 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." Rulings under this provision "come within the trial court's discretion and will not be overturned absent an abuse of that discretion." (*People v. Minifie*, *supra*, 13 Cal.4th at p. 1070.)

Our Supreme Court has explained: "Section 352 permits the trial judge to strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption. That section requires that the danger of these evils substantially outweigh the probative value of the evidence. This balance is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne*, *supra*, 4 Cal.3d at p. 744; *People v. Tran* (2011) 51 Cal.4th 1040, 1047 ["section 352 requires the exclusion of evidence only when its probative value is substantially outweighed by its prejudicial effect"]; see also *People v. Holford* (2012) 203

Cal.App.4th 155, 168 [section 352 objection should be overruled “unless the probative value is ‘substantially’ outweighed by the probability of a ‘substantial danger’” of one of the statutory counterweights].) Accordingly, “section 352 must bow to the due process right of a defendant to a fair trial and his right to present all relevant evidence of significant probative value to his defense. [Citations.] Of course, the proffered evidence must have more than slight relevancy to the issues presented. [Citation.]” (*People v. Burrell-Hart, supra*, 192 Cal.App.3d at p. 599; *People v. Reeder* (1978) 82 Cal.App.3d 543, 553.)

Here, the probative value of the excluded evidence was significant. Defendant’s sole theory to support an acquittal was self-defense. As we have explained, evidence of Atkinson’s prior violent conduct was probative of his character for violence, making it more likely that he was the aggressor during the fight with his son. For this purpose, as the Law Revision Commission advises in its comments on section 1103, even evidence of “slight probative value” should generally be admitted because even “weak” evidence of the victim’s violent character “[m]ay be enough to raise a reasonable doubt in the mind of the trier of fact concerning the defendant’s guilt.” (Cal. Law Revision Com. com., 29B pt. 3B West’s Ann. Evid. Code (2009 ed.) foll. § 1102, p. 312.) However, in this case, the evidence of Atkinson’s violent character was neither weak nor of slight probative value. While the excluded incidents of violence were over 10 years old, there was evidence suggesting that Atkinson’s character for violence, especially while intoxicated, remained the same throughout his life. Moreover, the excluded incidents would have added to the jury’s understanding of Atkinson’s pattern of violence. Such a pattern is more probative than a single incident. (See *People v. Stewart* (1985) 171 Cal.App.3d 59, 66 [“series of crimes relevant to credibility is more probative than is a single such offense”]; see also *People v. Muldrow* (1988) 202 Cal.App.3d 636, 648.) The excluded evidence painted a picture of a person whose violent character never abated.

The excluded evidence was also highly probative of defendant's state of mind and bolstered his claim that he reasonably believed in the need to defend against imminent harm and that he used a reasonable amount of force under the circumstances. For example, Toney testified that defendant held Atkinson in the chokehold after his father was no longer moving. Defendant testified that his father's body posture indicated he was still a threat. Without evidence of prior violent acts showing the degree of danger posed by Atkinson, the jury may very well have concluded that defendant's use of the chokehold for as long as he did was unreasonable. "[T]he fact that the evidence was not conclusive on this point did not negate its probative value to defendant's self-defense claim." (*People v. Wright, supra*, 39 Cal.3d at pp. 583-584.)

Moreover, as already mentioned, the excluded incidents corroborated defendant's testimony concerning his fear of his father. Because this testimony was largely uncorroborated, there was a substantial danger the jury viewed defendant's testimony as exaggerated. And given the lack of specific examples of violent conduct, there was also a substantial danger the jury viewed the reputation testimony offered by defendant's mother, aunt, and uncle as exaggerated. (See *People v. Davis, supra*, 63 Cal.2d at p. 657; *People v. Rowland, supra*, 262 Cal.App.2d at pp. 796-797.)

Nevertheless, the trial court ruled that the probative value of the evidence was substantially outweighed by the danger that its admission would require an undue consumption of time. This was an abuse of discretion. Defense counsel estimated she could present the evidence in "a couple of hours." Indeed, the two witnesses who would have testified concerning the prior incidents testified about Atkinson's reputation for violence. And Emery also testified about one prior incident. Adducing testimony concerning the remaining incidents would not have consumed an undue amount of time. (See *People v. Burrell-Hart, supra*, 192 Cal.App.3d at p. 600 ["since the evidence was to be presented by the testimony of three witnesses, two of whom testified anyway, the

presentation of said evidence would not consume an undue amount of time”].) Nor do we believe the excluded evidence was merely cumulative. While several witnesses testified that Atkinson had a reputation for becoming violent while drinking, and while Emery testified to the facts of one violent assault, we believe defendant was entitled to paint a more complete picture of his father’s violent background.

Finally, the trial court also suggested that its ruling was based in part on the danger of undue prejudice to Atkinson and the prosecution: “And, again, I certainly am sensitive to the defense, I’m also sensitive to the decedent is not here to sort of be able to defend himself as to things being said about him, and being able to rebut those things; what people say they saw, the circumstance, et cetera. [¶] . . . [¶] And the prosecution, there is no position to do that; that these things happened so long ago, happened in another state. So I do feel that I’m trying to strike some balance. Sort of protect the interests of both parties in this matter.” However, “[t]he “prejudice” referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against . . . [one party] and which has very little effect on the issues.’ [Citation.]” (*People v. Wright, supra*, 39 Cal.3d at p. 585.) As mentioned, the jury heard that Atkinson had a reputation for being violent when intoxicated and heard about a specific incident in which he pulled Emery’s hair, punched her in the head, and threw a trash can at her. The jury also heard about an incident in which Atkinson pulled a knife on defendant and his brother. In light of this evidence, “it is difficult to see how the admission of the [other incidents] would have further prejudiced them against the victim or the prosecution.” (*Ibid.*) At the same time, for the reasons set forth above, the evidence had significant probative value. Exclusion of the proffered incidents of violence was an abuse of discretion.⁴

⁴ While the trial court did not base its ruling on the danger of confusing the issues or of misleading the jury, we conclude these dangers do not substantially outweigh the probative value of the excluded evidence. Additional examples of Atkinson’s violent

E.

Prejudice

We also reject the Attorney General's contention that any error was harmless. Evidentiary error under section 352 requires reversal only if the reviewing court believes that, "absent the error, it is reasonably probable that a result more favorable to the defendant would have been reached." (*People v. Burrell-Hart, supra*, 192 Cal.App.3d at p. 600; *People v. Watson* (1956) 46 Cal.2d 818, 836.) In a self-defense case, exclusion of evidence bearing on the victim's aggressive character and on the defendant's credibility concerning the events leading up to the confrontation has been held to be prejudicial error. (*People v. Rowland, supra*, 262 Cal.App.2d at pp. 797-798.)

So too here. This was a close case. The jury rejected the prosecution's theory that Atkinson's death was voluntary manslaughter, but also rejected defendant's claim of self-defense, convicting him of involuntary manslaughter. The jury could have declined to believe defendant's testimony that his knowledge of his father's prior violent acts placed him in reasonable fear that his life was in danger or that, if such a fear existed, placing Atkinson in a chokehold was a reasonable means of defending against the threat. Moreover, as mentioned, there was a conflict in the testimony concerning whether defendant held his father in the chokehold even after he ceased to be a threat. While Toney testified that she saw defendant holding Atkinson in the chokehold after he was no longer moving, defendant testified that his father's body posture indicated he was still a threat. Without evidence of prior violent acts showing the degree of danger posed by Atkinson, the jury may have believed that holding him in the chokehold for so long was

conduct would have enlightened the jury concerning the nature of the threat defendant faced in his hallway the night of the fight. Nor would these examples have confused the issues since the key issue raised by the defense was whether defendant reasonably believed in the need to defend against imminent harm and used a reasonable amount of force in doing so. The excluded prior incidents went directly to that issue.

unreasonable. The excluded testimony concerning Atkinson's prior violent conduct "may very easily have turned the scale in favor of the prosecution." (*People v. Alpine* (1927) 81 Cal.App. 456, 471.)

Our dissenting colleague disagrees. He would affirm defendant's conviction based on his assessment that any error was harmless because "the proffered evidence in fact added little, if anything, to what the jury already knew about the victim as it related to defendant's claim of self-defense." He cites the testimony of defendant's mother, aunt, uncle, and cousin that Atkinson was known by the family to be extremely violent when intoxicated. He also cites the specific violent incidents testified to by defendant and the one such incident testified to by defendant's mother. Our colleague concludes, "[i]t would have added little for the jury to know of other incidents, similar to those of which it was already aware, occurring 14 to 26 years before trial." Were we to assume the jury believed defendant's account of his father's prior violent acts, we might agree. But that is the problem. The only evidence corroborating defendant's account of his father's prior violent conduct was reputation testimony from family members and one specific incident testified to by defendant's mother, a witness who was unquestionably biased in favor of her son. The excluded incidents of violent conduct corroborated defendant's testimony. Moreover, as we have already explained, the specific incidents involving violence against defendant were highly probative of defendant's state of mind at the time of the altercation. And the incident in which Atkinson got into a bar fight and slammed his opponent's head into a wall several times was highly probative of the nature of the threat defendant faced in his hallway and, in turn, the reasonableness of his decision to place his father in the chokehold that resulted in his unfortunate and unintended death.

In sum, while our dissenting colleague finds no reasonable probability that a result more favorable to defendant would have been reached had the excluded evidence been given to the jury, we find "at least such an equal balance of reasonable probabilities as to

leave [us] in serious doubt as to whether the [exclusion of this evidence] has affected the result. But the fact that there exists at least such an equal balance of reasonable probabilities necessarily means that [we are] of the opinion ‘that it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error.’” (*People v. Watson, supra*, 46 Cal.2d at p. 837.) Stated differently, the erroneous exclusion of evidence of Atkinson’s prior violent conduct undermines our confidence in the verdict, requiring reversal of defendant’s conviction.

DISPOSITION

The judgment is reversed.

_____ HOCH _____, J.

I concur:

_____ MURRAY _____, J.

HULL, J., Dissenting

In this matter, the majority concludes the trial court erred in excluding, pursuant to section 352 of the Evidence Code (hereafter § 352), certain proffered evidence regarding the victim's propensity for violence, especially while intoxicated, and that the trial court's error was prejudicial. As to the latter point, I disagree.

In assessing a claim of error of this sort, the appellate court is guided by well-settled rules.

“A trial court has broad discretion in determining whether to admit or exclude evidence objected to on the basis of section 352 (*People v. Ramos* (1997) 15 Cal.4th 1133, 1170), and rulings under that section will not be overturned absent an abuse of that discretion (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070). ‘[T]he term judicial discretion “implies absence of arbitrary determination, capricious disposition or whimsical thinking.”’ (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) ‘[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered.’ (*Ibid.*)” (*People v. Mullens* (2004) 119 Cal.App.4th 648, 658.)

At trial, defendant admitted he killed his father, but claimed he did so in self-defense. In support of that defense, he presented to the jury the following evidence, which was uncontested, regarding his father's history of violence toward others, particularly when the father was intoxicated.

Defendant testified as follows:

On the night in question, defendant's father began drinking while having dinner in defendant's home and continued drinking thereafter. After everyone else went to bed, including defendant's children, defendant's father began yelling at the television and continued to do so even though defendant twice asked him to stop. He was “really drunk.”

After the third instance of his father yelling at the television, defendant left his bedroom, poured his father's drink in the sink, took his father's whiskey and went back to

bed. This apparently prompted the father to pound on defendant's bedroom door until it opened and slammed into the dresser.

When defendant tried to get his father out of defendant's bedroom and into bed, his father resisted and "began throwing punches."

Defendant's father was "loved in the family" but was "violent with the people he was closest to," especially when he had been drinking. His father had physically abused him "lots of times" during his life and assaulted other family members, friends, and strangers. His father was "feared" and "renowned" for being "a tough guy" who got into "a lot of street fights."

In March 2009, his father, while living at defendant's home for a few weeks, routinely came home drunk. One night when he came home, he was "pretty beat up," and told defendant he had been in a bar fight but was too drunk to explain what had happened. Defendant also heard about an incident before his father moved into the apartment where his father got into a bar fight and significantly injured a friend he was fighting with. On another occasion defendant's father was drunk and pulled a pocket knife on defendant and his brother. Defendant said, based on prior experiences with his father, he was "very much afraid" during the fight on the night his father died.

Defendant knew his father was an "experienced fighter" who could "really hurt" defendant.

Defendant's uncle, who was his father's brother, testified that defendant's father "had a reputation for being violent when he had too much to drink."

Defendant's mother, aunt, and cousin also testified that defendant had a reputation for being violent when intoxicated.

Defendant's mother testified as follows:

She and the defendant's father were married in 1979 and that she had known him from that time until the time that he died. She said defendant's father was "a Jekyll & Hyde when he was drunk, and everybody knew it." "He'd be standing talking to you one

minute, be the nicest guy in the world, and then the next minute, he would be beating you up.” It was not just her whom he treated this way, “it was anybody.”

In one incident seven years before trial, when defendant’s mother went to the victim’s home to talk about defendant, the victim was intoxicated and violently assaulted her. Specifically, “[Defendant’s father] got mad and came after me. I run [*sic*] out the front door. He pulled me by my ponytail, hit me in the head with his fist. And then as I was headed toward my car, he threw a trash can at me.”

Defendant’s aunt testified that:

She had known defendant all of his life and that defendant’s father had a reputation, when he was drunk, as “your worst nightmare.” When intoxicated defendant’s father was “extremely--extremely violent.” That was his reputation “[t]o the end.”

In addition to the above evidence, defendant sought to place before the jury additional incidents of the victim’s violent conduct toward family members and others. Specifically, the defendant offered his cousin’s testimony that, sometime between 1979 and 1985, defendant’s father became violent to the point that he “demolished his trailer.” Further, defendant’s cousin was prepared to testify that she saw defendant’s father get into a bar fight in the 1990’s and saw him hit his co-combatant’s head into a wall several times.

The defendant also wanted the jury to hear further evidence from his mother that: (1) defendant’s father punched defendant in the face for being “mouthy” approximately 14 years before trial, (2) defendant’s father, while working on a car 18 years before trial when defendant was 13 years old, threw a wrench at defendant hitting defendant in the ankle, (3) defendant’s father pulled the mother’s hair and punched her two or three times when she told him, 26 years before trial, that she was moving away and taking defendant with her, and (4) when defendant was very young, his father threw a coffee cup at

defendant's mother, and that, during that time, defendant's father beat the mother once every two or three months.

The People objected to this additional testimony on the basis that it described incidents that were too remote to have any probative value or that whatever probative value they had was outweighed by the countervailing considerations set forth in section 352. The trial court excluded the evidence and the majority here concludes that the court erred in doing so.

It is unnecessary for me to decide whether the trial court's exclusion of the evidence exceeded the bounds of reason and thus was an abuse of discretion. The error, if there was one, was harmless and does not merit a reversal of defendant's conviction.

“Under article VI, section 13 of the California Constitution, error in the admission or exclusion of evidence warrants reversal of a judgment only if an examination of ‘the entire cause, including the evidence,’ ’ discloses the error produced a ‘miscarriage of justice.’ ’ (*People v. Breverman* (1998) 19 Cal.4th 142, 173, italics omitted.)” (*People v. Mullens, supra*, 119 Cal.App.4th at pp. 658-659, fn. omitted.) “Under the harmless error test in *People v. Watson* [(1956) 46 Cal.2d 818,] 836, ‘a “miscarriage of justice” should be declared only when the court, “after an examination of the entire cause, including the evidence,” is of the “opinion” that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.’ (See also *Breverman, supra*, 19 Cal.4th at p. 174.)” (*Mullens*, at p. 659.)

I suspect the trial court was motivated in its ruling by the same thought that motivates me to disagree with my colleagues here, at least as to the effect of the error the majority has concluded occurred at trial, and that is that the proffered evidence in fact added little, if anything, to what the jury already knew about the victim as it related to defendant's claim of self-defense.

The jury knew without dispute that defendant's father was drunk on the night in question and the jury knew, without dispute and according to numerous family members

in addition to defendant, that the victim had been known by his family up to the day he died as a “Jekyll & Hyde” who would become “your worst nightmare” and “extremely--extremely violent” when he was drinking. It would have added little for the jury to know of other incidents, similar to those of which it was already aware, occurring 14 to 26 years before trial. I suspect that defendant wanted to have the jury hear the additional evidence as part of an understandable effort by defendant to convince the jury to dislike the father so much that it would acquit the son.

I note that the fight with his father that resulted in his father’s death was not an isolated instance of anger or violence committed by a man not himself inclined to anger and violence with family members. Defendant testified at trial and admitted on cross-examination that on July 4--the year was not specified--he had been down by a river with his father and his brother and that, although defendant did not remember much of anything that day, he was told later he was being a “rowdy idiot,” “a jackass” towards his father and his brother and that his brother had to tackle defendant to the ground. While the year of this incident was not specified in the testimony, reading defendant’s testimony in context suggests to me that the incident occurred 17 days prior to defendant’s fight with his father that ended in the father’s death.

Further, the mother of defendant’s children testified that her relationship with defendant was marked by domestic violence, that it was “a very tumultuous kind of tense relationship.” The defendant would occasionally choke her while picking her up off the ground. On the last occasion, he held her to the ground with his hands around her throat and “was just squeezing very, very hard to the point where I thought [defendant] was going to crush my windpipe.”

Defendant in turn admitted that he grabbed the mother of his children by the throat “on several occasions” and that on the last occasion he had one hand on her throat and was choking her.

The point of this is that the focus of the matter at trial was whether defendant was merely defending himself during the altercation that led to his father's death. The fact of family violence by the father and by the son was a given and well known to the jury from the evidence it heard. Apprising the jury of still more incidents of such violence by the father many years earlier would have made little difference to this jury given the issue it was asked to decide.

In sum, I cannot say there was a miscarriage of justice here; that, after an examination of the entire cause, it is reasonably probable that a result more favorable to defendant would have been reached had the excluded evidence been given to the jury.

I would affirm the judgment.

 HULL , Acting P. J.