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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID BRIAN DAVIS,

Defendant and Appellant.

C077873

(Super. Ct. No. 14F233)

A jury found defendant David Brian Davis guilty of corporal injury (Pen. Code, § 273.5, subd. (a); count 1),¹ criminal threats (§ 422; count 2) and assault likely to cause great bodily injury (§ 245, subd. (a)(4); count 3). Defendant admitted two prior strikes (§ 1170.12), two prior serious felony convictions (§§ 667, subd. (a)(1), 1170.12), and two

¹ Further undesignated statutory references are to the Penal Code.

prior prison terms (§ 667.5, subd. (b)). The trial court sentenced defendant to state prison for 21 years. Defendant timely appeals.

Defendant contends the trial court abused its discretion in: (1) admitting evidence of his 2004 prior conviction for domestic violence; and (2) excluding evidence of his motivation for pleading guilty in 2011 to another prior domestic violence case. The parties agree that the abstract of judgment needs clerical correction. We shall direct correction of the abstract of judgment and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

2014 Charges

On the afternoon of January 3, 2014, Shasta County Deputy Sheriff Meghan Bliss arrived at the home of Carl Norquist, a neighbor of victim Lisa Campbell. Campbell was there and was visibly upset, crying, and her face was red and bloody. When asked about her injuries, Campbell told Bliss that in the morning defendant had “either punched or kicked her in the face while they were laying in bed arguing.” Immediately following the incident, Campbell ran to Norquist’s home for help. Norquist saw Campbell “was beat up,” “[s]he had marks on her face,” “[s]he had a bloody lip,” and was “rattled” because “she was crying.” Campbell told Norquist defendant had “slugged” her in the face and asked him to call 911. While on the phone, Norquist saw defendant leave in his truck.

Campbell told Bliss defendant had also placed both of his hands around her neck and threatened to kill her the night before (January 2). Bliss examined and photographed Campbell’s neck, finding no visible injuries there, but did see a bruise directly under Campbell’s left eye and injuries on her lips. Defendant was charged with three counts based on this conduct, count 1 for the January 3 injuries to Campbell and counts 2 and 3 for the January 2 threat and assault.

At trial, Bliss and Norquist testified as outlined above. Campbell testified and essentially recanted, denying she and defendant had argued on January 2 or 3, 2014, and denying that he injured her intentionally, instead claiming that he was “thrashing around”

and accidentally hit her. She claimed throughout her testimony that she did not remember or did not understand. She admitted to lying for defendant to protect him. She identified letters she wrote to him while he was in jail, professing her love for him. She claimed his prior convictions related to their relationship were also based on accidental conduct, as we describe in more detail *post*. She did confirm that she had started dating defendant in 2007 and during the last two years they had lived together intermittently; she was living with him at the time of the January 2014 incidents.

District Attorney's Investigator Mike Wallace testified as an expert that domestic violence victims will often recant or refuse to cooperate with the criminal justice system. Even if initially cooperative, victims can become hostile as the case progresses and when testifying in court tend to give different versions of events from those in the original police report. Wallace explained strangulation is a form of domination used to instill fear in a victim, and that it is possible to strangle someone without leaving a visible injury.

Defendant testified that on January 3, 2014, he was not at Campbell's house. He also denied being at Campbell's on January 2. Defendant claimed Campbell fabricated stories. He did, however, characterize his relationship with her as violent, as we describe in more detail immediately *post*.

Prior Domestic Violence Convictions

The trial court admitted evidence of three prior domestic violence incidents pursuant to Evidence Code section 1109, all of which resulted in criminal convictions. Two were for assaultive conduct against Campbell, and had occurred in 2009 and 2010 with resulting convictions in 2009 and 2011. Defendant does not challenge the admission of these two prior incidents on appeal.

The third incident occurred in 2003 and resulted in a 2004 conviction for criminal threats against defendant's then-wife. The witness was unavailable, and the specifics of the threat--which the jury never heard--were that defendant gave his wife a black eye and threatened to kill her, telling her would cut off her head and drink her blood. The trial

court took judicial notice of the incident, sanitized as follows: “On March 8th, 2004, in Shasta County Court case No. 03F9579, the defendant pled guilty and was convicted of Penal Code section 422, which is criminal threats, a domestic violence conviction, for an offense occurring on November 29, 2003.” This was read to the jury in the form of a stipulation. In addition, the parties stipulated that the 2004 conviction involved a woman other than Campbell, and the court informed the jury that an officer “would testify that he responded to a domestic violence call on November 29, 2003, and contacted victim Cynthia Starkey.”

At trial, Campbell characterized the 2009 and 2010 incidents as accidents and claimed to remember very little about both incidents when asked for details.

When asked about the three priors, defendant testified that the 2009 and 2010 incidents were accidents, and that he did not intentionally “stomp on” Campbell in 2009, nor did he intentionally gouge her eyes or stab her with a screwdriver in 2010. When asked about the 2003 threat, he admitted he threatened to kill the victim.

DISCUSSION

I

Admission of the 2004 Prior Conviction

Defendant first contends the trial court abused its discretion in admitting his 2004 conviction. Defendant claims the evidence should have been excluded pursuant to Evidence Code section 1109, subdivision (e), because the incident occurred over 10 years ago and thus was presumptively inadmissible; he adds that it was dissimilar to the 2014 incidents and was inflammatory. He argues prejudice from the error as to his conviction on counts 2 and 3.

A. Background

Prior to trial, the People moved in limine to admit evidence of the 2004 conviction together with the 2009 and 2011 priors (which are unchallenged on appeal). The People argued in the trial court that the 2004 prior, against a different domestic violence victim,

showed defendant's propensity to victimize his intimate partners and that his abusive behavior was neither random nor isolated. Defendant argued the prior should be excluded as it was impermissibly remote and not probative.²

After some back and forth, the trial court ultimately allowed the evidence of the 2004 prior to be read to the jury as detailed *ante*, finding that: "ultimately all the acts that resulted in a conviction, are bits and pieces of evidence where the jury can conclude these things aren't accidental, that Mr. Davis just doesn't have a regular relationship with a woman . . . that he choose[s] to dominate them in some fashion; that the types of assaults that he carries out involves assaults where his victim is vulnerable." The trial court noted that from 2004 to the present defendant had continuously "demonstrate[ed] his propensity to dominate women," which also weighed in favor of admission and mitigated the remoteness.

At the conclusion of trial, the court instructed the jury pursuant to CALCRIM No. 852 on the limited use of the evidence of prior convictions, stating the priors were relevant to show defendant's disposition to commit domestic violence, but was only one factor for the jury to consider and was not sufficient by themselves to prove guilt.

B. *Law and Analysis*

With certain exceptions not relevant here, Evidence Code section 1109 provides 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 Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a)(1).) Subdivision (e) of that same section

² Evidence Code section 1109, subdivision (e) provides that "[e]vidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice."

“establishes a presumption that conduct more than 10 years prior to the current offense is inadmissible. . . . [I]t sets a threshold of presumed inadmissibility, not the outer limit of admissibility. It clearly anticipates that some remote prior incidents will be deemed admissible and vests the courts with substantial discretion in setting an ‘interest of justice’ standard.” (*People v. Johnson* (2010) 185 Cal.App.4th 520, 539.) Thus “some greater justification for admissibility is necessary under [Evidence Code section 1109,] subdivision (e) than under [Evidence Code] section 352.” (*Johnson*, at p. 539.) “[T]he ‘interest of justice’ exception is met where the trial court engages in a balancing of factors for and against admission under [Evidence Code] section 352 and concludes . . . that the evidence was ‘more probative than prejudicial.’ ” (*Johnson*, at pp. 539-540.)

“Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s).” (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.)

Here, defendant first notes that the 2003 incident involved a different victim than the 2014 incidents, consumed little time, and resulted in a conviction--factors which he admits weigh *in favor* of admission. However, he argues that the 2003 incident was impermissibly remote under the applicable code section and the resulting (2004) conviction lacked similarity to the instant offenses because it was not proven to be a “domestic offense.” He adds somewhat contradictorily that its admission was cumulative and prejudicial due to its status as “a conviction identical to one charged.”

First and foremost, the jury *was* told that the 2004 conviction was for making threats in a domestic violence context. As such, the prior was sufficiently similar to the instant charges to be highly probative, as defendant was charged with making threats in a domestic violence context in 2014 in count 2. When coupled with the evidence of defendant’s 2014 conduct introduced at trial, the 2004 conviction was highly probative of

defendant's willingness to threaten his intimate partners. (See *People v. Johnson, supra*, 185 Cal.App.4th at p. 531; see also *People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274 ["The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense"].) Although the prior conduct had occurred more than 10 years before the current conduct, it was barely a month beyond that limit. Thus, although remote, the prior conduct was not so remote as to add to the prejudice already contemplated by the heightened scrutiny to its admission mandated by the code. Evidence of the prior (as heard by the jury) involved no inflammatory details of any sort, and the nature of the crime was no worse than the crimes defendant was accused of in his current trial. In his current case, the jury heard details of defendant's physical violence toward his intimate partner; there was no such evidence presented to the jury regarding the 2004 prior. Nothing about the prior's admission was inflammatory or otherwise prejudicial such that its probative value did not far outweigh its prejudicial effect.

C. Prejudice Resulting from the Prior's Admission

Defendant adds a short argument that but for the erroneous admission of the 2004 prior, it is reasonably likely he would have achieved a more favorable result on counts 2 (threats) and 3 (assault). Because we have found no error in the admission of the evidence, we need not reach this argument. We note, however, that in addition to testimony of multiple witnesses regarding the conduct charged in count 1, the jury heard evidence of defendant's prior attacks on Campbell occurring in recent years and resulting in criminal convictions. It heard defendant testify to his violent relationship with her. Further, as we have noted *ante*, the jury was properly instructed as to the limits of its consideration of this evidence. We do not see the probability of a more favorable result for defendant on the current charges had the limited evidence that he threatened yet another woman in 2003 been excluded. (See *People v. Watson* (1956) 46 Cal.2d 818, 837.)

II

Evidence of Defendant's Motive to Plead

Defendant next contends the trial court abused its discretion by excluding evidence of his motivation to plead guilty to the 2011 prior. He asked to testify that “falsely admitting guilt” in order to “get probation” and avoid a life sentence was “the lesser of two evils.”

A. Background

At trial, defense counsel sought to admit evidence as to why defendant had admitted guilt in 2011 to spousal abuse in 2010. After some back and forth, the trial court ruled that although the evidence might in some circumstances be admissible, it would apply Evidence Code section 352 to exclude it. The court explained that the reason defendant pleaded guilty was “not that probative of anything,” while there was a “great prejudice” in bringing the complex issue of plea bargaining before the jury. The court continued that “opening up a can of worms” would be “far more prejudicial, cumulative,^[3] so much information that would have to come out. [The prosecutor] would be able to [bring in] the lawyer that allowed the defendant to plead guilty in the earlier cases, whatever their discussions would have been, clearly it would have involved attorney/client discussions.” After continuing in this vein for a bit, the court ruled that defendant could not discuss “his motives behind pleading the way that he did.”

B. Law and Analysis

We review the trial court’s rulings concerning the admissibility of the evidence for abuse of discretion. (*People v. Thornton* (2007) 41 Cal.4th 391, 444-445.) Evidence Code section 352 provides the trial court with discretion to exclude otherwise relevant evidence if its probative value is substantially outweighed by the probability that

³ We observe that the trial court most likely meant to say time consuming--rather than cumulative--given the context.

admitting the evidence will unduly prolong the proceeding, prejudice the opposing party, confuse the issues, or mislead the jury. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1014.) Although a defendant has the general right to offer a defense through the testimony of his or her witnesses, “a state court’s application of ordinary rules of evidence—including the rule stated in Evidence Code section 352--generally does not infringe upon this right” to a defense. (*People v. Cornwell* (2005) 37 Cal.4th 50, 82, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Here, as the trial court pointed out, permitting defendant to introduce his motivation to plead in 2011 would open up this motivation to cross-examination and rebuttal by the People. This would result in a potentially lengthy and certainly collateral mini-trial, which clearly the trial court was willing to entertain permitting, from its comments as to what the “can of worms” would entail. This side issue would potentially lead to confusion within the jury and would certainly necessitate undue consumption of time. (See Evid. Code, § 352.) We conclude the trial court did not abuse its discretion by excluding this evidence.⁴

III

Error in the Abstract of Judgment

The abstract of judgment contained a clerical error reflecting defendant’s conviction on count 3 pursuant to section “24(a)(4),” instead of section 245, subdivision (a)(4). Defendant seeks correction of this error and the People agree. We shall direct the correction.

⁴ Although defendant also contends the cumulative effect of the errors requires reversal of counts 2 and 3, as we have found no error the contention necessarily fails.

