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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

TY RONE PITTS,

Defendant and Appellant.

C068055

(Super. Ct. Nos.
09F0234, 10F5731)

In case No. 10F5731, a jury convicted defendant Ty Rone Pitts of first degree murder (Pen. Code, §§ 187, subd. (a), 189)¹ and found that he personally used a deadly weapon in the commission of the offense (former § 12022, subd. (b)(1)).

In case No. 09F0234, the trial court found that defendant violated his probation by committing the offense in case No. 10F5731.

¹ Undesignated statutory references are to the Penal Code in effect at the time of defendant's April 22, 2011 sentencing.

Defendant was sentenced to state prison for a determinate term of five years (one year for weapon use plus four years for the probation case) plus a consecutive indeterminate term of 25 years to life. He was awarded 282 days of custody credit and zero days of conduct credit (§ 2933.2, subd. (c).)

On appeal, defendant contends the trial court erred when it (1) allowed the jury to consider two prior instances of his abuse of the victim—not to impeach defense evidence of his good character—but to show his propensity to commit abusive acts; and (2) failed to award conduct credit in the probation case. We shall affirm the judgment.

FACTUAL BACKGROUND

Prosecution Case-in-chief

On the evening of August 15, 2010, Shasta County Sheriff's deputies responded to the scene of a domestic violence incident. When they arrived, the officers found the victim, 24-year-old Randal Wert, lying outside the house. She had been stabbed multiple times. Emergency medical personnel declared her dead at the scene. A trail of blood led from the back porch of the house to the body. A chair on the porch had some blood stains and a small cut. A bloody knife, 24 inches in length, was found nearby. One of the children at the residence told officers that their dad had killed their mom.

Defendant, the boyfriend of Wert, was located about a half mile from the residence. He was advised of his constitutional

rights and agreed to speak with deputies. A digital recording (DVD) of the interview was played for the jury.

Defendant admitted stabbing Wert to death because she had been "needlin[g]," "bitchin[g]," and "bellyachin[g]" at him. He had warned her that, if she did not stop, he would react and stab her. He admitted stabbing her on the porch and, after she fled, in the driveway. He believed the latter wound was fatal. Toward the end of the confrontation, the children came out of the house. Defendant told them to say goodbye to their mother because she was dying.

K.E., the seven-year-old daughter, testified that defendant stabbed Wert in the stomach while she was seated in a chair on the porch. Later, K.E. saw Wert lying down on the driveway. Defendant told K.E. that Wert was dead and to say goodbye. K.E. told Wert to "[p]lease wake up."

The autopsy showed that Wert had suffered five stab wounds to the torso, two to the right arm, and one to the thigh. Two wounds to the torso went all the way through her body. There was a shallower "slicing" wound to the left elbow and defensive wounds to the palms of the hands. The cause of death was blood loss from the multiple wounds.

Pursuant to Evidence Code section 1109, evidence was introduced of two prior acts of domestic violence.

Amanda Larkins, a friend of Wert, testified that on July 4, 2006, she and Wert had wanted to attend a fireworks show.

Defendant did not want Wert to go. They got into an argument and he became violent. He threatened to kill Larkins unless she got Wert out of her minivan. When Wert complied and left the van, defendant pushed her and she stumbled. Larkins recalled seeing defendant hit Wert on the head with a beer bottle.

A Shasta County Sheriff's deputy testified that in December 2008, he responded to a domestic violence call and met the victim, Wert, at the hospital. She had a laceration on her finger and redness on her forehead and shoulders. The deputy proceeded to the residence that Wert shared with defendant. At the house, the deputy found blood in the hallway and a kitchen knife with a bloody handle in the dish drainer near the sink. In a presentence probation interview, defendant admitted that he had been armed with a knife. Defendant was on probation for this incident at the time of the present offense.

Defense

The defense presented three former girlfriends who testified that defendant was not a violent person. Defendant's son, N.P., testified that he had never seen his father demonstrate any physical violence. N.P. was aware that defendant had gone to jail as a result of a prior violent act. The defense presented evidence that Wert had a new boyfriend during the weeks prior to her death.

DISCUSSION

I. Prior Incidents

Defendant contends the trial court erred and violated his federal due process rights when it allowed the jury to consider the 2006 and 2008 incidents of "cohabitant abuse," not for the purpose of impeaching the defense evidence of his good character, but for the purpose of showing his propensity to commit such acts. Specifically, he claims the jury should not have been instructed with CALCRIM No. 852, which allowed the jury to consider the prior acts for the purpose of showing his propensity to commit domestic violence. The claim has no merit.

Evidence Code section 1109, subdivision (a)(1) provides in relevant part that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by [Evidence Code] Section 1101 if the evidence is not inadmissible pursuant to [Evidence Code] Section 352."

Evidence Code section 1109, subdivision (a)(1) creates an exception, for domestic violence cases, to the statutory rule that prior acts are inadmissible to prove a propensity to commit the charged crime. (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232; see *People v. Falsetta* (1999) 21 Cal.4th 903, 911.) The prior domestic violence evidence is allowed provided the trial court finds it admissible under Evidence Code section 352.

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; see *People v. Brown, supra*, 192 Cal.App.4th at p. 1233.)

Defendant argues that prejudice substantially outweighed probative value because the value of the prior acts was slight. Specifically, he claims the acts had slight relevance to the sole disputed issues of whether he presently acted in the heat of passion (thus making the offense voluntary manslaughter rather than murder) and whether an average person would likewise have acted from passion rather than reason. We disagree.

The 2006 incident was highly relevant because a cohabitant's desire to attend a fireworks show with a friend but without her cohabitant would not provoke an average person to domestic violence. The fact that defendant had responded to trivial provocation when an average person would not have done so tended to suggest that he similarly responded to woefully inadequate provocation in the present case. The evidence was

relevant to whether the present offense was murder or manslaughter.

The circumstances leading to the 2008 incident were not developed on the present record. While the incident was not directly relevant to the provocation issue, it also was not prejudicial because there was no danger that any juror based his or her decision to convict defendant upon the sparse evidence of the 2008 incident.

Defendant claims the prior acts were "inherently prejudicial." "The governing test, however, evaluates the risk of 'undue' prejudice, that is, "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues,"" not the prejudice 'that naturally flows from relevant, highly probative evidence.'" (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Against a backdrop of evidence that defendant inflicted eight stab wounds, two of which were through and through and one or more of which were fatal, evidence that he also had pushed Wert down, had hit her with a beer bottle, and had lacerated her finger did not tend "uniquely" to evoke an emotional bias against him. (*People v. Padilla, supra*, 11 Cal.4th at p. 925.) To the extent the prior acts evidence was damaging, it was because the 2006 and 2008 acts were highly relevant to

defendant's willingness to act in the absence of adequate provocation.

Defendant claims the prior acts were prejudicial because the jury never learned of any conviction or punishment for the July 2006 act and learned that, following his guilty plea, he merely was placed on probation for the 2008 act. (Citing, e.g., *People v. Falsetta, supra*, 21 Cal.4th at p. 917.)

"The testimony describing defendant's uncharged acts, however, was no stronger and no more inflammatory than the testimony concerning the charged offense[]. This circumstance decreased the potential for prejudice, because it was unlikely that the jury disbelieved [the prosecution evidence] regarding the charged offense[] but nevertheless convicted defendant on the strength of [the two prior incidents], or that the jury's passions were inflamed by the evidence of defendant's uncharged offenses" as opposed to the brutal, and fatal, present offense. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

The trial court properly admitted the 2006 and 2008 prior acts pursuant to Evidence Code section 1109 and correctly instructed the jury with CALCRIM No. 852.

II. Conduct Credit

In his opening brief, defendant contended the matter should be remanded to the trial court with directions to calculate his conduct credit against the four-year determinate term imposed for the probation violation.

The Attorney General responded that defendant's claim is foreclosed by this court's recent opinion in *In re Maes* (2010) 185 Cal.App.4th 1094 (*Maes*), which held that the broad language of section 2933.2, subdivisions (a) and (b) applies to "all determinate terms a murderer serves as a single period of custody either before or concurrent with the service of his or her indeterminate life term for murder." (*Maes, supra*, at pp. 1103-1104.)² In the Attorney General's view, *Maes* precludes any award of conduct credit in this case.

In his reply brief, defendant states he "cannot find a way to distinguish its facts from those in this case." He invites this court to "reconsider its view," but he offers no persuasive reason for doing so. We decline the invitation.

Maes involved postsentence conduct credit under section 2933.2, subdivisions (a) and (b), whereas the present case

² Section 2933.2 provides in relevant part:

"(a) Notwithstanding Section 2933.1 or any other law, any person who is convicted of murder, as defined in Section 187, shall not accrue any credit, as specified in Section 2933 or Section 2933.05.

"(b) The limitation provided in subdivision (a) shall apply whether the defendant is sentenced under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2 or sentenced under some other law.

"(c) Notwithstanding Section 4019 or any other provision of law, no credit pursuant to Section 4019 may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest for any person specified in subdivision (a)."

involves presentence conduct credit under section 2933.2, subdivision (c). (*Maes, supra*, 185 Cal.App.4th at p. 1100.) We find no indication of legislative intent to distinguish between presentence and postsentence credit for present purposes. Thus, our opinion in *Maes* controls the result in this case. Defendant was not entitled to presentence conduct credit.

DISPOSITION

The judgment is affirmed.

_____ BUTZ _____, J.

We concur:

_____ BLEASE _____, Acting P. J.

_____ NICHOLSON _____, J.