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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS ALBERTO LOZA,

Defendant and Appellant.

E052815

(Super.Ct.No. FVI700503)

OPINION

APPEAL from the Superior Court of San Bernardino County. Jules E. Fleuret, Judge. Affirmed with directions.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Garrett Beaumont, and Gil Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

Jesus Alberto Loza, defendant, was the sole caretaker of his infant son, J.J. (the

victim), while his girlfriend (the mother of the child) was at work. After defendant noticed the infant was acting strangely, he and the mother took J.J. to the emergency room where it was learned he had suffered subdural hematoma, intracranial as well as retinal hemorrhaging, and suspected skull fractures. The infant was transferred to Loma Linda University Medical Center for treatment. A jury convicted defendant of felony child abuse (Pen. Code, § 273a, subd. (a)), made true findings that defendant personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (b)), had been convicted of a serious or violent felony as an enhancement (Pen. Code, § 667, subd. (a)(1)), and had been convicted of a felony under the Strikes law. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12 subds. (a)-(d).) He was sentenced to an aggregate term of 23 years in state prison and appealed.

On appeal, defendant argues that (1) the court's denial of his motion for mistrial resulted in a violation of his constitutional rights, and (2) he was denied effective assistance of counsel when his attorney failed to object to questions about his prior history of violence. We affirm with modifications.

BACKGROUND

Defendant and his girlfriend Rina G. were in a relationship that produced a child, J.J., born in December 2006. Rina had two older children from a prior relationship, S.L. and A.L., who were six and three years of age in 2007. On March 13, 2007, the mother's older children were staying with their father and defendant was taking care of three-month-old J.J. while the mother was at work. Defendant was a good father who did not

become frustrated while caring for the child.

On March 13, 2007, Rina received a call from the defendant, who reported that something was wrong with J.J. Defendant reported that the baby woke up screaming and crying, and defendant noticed something was wrong. Rina advised defendant to check his temperature, feed him, and give him a bath. Rina asked defendant if anything had happened, but defendant said nothing had happened.

When Rina went home at lunch, she noticed something wrong with the baby, also. He was crying, did not respond to her, his eyes appeared dazed and he was not acting normally. Rina again asked defendant what had happened, but defendant stated nothing had happened, that the baby had awakened like that. Rina and defendant took the baby to the emergency room at St. Mary's Hospital.

Defendant and Rina had to wait approximately 45 minutes, and, while they waited in the emergency room waiting area, J.J. had a full seizure. A doctor then saw them and started working on the baby. After a CT scan was performed, the emergency doctor informed the parents that J.J. was bleeding internally in his brain and needed to be airlifted to Loma Linda University Medical Center. When informed of J.J.'s condition, defendant told Rina, in Spanish, that the baby had fallen. The doctor overheard this statement and informed the parents that it was not possible for J.J.'s injuries to have been caused by a fall.

Two law enforcement officers responded to the emergency room upon the report of suspected child abuse. Detective Goddard interviewed Rina and asked about the

injuries. Rina explained that defendant had reported he was sitting on the bed with the baby in his lap when the baby lunged forward, hitting his head on defendant's knee.

Later, Detective Goddard spoke with his partner, who had interviewed defendant, and then both officers spoke to the doctor who had examined J.J. The doctor informed the officers that the child's injuries could not have occurred as defendant described.

Detective Goddard decided to interview the defendant again, because the defendant had been alone with the child and the injuries were inconsistent with defendant's statement. Defendant admitted he had not been completely honest with the doctors because he did not want the hospital staff to think he was a bad father. He then explained he had been playing video games with the child on his lap; the baby lunged forward, hit the front of his head on the defendant's knee, and then fell to the ground landing on his back.

In the meantime, J.J. was evaluated by Dr. Amy Young at Loma Linda University Children's Hospital. She noted that J.J. had suffered subdural hemorrhage around most of the right side of his brain, with some bleeding on the left side; the bleeding extended into the interhemispheric fissure, between the two lobes of the brain. There was also cerebral edema and what appeared to be evidence of an early infarction. She observed bruising on J.J.'s right ear, as well as petechiae (ruptured capillaries) on both eyelids and his lower left jaw. The neuro-radiologist reported that there was an area on the skull that was suspicious for a fracture in the back of the head. Ophthalmological examination revealed retinal hemorrhages which were not consistent with a history of a short fall.

Additional studies revealed neuron injuries in the brain. Dr. Young formed the opinion that J.J.'s injuries were secondary to abusive head trauma. In her opinion, the injuries were caused by impact, but there was a shaking component as well.

Defendant was charged with a violation of Penal Code section 273a, subdivision (a), willful harm or injury to child, with a special allegation that defendant personally inflicted great bodily injury. (Pen. Code, § 12022.7, subd. (d).) It was further alleged that defendant had suffered a prior conviction for which he had served a prison term (prison prior) (Pen. Code, § 667.5, subd. (b)), two prior convictions under the Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d), and two prior convictions for serious or violent felonies. (Pen. Code, § 667, subd. (a)(1).)

Defendant was tried by a jury. During trial, Rina's oldest child S.L. testified he saw defendant shake J.J. on one occasion, although he did not indicate when this occurred.¹ However, S.L. denied that defendant had ever hit or shaken him or his younger brother. Other than the shaking incident, S.L. never saw defendant do anything mean to J.J. or hit J.J. S.L.'s father indicated that S.L. never reported the shaking incident to him and never described any type of violence by defendant. S.L. was known to be dishonest sometimes. S.L. once reported that father's girlfriend was physically violent towards S.L. and his brother.

¹ Since both S.L. and his brother were staying with their father on the date of the incident, we assume the shaking incident did not occur on that date.

The defense presented the opinion of emergency doctor Steven Gabaeff, M.D., an expert witness, that there was a reasonable possibility that J.J.'s injuries were the result of an accident. In reaching his conclusion, the doctor reviewed medical reports, as well as the family's social history, looking at the family dynamics and to determine if there were paths of violence, as opposed to stories of a loving, caring, good father. The expert considered this information important because the social service literature does not support the notion that a previously loving parent will snap under conditions of a wet diaper or a little extra crying. On the other hand, people who are abusive and violent, with histories of domestic violence or child abuse, are prone to continue that trend. Dr. Gabaeff acknowledged that defendant had some history of violence, but not involving children or family members.

The jury returned a verdict of guilty on the child abuse charge, and made a true finding that defendant inflicted great bodily injury. A jury trial was then conducted as to the allegations of prior convictions. The court struck one prior conviction alleged as both a strike prior and a prior serious felony conviction, after determining that one of defendant's convictions did not qualify as a serious or violent felony. The jury found that the remaining allegations were true. Defendant was sentenced to state prison for the upper term of six years for count 1, doubled under the Strikes law. The court also imposed a term of six years for the enhancement for infliction of great bodily injury (§ 12022.7, subd. (b)), and a five-year term for the serious felony prior conviction. (§ 667, subd. (a)(1).) Defendant was sentenced to an aggregate term of 23 years in state prison.

On January 26, 2011, defendant timely appealed.

DISCUSSION

1. The Court Did Not Err In Denying a Mistrial.

On appeal, defendant claims that the denial of the mistrial motion was error because the prosecutor's questions to the expert about defendant's history of violence were improper.² We disagree.

During the trial, defendant elicited testimony from the defendant's girlfriend that he had no history of domestic violence and he was always careful with the baby. Defendant also elicited testimony from his expert that the expert usually considers family dynamics and patterns of violence in evaluating whether a child's injuries were caused nonaccidentally by a parent. The prosecutor then asked the expert a series of questions about the witness's awareness of defendant's other history of violence, to which defendant did not object. After several questions, the expert acknowledged the defendant had a history of violence, although not involving children or family members. Defendant then made a motion for mistrial which was denied.

A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068, citing *People v. Haskett* (1982) 30 Cal.3d 841, 854.) Whether a particular incident

² In the alternative, defendant argues he was deprived of effective assistance of counsel due to counsel's failure to object to the prosecutor's questions. We address that issue separately, *post*.

is incurably prejudicial is by its nature a speculative matter and the trial court is vested with considerable discretion in ruling on mistrial motions. (*Wallace*, at p. 1068.) In reviewing ruling on motions for mistrial, we apply the deferential abuse of discretion standard. (*Ibid.*)

Because the defendant did not object to the questions asked of the expert, he forfeited any claim of error arising from the admission of the expert's responses to the prosecutor's questions. (Evid. Code, § 353.) A defendant who fails to make a timely objection or motion to strike evidence may not later claim that the admission of the evidence was error or that the prosecutor committed misconduct by adducing it. (*People v. Abel* (2012) 53 Cal.4th 891, 923-924.) Nevertheless, we will reach the merits of the claim that the admission of the responses to the questions about the defendant's history for violence because it is necessary to a determination of whether defendant was effectively represented.

The Evidence Code prohibits the prosecution from introducing evidence of a defendant's bad character or reputation when the evidence is offered to prove the defendant's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) However, when a criminal defendant presents opinion or reputation evidence on his own behalf the prosecutor may present like evidence to rebut the defendant's evidence and show a likelihood of guilt. (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 357; *People v. Hempstead* (1983) 148 Cal.App.3d 949, 953.) Thus, where a defendant introduced evidence of his religious recommitment and avoidance of violence, it was deemed

appropriate for the prosecution to present evidence of weapons possession in a prison environment to contradict that evidence and implicate a violent character. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1173.) A defendant has no right to mislead the jury through one-sided character testimony. (*People v. Eubanks* (2011) 53 Cal.4th 110, 145.)

Because the bad character evidence was adduced during cross-examination of the defendant's expert, it bears reminding that an expert witness may be cross-examined about the matter upon which his or her opinion is based and the reasons for his or her opinion. (Evid. Code, § 721, subd. (a).) The scope of this inquiry is broad and includes questions about whether the expert sufficiently considered matters inconsistent with the opinion. (*People v. Doolin* (2009) 45 Cal.4th 390, 434, citing *People v. Ledesma* (2006) 39 Cal.4th 641, 695.) Thus, an adverse party may bring to the attention of the jury that an expert did not know or consider information relevant to the issue on which the expert has offered an opinion. (*Doolin*, at p. 434.)

Here, the defense cross-examined the mother of the victim as well as the victim's oldest half-sibling about the defendant's character for nonviolence. Then he presented an expert who testified that a parent's history of nonviolence in the family was a major consideration in evaluating a child abuse case. The defendant placed his character for nonviolence squarely in issue. In light of the expert's testimony that he considered a parent's history of family violence in determining whether injuries to a child were caused accidentally or nonaccidentally, it was appropriate to determine if the expert was familiar with the defendant's history of violence.

Because the defendant placed his character for nonviolence in issue, there was no basis for a defense objection, either on grounds that character evidence was inadmissible or that the prejudicial nature of the evidence outweighed any probative value. (Evid. Code, § 352.) Accordingly, the trial court did not abuse its discretion in denying the motion for mistrial.

2. Defendant Was Not Deprived of Effective Assistance of Counsel.

Defendant also argues that his right to effective assistance of counsel was violated by counsel's failure to object to the prosecutor's questions to the defense expert regarding the latter's awareness of defendant's history of violence. We disagree.

To demonstrate that his right to effective assistance of counsel was violated, defendant must satisfy a two-pronged test: He must show (1) performance below an objective standard of reasonableness by his attorney, and (2) prejudice sufficient to establish a reasonable probability he would have obtained a more favorable result in the absence of counsel's error. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

As a general rule, the failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight. (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) A defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics. (*People v. Jimenez* (1992) 8 Cal.App.4th 391, 397.) Where the record sheds no light on why counsel acted in the manner challenged, we will

affirm unless counsel was asked for an explanation and failed to provide one or unless there simply could be no satisfactory explanation for the action. (*People v. Lopez* (2008) 42 Cal.4th 960, 966.)

Here, the prosecutor's questions were proper. Defense counsel had elicited testimony from defendant's girlfriend and the oldest half-sibling of the victim which was proffered as evidence of defendant's character for nonviolence against family members and children. Given the severity of the injuries to the child victim, the fact that the defendant was the sole caretaker of the child at the time of the injuries, and defendant's history which prevented him from testifying in his own defense, this was a competent strategy. Once the evidence of defendant's good character was admitted, the door was opened for the introduction of bad character evidence. This was not the result of an unreasonable tactical decision by trial counsel.

Further, defendant did not object to and has not challenged on appeal the fact that defense counsel had previously cross-examined the victim's mother by asking the mother if she was aware that defendant had previously been in trouble with the law. Thus, the issue of defendant's criminal history was before the jury before the expert testified.

Counsel's failure to object to the questions asked of the defense expert did not constitute a violation of defendant's right to effective representation, given her tactical decision to admit evidence of defendant's good character. And in light of the limited defenses available, this tactical decision was competent.

3. The Abstract of Judgment Must Be Amended.

Under line 9 of the abstract of judgment, there is no entry for a restitution fine pursuant to Penal Code section 1202.4, subdivision (b), although there is an entry reflecting a \$2,500 parole revocation restitution fine pursuant to Penal Code section 1202.45, subdivision (b). In line 11, there is an entry for the restitution fine of \$2,500 pursuant to Penal Code section 1202.4, subdivision (b).

The entry for the restitution fine belongs on line 9. The abstract is to be amended to move the entry from line 11 to line 9. This will avoid confusion on the part of the Department of Corrections and Rehabilitation which must deduct the restitution fine from defendant's prison wages.

DISPOSITION

The trial court is directed to amend the abstract to move the restitution fine entry from line 11 to line 9 and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. The judgment is affirmed as modified.

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RAMIREZ

P.J.

We concur:

MILLER

J.

CODRINGTON

J.