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

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
IGNACIO MARTINEZ,  
  
Defendant and Appellant.

C068929  
  
(Super. Ct. No.  
SF117001A)

A jury found defendant Ignacio Martinez guilty of making criminal threats (Pen. Code, § 422) and dissuading a witness from testifying (Pen. Code, § 361.1, subd. (c)(1)). The trial court found defendant had been convicted of a prior serious felony and had a prior strike conviction, and sentenced him to nine years in state prison.

On appeal, defendant contends the trial court abused its discretion under Evidence Code section 352<sup>1</sup> in permitting the prosecution to introduce evidence of a prior incident of domestic violence involving the same victim. We affirm.

#### BACKGROUND

The trial court's ruling on the subject evidence was made in limine, prior to jury selection. Defendant did not renew his objections or move to strike the subject evidence on the ground it did not conform to the offer of proof at the time the evidence was introduced at trial.

Although the trial court's ruling in limine may preserve an objection to evidence for appeal, our review is limited to assessing whether the trial court abused its discretion in ruling the evidence was admissible based upon the showing made by the parties at the hearing on the motion in limine. (§ 353; *People v. Morris* (1991) 53 Cal.3d 152, 189-190; *People v. Berryman* (1993) 6 Cal.4th 1048, 1070 [reviewing court "'focuses on the ruling itself and the record on which it was made. It does not look to subsequent matters . . . .'"]<sup>2</sup> Accordingly we

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<sup>1</sup> Further undesignated statutory references are to the Evidence Code.

<sup>2</sup> *People v. Morris, supra*, 53 Cal.3d 152, was disapproved on another point in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, footnote 1; *People v. Berryman, supra*, 6 Cal.4th 1048, was overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, footnote 1.

recite those facts proffered in connection with the prosecution's motion in limine, not those adduced at trial.

Defendant was charged with making criminal threats (Pen. Code, § 422) and dissuading a witness from testifying (Pen. Code, § 361.1, subd. (c)(1)), both of which were alleged to have occurred on December 6, 2010. The prosecutor represented the nature of the threats in this case were as follows: "Allegedly . . . it's a boyfriend-girlfriend, they have several children in common, [in a] several-year relationship. On the night of the incident, the victim at the time alleges the defendant contacted her 26 times from a blocked number. Of the 26 times of the blocked number she picks up about three times, that's how she knows it's the defendant. He believes she's cheating on him. The first time[, he] tells me -- or [he] tells her 'I know you're cheating on me, tell me who he is, um, there'll be a black cloud that comes over you.' She says 'There's nobody,' hangs up.

"Picks up again several calls later, he says 'You better tell me, if I find out I'll shank him and I'll shank you.' [¶]  
. . . [¶]

". . . She hangs up again, says 'Stop calling me.'

"Picks up again, I believe the last threat is if he finds out who she is -- he is, he'll kill her [sic], and if the victim testifies against him he will kill her.

"She then hangs up. A little bit later she's in the room with her children, she alleges at the time that she hears noise in the front and that she sees the defendant somehow enters into

the house from the front. She barricades herself in her bedroom and the defendant is pushing open -- or attempting to push open the door. He's only in the house, according to her, less than five minutes. She screams she's gonna call the police and he leaves.

"I don't know if that's what the victim will testify to now, but that is what is in the police report." Defense counsel agreed that was an accurate statement of what was in the police report.

Pursuant to sections 1109, 1101 and 352, the prosecution sought to introduce evidence of three prior incidents of domestic violence between defendant and the same victim involved in the instant case. The three incidents consisted of: (1) an April 15, 2008, charge for battery on a cohabitant/mother of his child (Pen. Code, § 243, subd. (e)), upon which he was acquitted after a jury trial, (2) a June 24, 2009, charge for willful infliction of corporal injury on his cohabitant/mother of his child (Pen. Code, § 273.5), which was dismissed by the district attorney for lack of evidence, and (3) an October 23, 2009, charge for willful infliction of corporal injury on his cohabitant/mother of his child (Pen. Code, § 273.5), which was dismissed by the district attorney in the interest of justice.

Defense counsel objected to the evidence as "highly prejudicial" and having no bearing on his guilt or innocence in this case. Defense counsel argued that the evidence was especially irrelevant and prejudicial because two of the cases

were dismissed by the district attorney and the third resulted in an acquittal.

The trial court ruled that evidence of all three incidents could be introduced at trial. Specifically, the trial court found that the evidence was "highly probative" on whether the threats made in the instant case conveyed to the victim a gravity of purpose and an immediate prospect of execution, and that the probative value of the evidence was not outweighed by danger of undue prejudice. The prosecutor agreed to present a stipulation to the jury that the 2008 incident resulted in a jury trial and a finding of not guilty, the June 2009 incident resulted in a dismissal based on the statute of limitations, and the October 2009 incident resulted in a dismissal because the district attorney's office determined there was no reasonable likelihood of conviction.<sup>3</sup>

#### DISCUSSION

Defendant contends the trial court abused its discretion under section 352 in permitting the prosecution to introduce evidence of the 2008 incident of domestic violence for which defendant was prosecuted and acquitted.

"Under . . . 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.]"

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<sup>3</sup> Ultimately, the prosecution presented evidence of only the 2008 incident at trial.

(*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) A court's exercise of its discretion under section 352 is not a ground for reversal unless the court acted in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438.) Defendant has failed to demonstrate an abuse of discretion here.

Defendant contends the subject evidence lacked probative value. We disagree.

Penal Code section 422 states in pertinent part that "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

To establish a violation of Penal Code section 422, the prosecution must show (1) the defendant willfully threatened to commit a crime that would result in death or great bodily injury to another person, (2) the defendant made the threat with the

specific intent that it would be taken as a threat, even if he did not intend to carry it out, (3) the threat was, on its face and under the surrounding circumstances, so unequivocal, unconditional, immediate, and specific as to convey a gravity of purpose and immediate prospect of execution, (4) the person threatened was placed in sustained fear for his or her own safety or that of his or her immediate family, and (5) the fear was reasonable under the circumstances. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 859-860.)

The statutory requirement that the threat be considered ““on its face and under the circumstances in which it [was] made”” means that the communication and the surrounding circumstances are to be considered together. (*In re Ryan D.*, *supra*, 100 Cal.App.4th at p. 860.) The circumstances under which a threat is made may give meaning to the actual words used. (*Ibid.*) The surrounding circumstances include such things as the prior relationship of the parties and the manner in which the threat was made. (*Ibid.*)

We agree with the trial court that the subject evidence is highly probative with respect to the charge of making criminal threats on the issue of whether the threatened crime conveyed to the victim a gravity of purpose and an immediate prospect of execution. The past circumstances of domestic violence tend in reason to show that defendant’s threats were not mere hyperbole or generalized expressions of frustration, but rather, actual threats made with a gravity of purpose and a prospect of execution.

We also find the subject evidence highly relevant to the charge of making criminal threats on the issues of whether the victim actually and reasonably sustained fear as a result of the threats. "The victim's knowledge of defendant's prior conduct is relevant in establishing that the victim was in a state of sustained fear. [Citation.]" (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) The past circumstances of domestic violence tend to establish that the victim feared for her safety, and perhaps for her children's safety, and that such fear was reasonable.

The fact that defendant was acquitted of the 2008 charge after a jury trial does not, of course, eradicate the probative value of the evidence. The jury for the criminal trial was required to find defendant guilty beyond a reasonable doubt, and did not. However, as with uncharged prior acts, the jury in this case had only to find defendant had engaged in the prior 2008 acts of domestic violence by a preponderance of the evidence in order to consider its probative value in this case. (*People v. Donnell* (1975) 52 Cal.App.3d 762, 777.) Thus, while proof of the acquittal tended to weaken and rebut the prosecution's evidence of the prior incident of domestic violence, as well as its relevance for establishing the elements of the current charges, it did not make the evidence irrelevant or inadmissible. (See *People v. Brown* (2011) 192 Cal.App.4th 1222, 1232-1233; *People v. Mullens* (2004) 119 Cal.App.4th 648, 652, 665-668.)

"When an objection to evidence is raised under . . . section 352, the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers 'substantially outweigh' probative value, the objection must be overruled. [Citation.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

Defendant contends the facts of the 2008 incident were "much more inflammatory" than those of the present case. The facts of the 2008 incident were not, however, presented or argued to the trial court at the time of its in limine ruling. The trial court was merely informed that in each of the prior incidents, defendant's claim that the victim was being unfaithful precipitated his actions.

Defendant also emphasizes the potential that, since the prosecution was permitted to use the evidence, despite his acquittal, the jurors might believe he had been wrongfully acquitted. While we recognize the potential for some prejudice in this regard, it was not an abuse of discretion for the trial court to find it did not substantially outweigh the highly probative value of the evidence.

DISPOSITION

The judgment is affirmed.

We concur: \_\_\_\_\_ NICHOLSON \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ BUTZ \_\_\_\_\_, J.

\_\_\_\_\_ MAURO \_\_\_\_\_, J.