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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR ROMERO,

Defendant and Appellant.

D061411

(Super. Ct. No. SCE309573)

APPEAL from a judgment of the Superior Court of San Diego County, Gary M. Bubis, Judge. Affirmed.

A jury convicted Hector Romero of first degree murder (Pen. Code, § 187, subd. (a)) and found true an allegation that he used a deadly weapon (knife) to commit the offense (Pen. Code, § 12022, subd. (b)(1)).

Romero was sentenced to an indeterminate term of 26 years to life in prison.

Romero appeals contending the trial court erred in excluding certain character evidence regarding the victim which was offered to demonstrate the victim was the aggressor in this case. We find the trial court acted well within its discretion under

Evidence Code¹ section 352 to exclude the offered evidence. Accordingly, we will affirm the judgment.

STATEMENT OF FACTS

The offense in this case occurred on March 16, 2011. Prior to that time Romero and the victim, Roque Varela, had a number of encounters. In December 2010, Varela was outside of Romero's house, talking loudly on a cell phone. Romero came outside and told Varela to be quiet. Romero reached for his waistband and Varela punched Romero, knocking him unconscious.

Later on the same day, Varela arrived at the house of a friend, Patricia Retes. Varela was not wearing a shirt and was sweaty and breathless. He told Retes that three men were chasing him. Retes saw three men outside of her house, one of whom was Romero.

Varela went out the back door and came to the front where Romero and the others were standing. Retes screamed for help from her neighbor, Nathan Hampton, who came outside and saw the three men in Retes's front yard.

Varela had his back to the wall and he and the men were exchanging insults. Hampton got in between the men and Varela. About that time Romero came around a parked car toward the location where Varela was standing. Romero was holding a three-to eight-inch kitchen knife. Varela later said that Romero threatened to stab him with the knife.

¹ All further statutory references are to the Evidence Code unless otherwise specified.

Retes screamed at Romero about the knife and, after further arguing between Romero and Varela, Romero and his companions left.

Varela told Hampton that he had at least two prior confrontations with Romero. In each instance, Varela said he had hit Romero and knocked him out.

On March 16, 2011, Varela was at the house of Sherisse Hurlburt, who was a mutual friend of both Varela and Romero. Hurlburt's two sons and one or both of her daughters were also present in the house.

While Varela was at the house, Hurlburt received a phone call from Romero. Romero said he wanted to come over to purchase some marijuana from Hurlburt. Hurlburt told Romero that Varela was there, that they would be leaving soon and that it was not a good idea for Romero to come over. Romero said he was coming over anyway.

When Hurlburt and Varela were leaving the house, they came face to face with Romero and another man.

Varela and Romero stared at each other and talked angrily in Spanish. Then they both said "no mas" and shook hands. Romero immediately pulled an eight- to nine-inch knife in a plastic case out of his pocket. He lunged at Varela with the covered knife and struck him in the left shoulder area.

Romero removed the cover from the knife as Varela backed away. As Romero lunged at him, Varela pushed a plastic chair in the way. Romero was, however, able to stab Varela.

Hurlburt's son, Daniel Gordon, attempted to help Varela. He hit Romero's companion in the head because they were starting to chase Varela who was running away. At that point, Romero and his companion got into their truck and drove away.

Varela died at the scene as a result of six stab wounds.

Defense

Romero testified and admitted stabbing Varela, but said he did so in self-defense. Romero said he was afraid of Varela as a result of the prior altercations. He knew that Varela had a reputation as a violent person.

Romero said that Varela was always the aggressor in their encounters and that Varela threatened to beat "the hell out of" him in 2009. Romero also testified about the December 2010 event where Varela knocked him out.

Romero testified he did go to Retes's house that day to speak to Varela. He denied having a knife and said that he and the other men left after Varela threatened him.

On March 16, 2011, Romero called Hurlburt to arrange a purchase of marijuana. He testified that Hurlburt told him to come to her house that night. He did not know that Varela would be there.

When Romero arrived at the house he encountered Varela who pushed him and threatened to kill him. When Varela came at him with a chair, Romero pulled a knife and stabbed Varela a number of times. Romero said he had always carried a knife since he was stabbed in 2008.

DISCUSSION

During the hearing on various pretrial motions, Romero offered evidence of two events involving Varela which Romero contends demonstrate Varela's character for violence and were relevant to prove Varela's role as the aggressor in the fatal encounter between them. Although Romero did not contend he was aware of the two events prior to stabbing Varela, he argues that such evidence was admissible pursuant to section 1103.² He specifically argues that the trial court abused its discretion in excluding the evidence under section 352. As we will discuss, the record does not support a finding of abuse of discretion.

A. Offer of Proof

During the in limine motions, the defense offered to introduce evidence of two acts of violence by Varela as relevant under section 1103 to prove Varela's character for violence and to show he was the aggressor in the current offense. Romero conceded he was not aware of these two incidents prior to stabbing Varela.

The first incident involved sheriff's deputies being called to a liquor store where they found Varela banging a stick on the ground, detained him and later found a throwing star in his pocket. Defense counsel said:

² Section 1103, subdivision (a)(1) provides: "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character."

"And what my offer of proof would be is that the sheriff deputy that responded to that call could come in and testify that they responded to a call of multiple gunshots in the area. As they arrived near this area -- and its on Gillespie Avenue . . . which is an avenue that we might hear about several times in this case. There's a liquor store on the corner there -- that they -- while this deputy was arriving, he sees two male subjects standing near the intersection. [¶] As he gets closer, he could see one of the subjects that's later identified as Rocky Varela, banging a stick on the ground and waving it in the air, so the deputy stops his car. The other guy runs south on Gillespie. He stays with Varela, and he hears Mr. Varela yelling back toward the area of Jamacha Lane as he bangs and waves the stick. He's told to drop the stick and lay down on the ground. He drops the stick but he ignores the officer's commands. And then he takes a few steps and throws an unknown object. They later find it is a throwing star. It's not the facts of the -- well, I don't know what they found.

"[Prosecutor]: It was a can of beer that he threw. The throwing star was in his pocket.

"[Defense counsel]: I saw the next paragraph. So here we have -- I'm not so interested in the conviction itself, but it's another factual scenario where violence, alcohol, and Mr. Varela are all involved. It would only require one witness, so it wouldn't be a lot of time consumption, and I think it goes to the heart of the character evidence that I intend to admit as to Mr. Varela."

The offer of proof did not inform the court of what caused the incident or whether Varela engaged in any violent acts. No information was offered regarding the report of shots being fired, who fired them or what precipitated Varela banging a stick on the ground.

The second incident was offered with almost no detail. Counsel said: "Well, I do have witnesses that have been a victim of his violence, at least one witness that was beaten by Mr. Varela--the gentleman in custody--and we need to talk about him too, judge."

The prosecutor identified the witness as Shukri Sahiti and advised the court that from the police report "apparently they never even got into a fight, just Mr. Varela was mean or intimidating toward him. . . ." Defense counsel did not disagree with the prosecutor's representation.

B. Standard of Review

Where a defendant asserts self-defense, evidence of the victim's violent character may be admissible to support the defense position that the victim was the aggressor. (*People v. Wright* (1985) 39 Cal.3d 576, 587.) The admissibility of such evidence is conditioned both on relevance and on the trial court's weighing of the prejudicial effect of the evidence as against its probative value. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827-828.)

We review the trial court's decision under section 352 to admit or reject character evidence under the abuse of discretion standard. We will not overturn the court's decision in the absence of a clear showing the court abused its discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

C. Section 1103

Evidence of a victim's character for violence can be proved both by reputation and by evidence of specific acts of violence that are sufficiently similar to the current offense that a jury could infer that the victim was the aggressor in the charged offense. If the defendant was aware of the incidents such awareness could also be relevant to show his or her state of mind at the time of the offense. Even if the defendant was unaware of such

incidents, the evidence may still be relevant to prove the victim's character. (*People v. Smith* (1967) 249 Cal.App.2d 395, 404; *People v. Cash* (2002) 28 Cal.4th 703, 726.)

Where the defendant was unaware of the incidents, the nature of the activity in such incidents should be sufficiently similar to the events in the charged crime in order for such evidence to have any meaningful probative value. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1306, fn. 11.)

Section 1103 specifically recognizes the trial court's responsibility to apply a section 352 analysis to any such offer of proof. (*People v. Hamilton* (2009) 45 Cal.4th 863, 930.) In making its analysis the court could rationally consider whether the defendant was aware of the incidents such that they may have influenced his or her state of mind. Further the court could consider the clarity or lack of clarity of the offer of proof in order to determine if the evidence will be confusing, unduly inflammatory, or will involve an undue consumption of time. The court could also consider the fact that other evidence of the victim's character for violence has or will be presented to the jury. (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 449-450.) As we have already noted, the court's decision to admit or reject this form of evidence is reviewed under the deferential abuse of discretion standard.³

³ Respondent urges us to treat this issue as waived because of the inadequacy of the offers of proof. (§ 354.) We agree the offers of proof are minimal at best. Indeed, the offer of proof as to the "beating" of Mr. Sahiti is almost nonexistent. However, the "offers" were not objected to on section 354 grounds in the trial court and, in light of our view of the trial court's exercise of discretion, we will consider the merits of Romero's contentions.

D. Analysis

The record demonstrates the trial court made a careful weighing of the defense offers of proof and exercised its discretion under section 352. Romero argues the trial court erred because it focused on the fact Romero was not aware of either incident before the events in the charged crime. The record does not support his argument.

The court reviewed the points and authorities and read the cases cited by counsel. Defense counsel clearly advised the court of the authority holding that section 1103 evidence can be admissible even in the absence of knowledge by the defendant. The court's focus on the defendant's lack of knowledge was not unreasonable in this case.

The prior incidents were only vaguely described and it would likely take a "trial within a trial" to clearly understand what happened. The liquor store incident involved reference to multiple gun shots and the fact that Varela possessed a martial arts weapon. However, there was nothing offered to explain the context. The jury would be left to speculate about who was responsible for the gunshots and the significance of Varela possessing, but not displaying a weapon. Further, the proposed evidence regarding the liquor store incident provides very little to demonstrate that Varela was an aggressor or that he had a character for violence, thus the probative value of the evidence in this case is minimal at best. The unexplained events could, however, be unduly prejudicial in that it could confuse the jury or cause it to form opinions based on inadequate information. For example, jurors would be left to speculate as to who was responsible for any gunshots. Or the jury would have to speculate as to whether Varela was involved in some act of violence, other than banging a stick on the ground.

We find it reasonable for the trial court to focus on Romero's lack of knowledge of the events. Had Romero known about the incidents, there would be some added relevance regarding the issue of self-defense. Absent such knowledge, the probative value of the proffered evidence was minimal and the prejudicial effect could easily be found to predominate.

Finally, there is virtually no probative value to the offer of proof regarding Mr. Sahiti. We have no idea what happened in any incident involving him and Varela. Given the prosecutor's unchallenged offer, the maximum value of the evidence might be that Varela was "mean" to him. Clearly the trial court was well within its discretion to reject such evidence.

We are satisfied that the trial court acted within its discretion under section 352 to exclude evidence of the two incidents at issue here

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.