

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,		C068972
	Plaintiff and Respondent,	(Super. Ct. No. SF115349A)
v.		
ROBERT EARNEST GOLDSBERRY,		
	Defendant and Appellant.	

Defendant Robert Earnest Goldsberry stabbed his girlfriend with a pair of rusty scissors after an argument about money. A jury found him guilty of inflicting corporal injury on a cohabitant and an enhancement for great bodily injury. The trial court sentenced him to 20 years in prison, which included the upper term on the offense and enhancement.

Defendant appeals from the resulting judgment raising four issues dealing with the evidence, trial counsel's performance, and sentencing. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Defendant and Pamela Marsh began dating in November 2009 and starting living together immediately thereafter. In March 2010, the two had been arguing about Marsh's spending habits, and Marsh had decided to end the relationship because during one of these arguments he had "put [his] hands on [her]."

On March 28, 2010, the day of the stabbing, Marsh had planned to sell some of their belongings at the flea market with defendant and then part ways with him. Upon arriving at the flea market, Marsh ate a little bit of methamphetamine that defendant had given her. After helping Marsh set up, defendant left Marsh alone to sell their belongings. When defendant returned, he demanded the money from the sales. He eventually took Marsh's purse but then threw it on the ground. When Marsh picked it up, defendant stabbed her on her forearm and her hand with a rusty pair of scissors. Marsh started bleeding badly, and her arm and hand felt numb. Marsh told a concession stand worker she had been stabbed and asked to borrow her phone. The concession stand worker gave her the phone, and Marsh called 911.

Marsh was taken to the emergency room by ambulance. She had two lacerations. One was to the forearm and was deep and "flap-like." It required stitches that had to stay in place for eight days. The other was to the hand and had punctured a vein, which caused the heavy bleeding.

Marsh was not the only victim of defendant's domestic violence. In 2004, defendant head-butted his then-wife D.,

injuring her lip and forehead, following an argument over money. Defendant pled no contest to misdemeanor battery. In 2007, defendant was living with a girlfriend, L. During that time, defendant was convicted of making criminal threats against L.

DISCUSSION

I

The Court Did Not Err In Admitting The Prior Acts Of Domestic Violence And Related Convictions

Defendant contends the court erred by admitting evidence of his prior domestic violence and related convictions. His contention is made up of two arguments.

Defendant's first argument is that Evidence Code section 1109 (the code section under which this evidence was admitted) and CALCRIM No. 852 (the related jury instruction) violated his federal constitutional rights. As defendant recognizes, the California Supreme Court has rejected similar challenges (*People v. Reliford* (2003) 29 Cal.4th 1007, 1016; *People v. Falsetta* (1999) 21 Cal.4th 903, 907, 910-922) and we are bound to follow those decisions (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

Defendant's second argument is the court abused its discretion in admitting the evidence because "the similarity of the 2004 incident [involving his ex-wife D.] was too great" and "[a]t the other extreme, [his] criminal threats conviction [involving his ex-girlfriend L.] was a serious felony that had no demonstrated relationship with the instant circumstances." There was no error.

The 2004 incident was relatively recent and no more inflammatory than the current offense. The evidence of the 2004 incident against defendant's ex-wife was that defendant head-butted his ex-wife, injuring her lip and forehead in an argument over money. That there was some similarity between the two, namely, in both cases defendant attacked his partner over a dispute about money did not make it an abuse of discretion to admit the prior act. The enactment of Evidence Code section 1109 eliminated the consideration of the intrinsic prejudice of prior similar acts tending to show a propensity to commit them. (See *People v. Soto* (1998) 64 Cal.App.4th 966, 984.)

The evidence of the 2007 conviction of criminal threats came in the form of a certified record of defendant's conviction and defendant's testimony that L. was an ex-girlfriend with whom he lived. Contrary to defendant's argument that a "demonstrated relationship" between the prior act and the current act is needed, all that was required to admit the prior act of domestic violence was "evidence of the defendant's commission of other domestic violence" in a current "criminal action in which the defendant is accused of an offense involving domestic violence." (Evid. Code, § 1109. subd. (a)(1).) There was that evidence here: L. was defendant's girlfriend with whom he was living when he "willfully threaten[ed] to commit a crime [against L.] which w[ould] result in death or great bodily injury . . . , with the specific intent that the statement . . . is to be taken

as a threat.” (Pen. Code, § 422.) No more relationship between this act and the one against Marsh was required.

II

Trial Counsel Was Not Ineffective

Defendant contends his counsel was ineffective in cross-examining three witnesses. We reject defendant’s contention because counsel’s performance was not deficient, which is the first prong of an ineffective assistance of counsel analysis. (*People v. Waidla* (2000) 22 Cal.4th 690, 718.)

First, defendant contends counsel was deficient in cross-examining his ex-wife, D., because the manner in which he did so opened the door to introducing the certified record of defendant’s 2004 battery conviction. Before trial, the court ruled only the facts behind the conviction could come in, but if defendant testified and denied the offense, the conviction itself would become admissible. During trial, D. testified defendant had head-butted her, injuring her lip and forehead. On cross-examination, defense counsel questioned D. on how defendant could have head-butted her, given that she was five feet four inches tall and defendant was six feet two inches tall. Counsel then introduced into evidence pictures of D. after the incident to question whether she was injured. The court ruled defense counsel had opened the door to the fact of the prior conviction and allowed the People to present proof that defendant pled no contest to misdemeanor battery. Counsel’s performance in questioning D., which opened the door, was not deficient. It was a reasonable trial tactic to question

D. about the facts behind the prior conviction given that the photograph of D's injury did not show much bruising, which D. then had to explain away as being because her skin was brown. As compared to D.'s description of defendant's head-butting her, the introduction of a no contest misdemeanor battery conviction was a minor risk.

Second, defendant contends his trial counsel was deficient in cross-examining Marsh in a way that elicited the fact defendant supplied Marsh with methamphetamine. Defense counsel asked Marsh, "You used methamphetamine on March the 28th?" Marsh responded, "Yeah. What was left over from something he bought." Defense counsel then got Marsh to concede she had never told police the methamphetamine was actually defendant's. From this colloquy, it is apparent the problem with defendant's appellate contention is that it was Marsh who veered away from the yes-or-no question defense counsel asked her and it was defense counsel who then was able to get Marsh to concede she had not told police the methamphetamine had come from defendant. Counsel's cross-examination of Marsh was not deficient.

Third, defendant contends his trial counsel was deficient in cross-examining the concession stand worker in a way that resulted in her testifying that Marsh told her it was defendant who stabbed Marsh. Trial counsel asked the concession stand worker, "Did [Marsh] say anything about where she had been stabbed? Not on her body, but where --" The concession stand worker responded, "She said, 'My boyfriend stabbed me.' She said, 'My boyfriend stabbed me.'" From this colloquy, it is

again apparent the problem with defendant's appellate contention is that it was the concession stand worker who veered away from the yes-or-no question asked by defense counsel. Counsel's cross-examination was not deficient.

III

Substantial Evidence Supported

The Great Bodily Injury Enhancement

Defendant contends there was insufficient evidence of great bodily injury to support the enhancement. He argues Marsh's injuries were not severe and the enhancement required more than "transitory and short-lived bodily distress."

The case law defendant relies on for this proposition has been criticized by our Supreme Court. Defendant relies on *People v. Caudillo* (1978) 21 Cal.3d 562, where the court initially suggested that the "great bodily injury" enhancement (which the statute defines as "significant or substantial physical injury" (Pen. Code, § 12022.7, subd. (f))) requires an injury "severe or protracted in nature," one that constitutes "permanent, protracted or visible disfigurement," or a "serious impairment of physical condition or any protracted impairment of function of any portion of [the] body," rather than an injury that is "transitory and short lived." (*Caudillo*, at pp. 588-589.) In *People v. Escobar* (1992) 3 Cal.4th 740, the California Supreme Court disagreed, explaining *Caudillo* had "superimposed substantial judicially created baggage" on the definition of great bodily injury and that the term does not require "'permanent,' 'prolonged' or 'protracted' disfigurement,

impairment, or loss of bodily function." (*Escobar*, at pp. 745, 750.) Injuries such as "multiple contusions and swelling of [the] hands, arms and buttocks," "multiple abrasions and lacerations to the victim's back and bruising of the eye and cheek," and a "swollen jaw, bruises to head and neck and sore ribs" all are sufficient. (*Escobar*, at p. 752.)

Here, the evidence was sufficient as well. Defendant's scissor attack caused Marsh to bleed badly and left two lacerations. One was to the forearm and was deep and "flap-like." It required stitches that had to stay in place for eight days. The other was to the hand and punctured a vein, which caused the heavy bleeding. This was enough to constitute great bodily injury under the statute and *Escobar*.

IV

Defendant's Sentencing Claim Lacks Merit

Defendant contends the court abused its discretion in imposing the upper term on the substantive offense and the great bodily injury enhancement and trial counsel was ineffective for not objecting.

Counsel was not ineffective because there was no counsel at that time; defendant was representing himself. The only objection defendant raised at sentencing was when the court was considering as an aggravating factor that defendant dissuaded Marsh from testifying. On appeal, defendant contends this fact was not a "substantiated factor in aggravation." Not so. The evidence came from a motion for new trial defendant had filed himself that included a memorandum from a defense investigator

who recounted an interview with Marsh in which Marsh stated defendant told her to testify "what had happened was an accident." Defendant told Marsh this when the two were being transported back to jail in the same van after they had been in court.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

BLEASE, Acting P. J.

HOCH, J.