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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KASCELL MORGAN,

Defendant and Appellant.

D059305

(Super. Ct. No. SCD229292)

APPEAL from a judgment of the Superior Court of San Diego County, Richard S. Whitney, Judge. Affirmed.

A jury found Kascell Morgan guilty of false imprisonment and making criminal threats to his former girlfriend. (Pen. Code, §§ 236, 237, 422.) The court imposed three years' formal probation. On appeal, Morgan contends the court erred in admitting evidence of two prior acts of domestic violence under Evidence Code section 1109.¹ We reject this contention and affirm.

¹ Statutory references are to the Evidence Code unless otherwise specified.

FACTUAL AND PROCEDURAL SUMMARY

In the morning of August 23, 2010, Morgan picked up his girlfriend Ericka Garcia from her home. After Garcia got into the car, the two began arguing. Morgan told Garcia he was going to have her "ass beat" and he "was going to shoot" her. Morgan said he had a gun in the car. Garcia was afraid and wanted to get out of the car. When Morgan stopped at a red light, Garcia opened the door and attempted to exit the car. But Morgan accelerated the vehicle and drove erratically, including driving over the center divider of the road.

Morgan then drove south on the freeway, while continuing to yell and threaten Garcia. Morgan slapped or backhanded Garcia on the mouth and had earlier pulled out some of her hair.

Eventually, Morgan exited the freeway and stopped at a red light. Garcia jumped out of the car and asked a bystander for help and to call the police. Garcia was crying and told the 911 operator that her boyfriend had threatened her with a gun and she needed help. She later told the police that during the car ride Morgan pulled out a gun from underneath the front seat, pointed it at her head, and threatened to shoot her in the face and kill her. She also said that Morgan told her she was going to be raped, shot in the face, and killed.

Morgan was arrested and charged with kidnapping and making a criminal threat.

Before trial, the prosecutor moved to admit evidence of two prior acts of violence committed by Morgan against former girlfriends under section 1109. The prosecutor said

he did not intend to bring the victims into court, but would present the evidence by using language on Morgan's guilty plea forms.

With respect to the first prior act, the prosecutor said Morgan had committed numerous acts of violence against his former fiancée in 2001. These violent acts included "slamm[ing] her to the ground," kicking her, and punching her in the face. The prosecutor said he was seeking to admit Morgan's guilty plea to only one of these incidents occurring on November 20, 2001.

With respect to the second prior act, the prosecutor said that Morgan committed domestic violence against Sheryl Wakefield on four separate dates in 2003 and 2004, but he was seeking to admit Morgan's guilty plea arising out of only one of those incidents occurring on March 18, 2004.

Defense counsel urged the court to exclude the evidence under section 352 and due process principles. Counsel argued the prior acts were "remote" and not "relevant or material" to the current alleged crimes, and there was a likelihood of confusion because they were "completely separate incident[s]" which could be "very confusing for lay people." Counsel said the evidence was particularly prejudicial because the prosecutor was not calling "live witnesses" and therefore there was no information for the jurors to evaluate the cases. Defense counsel claimed the police reports showed the victim in the second incident "was not a credible, truthful person."

The prosecutor responded that the purpose of section 1109 is to permit a prosecutor to present prior acts evidence "for propensity purposes to show the jury the defendant's continuing course of conduct in domestic violence crimes" The

prosecutor also said that by using language on the plea forms to present the evidence he would avoid witness testimony that might sound "grotesque or inhuman." With respect to the prior victims' credibility issues, the prosecutor noted that Morgan had admitted to the crimes, and that if Morgan wanted to challenge or explain these admissions, he "can testify about that or . . . call [his former girlfriends] to come in."

The court ruled that the evidence of Morgan's two prior guilty pleas (March 2004 and November 2001) would be admitted, but that none of the other underlying evidence would be presented. The prosecutor also agreed not to present evidence of Morgan's violent acts towards a third woman that occurred about 15 years earlier.

Thereafter at trial, the prosecutor read the following to the jury: "On January 22 of 2002, [Morgan] admitted to unlawfully using force or violence against his girlfriend at that time . . . causing corporal injury resulting in a traumatic condition. That was a misdemeanor. [¶] On April 21st of 2004, [Morgan] admitted to willfully and unlawfully using force upon a roommate or girlfriend resulting in a traumatic condition. Also a misdemeanor." The court told the jury it could consider these facts as evidence in the case.

At trial, Garcia testified at length regarding Morgan's abusive behavior while she was in the car the morning of the incident, as summarized above. However, her statements regarding details of the incident were often contradictory and inconsistent. At times, Garcia said she was the primary aggressor and that both parties were threatening each other. Additionally, Garcia retracted some of her statements told to the police officers shortly after the incident, including specific threats made by Morgan. She

acknowledged that at the preliminary hearing she testified that Morgan said he was going to rape and kill her, but at trial she said she could not remember his exact words and believed she might have exaggerated.

Defense counsel began a cross-examination after the lunch break. After Garcia testified for a few minutes, the court told the jury it was taking a recess. When the jury left the courtroom, the court and counsel discussed the fact that it appeared Garcia was under the influence of drugs and discussed the possibility that Garcia may have taken drugs during the lunch recess. While waiting for counsel to come represent Garcia, the prosecutor suggested that the court take her into custody and bring her back in the morning to testify. Defense counsel objected, stating: "I object to that procedure. I think it appears to everyone that Ms. Garcia is under the influence of — she's sweating. She's dabbing at the sides of her mouth, her eyes are red. You mentioned in chambers off the record you could smell the chemical odor characteristic of methamphetamine use. It appears she's under the influence." Defense counsel asked the court to dismiss the case, or alternatively allow him to complete his cross-examination and thus permit the jury to observe her demeanor and reach conclusions about her lack of credibility. The court refused to dismiss the case, but granted the defense motion to continue the cross-examination.

Thereafter, defense counsel continued the examination, during which Garcia testified essentially consistent with her direct examination. Defense counsel also elicited testimony that she had been previously charged with using methamphetamine and had used methamphetamine the day before the incident. She also acknowledged that she was

aware that Morgan had informed her drug counselors that she was using methamphetamine. She asserted her Fifth Amendment rights in response to defense counsel's questions whether she was under the influence of drugs at the current time.²

During closing arguments, the prosecutor acknowledged that Garcia may be a drug addict and is an "unlikeable" victim, but urged the jury to focus on the evidence showing that Morgan did engage in abusive and threatening conduct while Garcia was in Morgan's car on the morning of the incident. He emphasized the evidence that a witness saw a struggle in the car, witness descriptions of Garcia's frightened demeanor shortly after she escaped from the car, and Garcia's statements to the 911 operator and to the police officers after the incident. The prosecutor also mentioned the fact that Morgan had admitted "to beating up women two times in the past."

Defense counsel urged the jury to find the prosecution did not prove its case based primarily on Garcia's lack of credibility, emphasizing her inconsistent testimony and the fact that she is a methamphetamine user and had a motive to lie.

The jury found Morgan not guilty of kidnapping, but found him guilty of the lesser included offense of false imprisonment. (Pen. Code, §§ 236, 237.) The jury also found Morgan guilty of making a criminal threat. (Pen. Code, § 422.)

² Shortly after Garcia's testimony, a deputy sheriff conducted a preliminary drug assessment on Garcia, and found no signs of methamphetamine but said that Garcia admitted using marijuana at about 4:30 that morning and the deputy believed it probable that Garcia had "used some kind of depressant- or opiate-type drug a very long time ago."

DISCUSSION

Morgan does not challenge the sufficiency of the evidence to support the verdicts or contend the court erred in responding to issues regarding Garcia's possible drug use on the day of her testimony. Morgan's sole contention on appeal is that the court prejudicially erred in admitting the evidence of his two prior guilty pleas to domestic violence charges under section 1109.

A. *Applicable Law*

Section 1109 provides an exception to the general rule codified in section 1101, subdivision (a) that prior acts may not be used to prove a defendant's conduct on a specified occasion. Under 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 inadmissible pursuant to Section 352." (§ 1109, subd. (a)(1).) If evidence is admitted under section 1109, a jury may infer from the evidence that the defendant had a disposition or propensity to commit other offenses involving domestic violence and may infer that he was likely to commit and did commit the current domestic violence offense. (*People v. Ogle* (2010) 185 Cal.App.4th 1138, 1143; *People v. Johnson* (2010) 185 Cal.App.4th 520, 528.)

Under 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 section 352, " "prejudicial" is not synonymous with "damaging." ' ' (*People v. Karis* (1988) 46

Cal.3d 612, 638.) Prejudice under 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.' " (*Ibid.*; see *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.)

We apply an abuse of discretion standard to a trial court's admission of prior acts of domestic violence under section 1109 and its refusal to exclude the evidence under section 352. (*People v. Johnson, supra*, 185 Cal.App.4th at p. 539; *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.)

B. *Analysis*

Morgan does not challenge the fact that the current and prior charges involved "domestic violence" within the meaning of section 1109, subdivision (d)(3), and thus that the evidence was potentially admissible as disposition evidence under the code section. (§ 1109, subd. (a)(1); see Pen. Code, § 13700, subd. (b).) Morgan argues instead that the court abused its discretion when weighing the probative value and the potential prejudicial effect of the evidence.

We find no abuse of discretion in the court's balancing of the relevant factors. Given the sanitized manner in which the evidence was presented, the court had a reasonable basis to conclude the evidence would not take an undue amount of time or confuse or mislead the jurors as to the true issues in the case. Additionally, the nature of the misdemeanor guilty pleas was not likely to trigger an inappropriate emotional reaction from the jury. Moreover, the probative value was strong because the acts were

relatively recent and involved similar acts of domestic abuse against Morgan's prior girlfriends.

In enacting section 1109, the Legislature decided that past acts of domestic violence *are admissible* to prove a defendant's propensity to commit domestic violence in a current charged offense. The fact that the evidence was potentially damaging to Morgan's case is not a sufficient reason to find the court abused its discretion under section 352.

Instead of focusing on the section 352 factors, Morgan devotes most of his appellate briefs to discussing the fact that Garcia may have been under the influence of drugs during her cross-examination. Morgan does not suggest the court erred in responding to this incident, but contends this incident shows the court should have denied the prosecutor's section 1109 motion because Garcia's credibility was substantially in question at trial.

The argument is unavailing because the court ruled on the prosecutor's section 1109 motion long before the drug-use incident arose, and we assess the court's ruling at the time it was made. Although he had the opportunity to do so, Morgan never reasserted his objection to the section 1109 prior acts evidence after Garcia's direct or cross-examination testimony.

In any event, even if Morgan had timely raised the issue, a victim's lack of credibility is not necessarily a basis for a court to exclude section 1109 prior acts evidence. In enacting section 1109, the Legislature intended to allow prior domestic violence acts to prove a current domestic violence crime because such crimes are

frequently credibility contests between the victim and the perpetrator. (See *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1311.) Recognizing the likelihood that a defendant who has previously committed these acts against a spouse or girlfriend will repeat this type of offense, the Legislature intended that the propensity evidence would be presented to the jury to promote the victim's version of the incident, unless the evidence is unduly inflammatory or would create confusion or mislead the jurors. (See *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027-1028.)

Under these principles, the fact that Garcia was the only witness to the offense and may have had credibility problems is precisely the type of case for which section 1109 was intended to apply. The jury, as the trier of fact, had an opportunity to assess all the evidence, including Garcia's drug use, Garcia's testimony, Garcia's statements shortly after the incident, and the fact that Morgan had physically abused prior girlfriends. The jury's finding that Morgan was not guilty of kidnapping, but guilty only of the lesser included offense, shows the jury understood and complied with its duty to independently evaluate the evidence without undue reliance on the prior acts evidence. The court acted well within its discretion in permitting the prosecutor to present the prior acts evidence under section 1109.

DISPOSITION

Judgment affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.