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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAWN MICHAEL HARRIS,

Defendant and Appellant.

D059126

(Super. Ct. No. SCN243682)

APPEAL from a judgment of the Superior Court of San Diego County, Joan P.

Weber, Judge. Affirmed.

A jury convicted Shawn Michael Harris of forcible oral copulation. (Pen. Code,¹ § 288a, subd. (c)(2).) It deadlocked on charges of sodomy by force and forcible spousal rape, and the court dismissed those charges. The court sentenced Harris to six years in prison.

¹ Statutory references are to the Penal Code unless otherwise stated.

Harris contends the court erred in admitting an "excessive" number of prior acts evidence under Evidence Code sections 1108 and 1109, and in failing to instruct the jury on the lesser included offenses of assault, assault with intent to commit oral copulation, attempted oral copulation, and battery. We affirm.

FACTUAL BACKGROUND

Prosecution Testimony Regarding Forcible Oral Copulation Incident

Harris's wife, C.H., testified that the day before Easter in 2008, which was one week before the forcible oral copulation incident, Harris was driving a car with her and their son in it through their church parking lot, when someone drove towards them. Harris made a rude gesture to the other driver, and C.H. criticized him for it. Harris responded by striking a snow cone out of C.H.'s hand, pressed her neck hard, and said, "Don't push my buttons." C.H. became particularly upset because their son had witnessed the incident. That night, C.H. went out to buy a gun, explaining to the gun shop owner that she was a victim of domestic violence. But she was required to wait 10 days before obtaining the gun.

The relationship between C.H. and Harris remained poor the next week, and reached a critical point on March 28, 2008, when the oral copulation incident occurred. As soon as C.H. got home from work that afternoon, Harris, a stay-at-home father, asked her, "Do you want to leave or do you want me to because I can't stand to be around you." C.H. went to the master bedroom to nap. Shortly afterwards, Harris asked her if she wanted to have sex. She said no, because they needed to discuss events of the past week. Harris asked C.H. if she had called a woman friend of his, whom he had met at a

"mommy and me class." Based on her answer, he accused her of lying to him and said she needed to be punished. C.H. excused herself to the bathroom, and used a tape recorder to secretly record the entire ensuing interaction with Harris. A copy of the recording was played for the jury.

On the audiotape, Harris gave C.H. this ultimatum: "You suck or get butt fucked." She interpreted that as a demand to perform oral sex on him or he would force her to have anal sex. While he was choking her, she protested that he was hurting her neck, and said, "Okay, okay, okay! I'll suck it! Owwww!" She testified that she relented out of fear, and to avoid the hurt from forced anal sex. He told her, "Hurry up and fucking do this" and, "You think this is a fucking joke?" C.H. protested, "I can't breathe. I can't breathe. I'm sorry, I'm sorry, I can't breathe. I'm sorry, I can't . . ." Harris responded, "You need to stop lying." She repeatedly denied lying to him, and tried to talk her way out of orally copulating him. She pleaded, "I don't want to be raped. Nobody deserves to be raped." Harris responded, "I'll go get a knife downstairs if I fucking have to." He added that she was not dumb or confused, and he would "be sure to carve that on [her] fuckin' head when [he dumped her] body." Harris held the back of her head as she orally copulated him. At one point, Harris switched to having vaginal intercourse with her. Harris asked C.H. if she was going to call the police. She said, "No, leave me alone." He responded, "Great idea." She retorted, "If I could survive the phone call I would have called." C.H. testified that her retort referred to her fear of calling the police because Harris had threatened that if she did call, he would kill her before the police arrived. She was certain

he would carry out the threat. Further, she had not yet obtained the gun she had purchased.

Prior Acts Testimony

Before trial, the People moved in limine to admit testimony regarding Harris's prior acts under Evidence Code sections 1108 and 1109. The court excluded testimony regarding an incident involving Harris's previous girlfriend. But over Harris's objections, the court admitted C.H.'s testimony regarding prior incidents of sexual or domestic abuse during their marriage. The court expressly declined to rely on Evidence Code section 1101, saying, it "requires a great degree of similarity, and these incidents as we've reviewed them are all very different and unique."

C.H. testified that in 1998, approximately two years after they were married, she and Harris got into an argument, he called her a "bitch," and hit her as they were driving to work. She got a restraining order against him, and he was convicted of misdemeanor battery.

In November 2003, Harris and C.H. got into an argument and he threatened to throw a four-foot tall play structure for cats at her. Police were called, but she filed no charges against Harris.

In April 2004, Harris poured water on their bed, and C.H. went to sleep on a couch. He followed her, pushed her head into the ground, and forced her to turn on the television despite the fact she had to work the next day. She called police, initially

sought a restraining order, but withdrew the request because she hoped Harris would change.

In an August 2007 incident, C.H. sought to discuss their outstanding problems, but Harris did not want to; therefore, C.H. hid his keys to stop him from leaving the house. He pressed her head to the floor as hard as he could, and kicked her. She said she would divorce him, and he threatened to kill her, telling her no one would protect her, not even the police. She called 911, and the recording of the call was played for the jury.

In November or December 2007, while they were discussing their marriage, Harris pretended to fall asleep; therefore, C.H. lied about having an affair, in order to get a reaction out of him. Harris immediately straddled her and started choking her. She did not report the incident to police because she was afraid of Harris's death threats.

In another incident, C.H. had just finished showering and was grooming herself. She and Harris got into an argument, and he masturbated in front of her against her wish. When he repeated that behavior some time later, C.H. videotaped him but he saw the camera and erased the recording.²

Harris's Testimony Regarding the Oral Copulation Incident

Harris testified that both before and throughout their marriage, he and C.H. had engaged in sexual role playing, and the March 28, 2008 incident was a scenario they had acted out several times before. While acknowledging C.H. had orally copulated him, Harris denied it was forcible and dismissed the notion he was choking her. He insisted,

² We omit C.H.'s testimony regarding a charged incident of sodomy by force because the jury acquitted Harris of that charge.

"It's all verbal. It's just acting. I'm not punching her, holding her, tying her down, none of that." He explained that when his penis was in her mouth and she said, "You are choking me," he liked to hear that "because it made me feel like I had a bigger penis than I really do." He testified C.H. so enjoyed the role play, she achieved orgasm. He denied threatening to kill C.H. that night, saying, "I have no desire to kill my ex-wife. It's [*sic*] the mother of my children. I've got no interest in that."

Harris stated C.H. had stopped the tape recorder without recording a second part of the role play. They were interrupted by the children's voices upstairs, and he checked on them. According to Harris, in the unrecorded part of the role play that ensued, C.H. pretended to be angry that Harris was having an affair with another woman, and held his head as he performed oral sex on her, while he said, "I can't breathe."

On Harris's cross-examination, this exchange took place:

"[Prosecutor:] On the recording that we heard here in court during your—your role play with [C.H.] on March 28th, 2008, do you know approximately how many times she expresses to you 'No' or 'Stop' or 'I don't want to do this'?"

"[Harris:] No. But I'm sure you're going to tell me.

"[Prosecutor:] She tells you that approximately 50 times. Does that sound about right?"

"[Harris:] Whatever is in the scene is in the scene."

Harris's Testimony Regarding the Prior Acts

Harris generally denied C.H.'s testimony regarding each prior act, and denied ever threatening to kill C.H., choking her, or forbidding her from calling the police. He

testified that from the 1998 misdemeanor incident until approximately six months before the oral copulation incident, they got along "pretty good for ten years."

Harris disputed C.H.'s account that he had threatened her with the cat play structure. He testified, "It was a verbal argument. I did get angry. I avoided escalation by leaving the argument."

Harris denied straddling C.H. during their argument about the television. He explained he twice turned the television on and she twice turned it off, and after each time she did so, he left to avoid escalating the argument.

Harris explained the incident in which C.H. had hidden his keys: "[C.H.] knew that when the situation escalated that I would take a timeout and not let it get out of control, she would proactively either hide my keys, wallet, phone or a combination of all three prior to an argument so when I would call for a timeout and attempt to leave I couldn't find any of my belongings and she could continue the conversation while I was looking for my belongings." That day, he "tore the house up" looking for his keys, and when she eventually gave them to him, he left.

Harris testified that when C.H. told him she was having an affair, he asked her to clarify her statement, but she was vague. Therefore, because he was sleepy and did not want to talk about the issue, he drove to a rest stop and slept.

When asked on cross-examination regarding the incident when he masturbated in front of C.H., he said sometimes he had masturbated at her request, but he never masturbated in front of her against her wishes.

He denied he had "flipped off" a driver in the church parking lot, saying, "I scratched my neck like this, and I guess in Italian, which I don't know—that means—it's the same as flipping off." He denied hitting C.H in the mouth or poking her in the neck during that incident.

DISCUSSION

I.

Harris contends the court erred in admitting evidence of his prior acts under Evidence Code sections 1108 and 1109 because "the sheer number of the other incidents resulted in a clear portrayal of [himself] in an extremely negative light, one that would necessarily influence the jury. The incidents bore little similarity to the current charged offenses. The prosecution does not have a right to present cumulative evidence that creates a substantial danger of undue prejudice."

In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), the California Supreme Court considered a challenge to the constitutionality of Evidence Code section 1108 permitting propensity evidence in sexual offense cases. The court held that the propensity evidence was admissible only if it was also admissible under Evidence Code section 352. (*Falsetta, supra*, at p. 917.) "Thus, there is an overriding safety valve built into [the] statute that continues to prohibit admission of such evidence whenever its prejudicial impact substantially outweighs its probative value. ([Evid. Code,] § 352.)" (*People v. Johnson* (2010) 185 Cal.App.4th 520, 529.) The same is true of Evidence

Code section 1109.³ Therefore, although the California Supreme Court has not ruled directly on the constitutionality of Evidence Code section 1109, by parity of reasoning with *Falsetta*, the Courts of Appeal have uniformly held that Evidence Code Section 1109 does not offend due process. (*Johnson*, at p. 529.)

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 proffer 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.

³ 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.

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.)

We review for abuse of discretion a court's ruling on relevance and admission or exclusion of evidence under Evidence Code section 352. (*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.) Review of a 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*, at p. 836.)

As a preliminary matter, the approximately eight prior acts that were admitted into evidence were not excessive. Also, they were not cumulative, in that they showed different ways Harris exerted control over C.H. at different times during their marriage. Next, we conclude it was not reasonably likely the prior acts evidence so inflamed the jury that it based its verdict on those incidents. It was not likely the jury was confused regarding the specific charged offense of a forcible oral copulation incident, which was

more egregious than the prior act incidents because of its sustained duration, and the sexual aggression it entailed. Further, that incident was unique in that the audiotape documented it from start to finish. By contrast, the prior acts involved discrete acts of shorter duration or relatively less severity, including the snow cone incident, Harris's threat to throw the cat play structure at C.H., and his masturbating in front of her as she readied herself for work. Although Harris objects that a basis for exclusion of the prior acts testimony was the fact they were dissimilar from the charged crimes, we conclude that in this case their very dissimilarity weighs against his claim the jury was confused by admission of that evidence.

Harris's belief that he was prejudiced amounts to speculation. The jury was specifically instructed with CALCRIM No. 852 that it may consider the Evidence Code section 1109 evidence in assessing guilt. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Moreover, the jury acquitted Harris of two charges, showing the jurors limited their consideration of the Evidence Code section 1109 evidence as instructed. (*Rucker, supra*, 126 Cal.App.4th at p. 1120.)

Finally, we note that Harris denied C.H.'s versions of each of the prior incidents; therefore, the jury was afforded an opportunity to evaluate the conflicting versions and make credibility determinations. Based on the above, we conclude that the trial court did not err in admitting evidence of Harris's prior domestic violence and sexual assault.

II.

Harris contends the trial court erred by not instructing the jury sua sponte that lesser included offenses of the crime of forcible oral copulation include assault (§ 240), assault with intent to commit oral copulation (§ 220), attempted oral copulation (§§ 663, 288a), and battery (§ 242). He contends that from both his and C.H.'s testimony, "it could reasonably be inferred that at some early point in the oral copulation there was consent. [C.H.] could then have withdrawn her consent. Based on the testimony, [he] then attempted to continue the oral copulation, even over [C.H.'s] objections."

Section 288a, subdivision (c)(2), defines forcible oral copulation as "an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." A reasonable, good faith belief in the victim's consent is a defense to this charge. (*People v. May* (1989) 213 Cal.App.3d 118, 124; CALCRIM No. 1015.)

The trial court's duty to instruct on lesser included offenses has been summarized thus: " 'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]

The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715-716, fn. omitted, overruled on other grounds as stated in *People v. Breverman* (1998) 19 Cal.4th 142, 148.)

"[T]he sua sponte duty to instruct on lesser included offenses, unlike the duty to instruct on mere defenses, arises even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued. Hence, substantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself." (*People v. Breverman, supra*, 19 Cal.4th at pp. 162-163.) Further, " "[I]t has long been settled that the trial court need not, even if requested, instruct the jury on the existence and definition of a lesser and included offense if the evidence was such that the defendant, if guilty at all, was guilty of something beyond the lesser offense." " (*People v. Guertin* (1996) 47 Cal.App.4th 505, 507.)

Here, at a minimum, the testimony set forth above from both C.H. and Harris establishes conclusively that C.H. orally copulated Harris. Therefore, the operative question was whether she did it voluntarily or forcibly. The audiotape revealed that C.H. protested numerous times, and Harris ignored her pleas. Instead, Harris gave her an ultimatum to perform oral sex on him, and threatened to carve on her body that she was a

liar or confused. The jury was instructed regarding the elements of forcible oral copulation with CALCRIM No. 1015, and convicted Harris. In other words, if Harris was guilty at all on this count, he was guilty only of forcible oral copulation. Thus, the lesser included offense instructions were not supported by substantial evidence, and were not required.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.