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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PETE NICHOLAS CAMARGO,

Defendant and Appellant.

D058204

(Super. Ct. No. JCF25365)

APPEAL from a judgment of the Superior Court of Imperial County, Raymond A. Cota, Judge. Affirmed.

A jury convicted Pete Camargo of battery with serious bodily injury (count 2, Pen. Code,¹ § 243, subd. (d)), battery on a former spouse (count 3, § 243, subd. (e)(1)), simple assault (count 4, §§ 240, 241 subd. (a)), assault by means likely to produce great bodily

¹ All statutory references are to the Penal Code unless otherwise stated.

injury (count 5, § 245, subd. (a)(1)), and resisting, obstructing, or delaying a peace officer (count 7, § 148 subd. (a)(1)).² The court sentenced Camargo to prison for four years.³

On appeal, Camargo's sole contention is that the trial court abused its discretion and committed reversible error by denying his in limine motion to exclude prior bad acts of domestic violence because their admission was unduly prejudicial under Evidence Code section 352. We conclude the trial court properly admitted evidence of Camargo's prior domestic violence convictions in 2004 and 2006. Additionally, even if the trial court improperly admitted evidence of domestic violence incidents in 1991 and 2004, any error was harmless. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Camargo and M.C. were married from October 1991 to February 2008 and have three children together. In April 2010, M.C. and the three children were living in an apartment in Brawley, California, and she and Camargo were not on good terms. That month, M.C. filed for a restraining order against Camargo, but the sheriff's department was unable to serve Camargo with the order. M.C. twice attempted to have Camargo served with the order.

² During trial, the court reduced count 3 to a misdemeanor and dismissed count 6, resisting, obstructing, or delaying a peace officer. The jury found Camargo not guilty of first degree burglary, set forth in count 1. For count 4, which charged Camargo with violating section 245(a)(1), the jury found Camargo guilty of the lesser included offense of misdemeanor assault.

³ On count 2, the court sentenced Camargo to the upper term of four years. The court imposed concurrent sentences on counts 3 and 7. Camargo's sentences for counts 4 and 5 were stayed under section 654.

On May 6, 2010, at approximately 10:00 a.m., M.C. was home with her son, A.C., and another child when Camargo arrived at the apartment. Camargo knocked on the windows and said he wanted to talk about the children. M.C. told Camargo to leave, but he entered the apartment through an unlocked door. Camargo was angry and asked M.C. if she had gotten a restraining order, and she responded "yes." Camargo pushed her to the floor, and she received a rug burn on her elbow.

In response, A.C. told Camargo to leave. Camargo opened the door and stepped outside. Camargo was angry and assumed a boxer's stance, and he and A.C. circled each other outside. A.C. dodged Camargo's first swing and threw a jab at Camargo but missed. Camargo punched A.C. in the mouth, started laughing, and drove away. M.C. called 911.

Camargo's punch caused A.C.'s nose and mouth to bleed. A.C. was wearing braces, and his lips were "cut up" and swollen. A.C.'s front left tooth turned gray and was loose, and that usually indicates nerve damage, according to A.C.'s treating dentist, Dr. Shue.

Around 11:00 a.m., Brawley Police Department Officer Jesse Rotner responded to M.C.'s apartment and observed A.C. with blood on his face, and swollen lips. Officer Rotner gathered information from M.C. and "established that some type of crime occurred." M.C. stated Camargo was most likely going to his house, and Officer Rotner relayed this information to Police Officer Torray Scales.

Officer Scales went to Camargo's home. Camargo opened the front door, stepped outside, and asked "what the fuck" Officer Scales wanted. Officer Scales replied he was

authorized to arrest Camargo for domestic violence, and he attempted to do so, but Camargo barricaded himself in his home. Police backup arrived, and Officer Rotner kicked the door 15 to 20 times until it opened. Once inside, the officers observed Camargo in a fighting stance. The officers also saw Camargo's father in the room. Camargo refused Officer Rotner's order to get on the ground. The officers used various means, including a taser, to try to subdue Camargo. The officers attempted to handcuff Camargo, but he continuously resisted by swinging his arms and kicking.

Following Camargo's arrest, Officer Rotner returned to M.C.'s apartment. He took statements from M.C. and A.C. and photographed A.C.'s injuries. Officer Rotner testified that M.C. complained of pain in her elbow.

Before trial, Camargo filed a motion in limine to exclude trial testimony of his prior bad acts under Evidence Code section 352. The motion acknowledged that in 2004 and 2006, Camargo suffered convictions of misdemeanor battery on a spouse. The People filed a motion in limine to admit evidence of prior domestic violence acts under Evidence Code section 1109. After conducting an analysis under Evidence Code section 352, the court denied Camargo's motion to exclude the evidence: "What I think that this does is that it tends to show all of this activity, a pattern of conduct that's relevant; that the defendant seems to have a penchant for exercising violence and control in his home, whether living with his wife and children or not. He seems to have a motive, if you will, for attempting to control his wife's life. And I don't find that there's something unduly prejudicial about this. I think it is relevant.

... [¶] ... And as far as unduly prejudicial, it is not like it is the kind of conduct that's resulted in some very inflammatory injuries, serious injuries. I don't find that the presentation of this evidence will cause an undue consumption of time. And I think that it is properly introduced during this trial to show, as I say for the most part, this pattern of behavior." The court also concluded that the prior convictions were not old.

Although a 1991 incident was not discussed in the in limine motions, on direct examination of M.C., this exchange occurred regarding that incident:

"[Prosecutor]: When you stated previously that you said the first few weeks seemed happy of your marriage, what did you mean by that 'seemed happy'?"

"[M.C.]: Well, because very quickly, within the four weeks, I got my first slap.

"[Defense Counsel]: Objection. Relevance. Move to strike that.

"[The Court]: Overruled. I will allow it."

M.C. testified during trial that in June 2004, although she and Camargo were separated, they attended her brother's wedding together. At the reception, M.C. and Camargo had a "conflict" because Camargo did not like that M.C. was dancing. They went back to M.C.'s mother's home, and M.C. and Camargo argued. M.C. and A.C. testified that Camargo threw M.C. into the shower, causing the shower curtain and rod to fall with M.C. Camargo then turned on the water, getting her dress wet. The police officer who responded to the scene observed a small cut on M.C.'s upper lip. Without objection, A.C., who was 12 years old at the time of the 2004 incident, also testified that Camargo had forcible intercourse with M.C. after throwing her into the shower.

Afterwards, Camargo "just got her and threw her towards the couch" and "hit her across, somewhere along the face right here."

M.C. also testified that in November 2006, Camargo grabbed her around the neck after an argument.

DISCUSSION

Camargo contends the trial court erroneously denied his in limine motion to exclude prior acts of domestic violence that were unduly prejudicial under Evidence Code section 352. He contends M.C. and A.C. were permitted to testify regarding a remote 1991 incident. Camargo asserts the jury convicted him based on his prior acts rather than the merits of the case, and if the trial court had granted his motion to exclude the evidence, the jury likely would have acquitted him on all counts.

Standard of Review

We review a trial court's ruling on relevance and admission or exclusion of evidence under Evidence Code section 352 for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) "We will not overturn or disturb a trial court's exercise of its discretion under [Evidence Code] section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

Applicable Law

Evidence Code section 1109 provides an exception to the general rule codified in Evidence Code section 1101, subdivision (a) that prior acts may not be used to prove a defendant's conduct on a specified occasion. (Evid. Code, § 1109, subd. (a)(1).) Under

Evidence Code section 1109, prior acts of domestic violence are admissible when the defendant is charged with a criminal offense involving domestic violence if the evidence is not made inadmissible under Evidence Code section 352.

Under Evidence Code section 352, the trial court has discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." In applying Evidence Code section 352, " "prejudicial" is not synonymous with "damaging." " " (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Rather, prejudice under Evidence Code section 352 refers to evidence " 'which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.' " (*Karis*, at p. 638.) In other words, in cases involving the proffering of evidence of prior acts of domestic violence under Evidence Code section 1109, the question is whether there is a likelihood the evidence will inflame the jury members so that they will base their verdict not on the evidence presented as to the charged offenses, but rather on an emotional response to the defendant's commission of other acts or crimes.

When determining prejudice, relevant factors 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.)

Analysis

Here, the trial court reasonably found the evidence of the prior domestic violence convictions in 2004 and 2006 more probative than prejudicial, and we find no abuse of discretion. In 2004, Camargo threw M.C. in the shower. In the 2006 incident, Camargo grabbed M.C. by her neck. The trial court did not act in an arbitrary or absurd way in concluding these prior incidents were relevant under Evidence Code section 1109 to show a "pattern of conduct" that Camargo has a "penchant for exercising violence and control in his home." The court ruled Camargo seemed motivated by an attempt to control M.C.'s life. Moreover, the court recognized that the prior convictions were not old, the conduct in the prior convictions did not result in "inflammatory injuries," and the presentation of the evidence would not cause an undue consumption of time. We conclude the trial court did not abuse its discretion in denying Camargo's motion to exclude evidence of his prior domestic violence convictions in 2004 and 2006.

1991 Incident

Camargo also contends that M.C.'s testimony about him slapping her in 1991 was too remote in time to be admitted. 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." Therefore, "while evidence of past domestic violence is presumptively admissible under [Evidence Code section 1109,] subdivision (a)(1), [Evidence Code section 1109,] subdivision (e) establishes the opposite presumption with respect to acts more than 10 years past." (*People v. Johnson* (2010))

185 Cal.App.4th 520, 537.) The trial court satisfies the "interest of justice" exception when it engages in a balancing of factors for and against admission under Evidence Code section 352 and concludes the evidence is more probative than prejudicial. (*Johnson*, at pp. 539-540.)

Camargo argues that because the 1991 incident was not addressed in limine, the court did not first determine whether it was admissible "in the interest of justice" or engage in the Evidence Code section 352 balancing test, and therefore the court committed prejudicial error in admitting it. Camargo also contends that because of the close proximity of the alleged incident to M.C.'s and Camargo's wedding, the jury was inflamed by M.C.'s testimony and convicted Camargo based on emotions rather than the merits of the case.

Under Evidence Code section 353, subdivision (a), a judgment shall not be reversed by reason of erroneous admission of evidence unless an objection to the evidence or a motion to exclude or strike it was " 'timely made and so stated as to make clear the specific ground of the objection.' " A defendant's failure to make a timely and specific objection on the claim asserted on appeal makes that claim not cognizable. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 20.) More specifically, a relevance objection, without an objection to the perceived prejudicial effect of the evidence, does not preserve an Evidence Code section 352 claim for appeal. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1130.) Camargo only objected to testimony regarding the 1991 incident on relevance grounds; therefore, we conclude Camargo has forfeited these claims.

However, even if Camargo's claim about the 1991 incident was preserved for appeal and, assuming arguendo, the evidence was erroneously admitted, we conclude any error was harmless. Review of a trial court's exercise of discretion under Evidence Code section 352 is based on the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Alcala* (1992) 4 Cal.4th 742, 790-791.) The trial court's judgment may be overturned only if "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (*Watson, supra*, at p. 836.)

Here, Camargo has failed to meet his burden of showing it is reasonably probable he would have obtained a more favorable result in this matter absent the assumed evidentiary errors. Only the count 3 battery and count 4 assault convictions were potentially affected by the testimony regarding the 1991 slap. For counts 2 and 5 related to the attack on A.C., the convictions were supported by testimony independent of the prior acts. Specifically, there were photographs and testimony from A.C., M.C., Officer Rotner, and Dr. Shue regarding A.C.'s injuries. The prior acts also had no bearing on count 7, resisting, obstructing, or delaying a peace officer. For counts 3 and 4, which involve Camargo's attacks on M.C., the evidence of guilt was strong. M.C. and A.C. both testified that Camargo pushed her onto the floor and she received a rug burn. Officer Rotner also testified that M.C. complained of pain in her elbow. It was not necessary for the jury to rely on the prior bad act, and therefore we conclude any prejudice to Camargo from the assumed error was harmless.

2004 Incident

Additionally, Camargo argues that A.C.'s testimony about Camargo sexually assaulting M.C. in the shower during the 2004 incident was unduly prejudicial. Because the People's opposition motion and oral argument did not discuss the alleged sexual assault, Camargo argues the court did not engage in the mandated Evidence Code section 352 balancing test outside the presence of the jury. Camargo also contends the jury heard evidence of a more serious offense that was irrelevant because he was charged with a domestic violence crime, not a sex crime. We conclude Camargo has forfeited any claim of error regarding A.C.'s testimony about the alleged sexual assault because Camargo failed to object at trial as required by Evidence Code section 353, subdivision (a). Additionally, as noted above, any error in admitting this evidence was also harmless under the *Watson* test because there was an abundance of other testimony to support Camargo's convictions.

For the foregoing reasons, we conclude the trial court did not abuse its discretion in denying Camargo's motion to exclude his prior domestic violence convictions in 2004 and 2006. Even if the trial court improperly admitted evidence of the 1991 incident and 2004 sexual assault, any error was harmless.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.