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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ARCHIE CLAYBON III,

Defendant and Appellant.

C075804

(Super. Ct. No. 13F06254)

Defendant Archie Claybon III, who was convicted of one count of domestic violence, contends that the logic of *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), upholding the constitutionality of Evidence Code section 1108 in allowing evidence of prior sex acts, does not apply to admitting evidence of prior acts of domestic violence pursuant to Evidence Code section 1109 (all further statutory references are to the Evidence Code unless otherwise designated). He acknowledges the litany of appellate cases that have rejected this claim, as do we. But we agree with defendant that the trial court erroneously believed the imposition of a \$500 fee for domestic violence programs was mandatory. Because the court committed a legal error, the issue is not forfeited, and because the court elected to exercise its discretion to waive all other fees that were not

statutorily mandated, or to reduce them to the statutory minimum, the error was prejudicial. We reverse the imposition of the fee for the domestic violence programs and remand with directions to determine whether the fee should be imposed. In all other respects, we affirm the judgment.

FACTS

The victim, defendant's live-in girlfriend at the time of the incident and at the time of trial, denied the truth of her earlier statements to the police describing how defendant had struck her on the afternoon of September 22, 2013. An expert on intimate partner battery explained to the jury that victims often recant their earlier reports of abuse due to fear of violence, fear of retaliation, and fear of not having any money to support them. Defendant did not testify at trial.

The prosecution played two audiotapes for the jury. In the first, the victim told a police dispatcher that defendant had hit her in the face and she needed stitches in her lip. She had been in an argument with her boyfriend, who told her to drive herself to Walmart. He followed her to the car, ordered her to roll down her window, and punched her in the face.

In the second, she gave a responding police officer the same account: that defendant punched her in the face as she sat in the car parked outside their apartment. Walking away, he said, "I bet your people aren't gonna [*sic*] think you're pretty now." She told the officer that two weeks earlier, defendant had thrown a glass at her during an argument, but he had never hit her before. On this occasion, they were fighting about text messages he had received from other girls. At trial, she recanted.

At the hospital, the victim exchanged text messages with defendant. She wrote, "You can't keep abusing me" and "Good job. Now I have to go to ER. Great job." He responded, "Worried the neighbor won't think you're sexy now?" And she replied, "Fucking woman beater." But once it became obvious the police were taking it further than she intended, she warned him to hide. She received three stitches in her lip.

The victim testified she had been in a prior abusive relationship, suffered from anxiety and depression, was medicated, and was on a medical disability. Short tempered, she often confiscated defendant's cell phone. On September 22, she tried to grab the cell phone from him; it slipped and then hit her on the right side of her lip. She picked up the car keys and ran out of the apartment.

Police Officer James Thorndyke testified that he met the victim in the back of an ambulance in the Walmart parking lot and took photographs of her injuries. He contacted defendant at the apartment defendant shared with the victim. Defendant explained that when he refused to take the victim to Walmart, she tried to grab his cell phone; her hand slipped off the phone and her own hand hit her in the face. He guessed that her ring might have cut her lip, but he did not see any blood. Thorndyke arrested him.

I

It has been over 15 years since the California Supreme Court in *Falsetta, supra*, 21 Cal.4th 903 upheld the constitutionality of section 1108, permitting admission of a defendant's other sex crimes in a prosecution for a sexual offense. Rejecting the defendant's argument that section 1108 violates due process principles by allowing admission of propensity evidence, the court concluded that "in light of the substantial protections afforded to defendants in all cases to which section 1108 applies, we see no undue unfairness in its limited exception to the historical rule against propensity evidence." (*Falsetta*, at p. 915.)

In the ensuing 15 years, Courts of Appeal have consistently applied *Falsetta's* rationale in rejecting due process challenges to section 1109, the propensity toward domestic violence counterpart to section 1108. Section 1109 states, in pertinent part: "[I]n 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 Section 1101 if the evidence is not inadmissible pursuant to Section 352." (§ 1109, subd. (a)(1).) Defendant fails to cite a single case in which

Falsetta was successfully distinguished and section 1109 was found to violate a defendant's right to a fair trial.

To the contrary, in case after case the Courts of Appeal have consistently applied the *Falsetta* analysis to section 1109. Section 1109, like section 1108, “ends with the same conditional language, namely, that such evidence is admissible only ‘if the evidence is not inadmissible pursuant to Section 352.’ [Citations.] Thus, there is an overriding safety valve built into each statute that continues to prohibit admission of such evidence whenever its prejudicial impact substantially outweighs its probative value. (§ 352.) It was precisely the incorporation of this safeguard that led the Supreme Court in *People v. Falsetta* (1999) 21 Cal.4th 903, 917 . . . to uphold the constitutionality of section 1108 against an attack similar to the one raised here.” (*People v. Johnson* (2010) 185 Cal.App.4th 520, 529.)

In *People v. Brown* (2000) 77 Cal.App.4th 1324, *Brown*, like defendant here, argued that “the principles underlying the *Falsetta* opinion, ‘a case which dealt solely with sexual offense evidence,’ are ‘obviously inapplicable in a domestic violence case.’ To the contrary, we find the reasoning underlying the *Falsetta* opinion applies to this case because sections 1108 and 1109 can properly be read together as complementary portions of the same statutory scheme. A bill analysis prepared for those who voted to enact section 1109, states that ‘[t]his section is modeled on the recently enacted Evidence Code 1108, which accomplishes the same for evidence of other sexual offenses, in sexual offense prosecutions.’ [Citation.] The analysis goes on to indicate, ‘Proponents argue that in domestic violence cases, as in sexual offense cases, special evidentiary rules are justified because of the distinctive issues and difficulties of proof in this area. Specifically, evidence of other acts is important in domestic violence cases because of the typically repetitive nature of domestic violence crimes, and because of the acute difficulties of proof associated with frequently uncooperative victims and third-party witnesses who are often children or neighbors who may fear retaliation from the abuser

and do not wish to become involved.” (*Brown*, at p. 1333.) While it is unnecessary to cite to the vast number of cases that have upheld the constitutionality of section 1109 against similar due process challenges, we list but a few. (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1025-1030; *People v. Johnson* (2000) 77 Cal.App.4th 410, 416-420; *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703-704; *People v. Price* (2004) 120 Cal.App.4th 224, 239-241.) “We agree with the reasoning and the results in these cases, and adopt their analyses as our own. In short, the constitutionality of section 1109 under the due process clauses of the federal and state constitutions has now been settled.” (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310.)

As a side note, we reject any notion that defendant has raised something new to distinguish his routine due process challenge from those raised in the cases noted above. He argues that while admission of prior sex acts may not offend a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, the admission of propensity evidence in a domestic violence case clearly does. He misreads *Falsetta*. The Supreme Court was actually ambivalent about whether the long-standing practice of excluding propensity evidence in sex crime cases reflected a fundamental, unalterable principle embodied in the Constitution, but it was not ambivalent that the legislative exceptions to the long-standing rule of barring propensity did not *offend* fundamental historical principles because of the number of safeguards accorded the defendant. (*Falsetta, supra*, 21 Cal.4th at pp. 913-914.) Most importantly, “we think the trial court’s discretion to exclude propensity evidence under section 352 saves section 1108 from defendant’s due process challenge.” (*Falsetta*, at p. 917.)

Consequently, whether exclusion of propensity evidence in domestic violence cases constitutes a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental is not dispositive because section 352 saves section 1109, just as it saves section 1108. Section 352’s safety valve assures that section 1109 does not “unduly ‘offend’ those fundamental due process principles.” (*Falsetta*, at p. 915.)

II

The trial court placed defendant on five years of formal probation, and as a condition of probation, he was ordered to serve 270 days in jail. The trial court also assessed and waived a series of fees. The court stated, “There is a minimum \$500 that has to be paid to the domestic violence programs special fund, and that is -- I believe that’s a mandatory fine, so I am not able to waive that.” As to many discretionary fines, however, the court waived them or reduced the amount to the statutory minimum.

Reviewing the probation officer’s recommendations, the court stated: “It talks about defendant making payments to a battered women’s shelter up to a maximum of \$5,000. I believe this is discretionary. Given what I know about the income situation for the defendant, I am not inclined to impose that as a condition. So I will strike that unless there is some kind of opposition to that.” The court also waived the proposed cost of the probation report, the investigation, and the presentence report “[i]n consideration of defendant’s financial obligations to his family.” The court reduced the mandatory restitution fine to the statutory minimum of \$280.

The Attorney General insists the issue is forfeited. (*People v. McCullough* (2013) 56 Cal.4th 589.) But *McCullough* involves factual, rather than legal, error. “[W]e may review an asserted legal error in sentencing for the first time on appeal where we would not review an asserted factual error.” (*Id.* at p. 594.) In *McCullough*, the defendant did not challenge the trial court’s finding that he had the ability to pay a booking fee, a claim of factual error. Here, the court’s error was legal. It misunderstood the statute, believing the fee was mandatory, and said so expressly on the record.

Penal Code section 1203.097 is discretionary, not mandatory. Subdivision (a)(5)(A) of that section states: “A minimum payment by the defendant of a fee of five hundred dollars (\$500) to be disbursed as specified in this paragraph. If, after a hearing in open court, the court finds that the defendant does not have the ability to pay, the court may reduce or waive this fee. If the court exercises its discretion to reduce or

waive the fee, it shall state the reason on the record.” Because the court was not aware of its discretion, defendant raises an error of law, not fact, and therefore he did not forfeit his right to raise the error on appeal.

On its merits, we conclude the court was unaware of its discretionary power to waive the fee for domestic violence programs pursuant to Penal Code section 1203.097. As a result, it imposed what it believed to be a mandatory \$500 fee. It did not, therefore, act with “informed decision,” and its misinterpretation of the statute constitutes legal error.

The Attorney General resists the notion that defendant did not receive constitutionally effective assistance of counsel for failing to object to imposition of the fine because he cannot demonstrate prejudice. We need not directly address the inadequacy of counsel claim, but we do conclude that the trial court’s error was prejudicial. The court exercised its discretion to waive or reduce every fee it believed it had the discretion to waive or reduce. Thus, the record reflects it is highly likely the court would have reduced or waived the \$500 fee for domestic violence programs. Because the court committed legal error by imposing a mandatory fee that was statutorily discretionary, we must remand the imposition of the fee to the trial court to exercise its discretion.

DISPOSITION

The case is remanded to the trial court to determine whether defendant should be assessed a \$500 fee for domestic violence programs. In all other respects, the judgment is affirmed.

_____ **RAYE** _____, P. J.

We concur:

_____ **MURRAY** _____, J.

_____ **HOCH** _____, J.