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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.

DARRYL DEMETRIOUS WEST,

Defendant and Appellant.

E053086

(Super.Ct.No. FSB905339)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie, Judge. Affirmed as modified.

Kenneth Nordin, 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, James D. Dutton and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Darryl Demetrious West and his girlfriend, Charrise Powell, had a tumultuous relationship. They first came to the attention of police in March 2009 when defendant hit Powell during an argument over his cheating on her. Charges against defendant were eventually dropped. Several months later, defendant was observed grabbing Powell by the neck and punching her in the face. Powell was knocked out cold. By the time of trial, Powell had died due to unknown causes unrelated to defendant hitting her. Defendant was convicted of corporal injury to a cohabitant and assault with force likely to cause great bodily injury.

Defendant now contends on appeal:

1. The admission of Powell's preliminary hearing testimony from the incident occurring in March 2009 violated his federal constitutional rights to confront adverse witnesses and due process of law.
2. Two of the sentence enhancements imposed for prior prison terms served (Pen. Code, § 667.5, subd. (b)) must be stricken.

I

PROCEDURAL BACKGROUND

Defendant was found guilty by a jury of corporal injury to a spouse or cohabitant in violation of Penal Code section 273.5, subdivision (a); (count 1))¹ and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)); (count 2)). It

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

was further found true by the jury that defendant inflicted great bodily injury upon the victim within the meaning of section 12022.7, subdivision (e) for count 1 and within the meaning of section 12022.7, subdivision (a) for count 2.

In a bifurcated proceeding, after defendant waived his right to a jury trial, he was found to have suffered two prior serious or violent felony convictions within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d). Defendant was also found to have suffered two prior serious convictions within the meaning of section 667, subdivision (a)(1) and to have served four prior prison terms within the meaning of section 667.5, subdivision (b). Defendant was sentenced to 25 years to life, plus a 19-year determinate term on the great bodily injury and prior enhancements, for a total prison term of 44 years to life.

Defendant appealed.

II

FACTUAL BACKGROUND

Kevin Westerhold was stopped at a red light at the corner of Baseline and Arrowhead Streets in San Bernardino on December 17, 2009, at 5:00 p.m. While Westerhold was waiting at the intersection, he observed a man, whom he identified in court as defendant, and a woman, whom he identified as Powell, in what appeared to be a fight. While Westerhold was driving through the intersection, he observed defendant grab Powell by the throat with his left hand, take one step forward, and then hit her in the head with his right hand. Powell fell to the ground and was not moving.

San Bernardino Police Officer Gerald Walent was dispatched to a battery in progress at that location at 5:00 p.m. When he arrived, Powell was conscious, and he spoke with her. She was very distraught and was crying. She complained that she had a lot of pain in her neck and head. She had clearly been drinking.

Powell identified defendant as the person who “beat the shit out of [her]” at a field show up right after the incident. Westerhold told Officer Walent at the scene that defendant had grabbed, choked, punched, and knocked out Powell. Westerhold identified defendant at the field show up.

Officer Walent observed noticeable injuries to Powell. She had a deep one-inch by one-inch abrasion on her head. An entire chunk of hair eventually fell out of her head. Powell was having pain in the area. An ambulance was called to the scene, and she was taken to the hospital. While Powell was at the hospital, her neck started to show redness and bruising.

Medical records for Powell showed that she had a large hematoma on her head and complained of pain. There were no visible injuries to defendant at the scene. Powell died on February 8, 2010, from unrelated causes. Defendant had no involvement in her death.

The jury was also presented with Powell’s testimony from a preliminary hearing held regarding an incident that occurred on March 19, 2009 (the prior incident). On that date, Powell contacted the police and claimed that defendant had hit her 20 to 30 times. Powell had visible injuries when the police arrived.

III

ADMISSION OF PRELIMINARY HEARING TESTIMONY FROM A PRIOR CASE OF DOMESTIC VIOLENCE BETWEEN DEFENDANT AND THE VICTIM

Defendant contends that the trial court erred by admitting testimony from the preliminary hearing from the prior incident. Powell testified at the preliminary hearing but defendant claims that he could not effectively cross-examine her, since the People failed to turn over discovery pertinent to cross-examination prior to the hearing.

A. *Additional Factual Background*

Prior to trial, the People filed a notice of intent to admit the prior incident pursuant to Evidence Code section 1109. The People attached a police report for the prior incident. According to the narrative attached to the police report, an officer was called to the scene of a disturbance. Defendant and Powell were at the scene. When the officer approached them, defendant began jumping up and down yelling, “Man that bitch gonna lock me up.” Powell reported that defendant had told her that he had another girlfriend. Powell tried to get her belongings out of defendant’s car, and he started hitting her in the upper body. She was able to get away and ran to a pay phone to call the police, but defendant caught up to her. He again hit her with his fists. Powell had redness and swelling to her left neck, swelling to her left eye and upper lip, and pain to her chest.

The People brought a motion in limine in which they sought to introduce the testimony from the preliminary hearing for the prior incident, which was held on April 7, 2009. The People provided that the victim was unavailable since she was deceased, and

the cross-examination of Powell at the preliminary hearing had the same interest and motive as would be present in this case.

Defendant filed opposition to the Evidence Code section 1109 evidence. He complained that there were no independent witnesses to the prior incident. Allowing Powell's preliminary hearing testimony would also violate defendant's constitutional rights to due process, a fair trial, effective representation of counsel, and confrontation and cross-examination of witnesses under the state and federal Constitutions.

At the time of the hearing on the motions in limine, the trial court addressed the admission of the preliminary hearing transcript. Defendant's counsel argued, "There is an inadequate ability to cross-examine. It's a violation of due process. I don't believe that -- especially given the habit of the District Attorney's office not giving us full discovery -- I don't believe that we had full discovery at that time. I wasn't the attorney on the case." The trial court inquired whether in the case on the prior incident discovery had actually not been turned over, but defendant's counsel could not provide any information. The trial court indicated that unless there was specific evidence that the People did not turn over the discovery, the testimony would be admitted.

After the hearing, defendant's counsel filed a supplemental opposition to the Evidence Code section 1109 evidence. Defendant's counsel declared that the file for the prior incident had a notation that the public defender's office received discovery, including police reports, on May 22, 2009, which was after the preliminary hearing.

Defendant's counsel attached numerous documents relating to Powell's prior convictions, which will be discussed in more detail, *post*.

At the hearing on the matter, defendant's counsel indicated that discovery received by the public defender's office was usually placed in manila envelopes that were time stamped, and "[the documents attached to the opposition] are not time stamped in manila envelopes." Defendant's counsel stated, "So based on their course of practice and their habits it appears that they provided this after the initial case but I can't say when." The trial court stated it had reviewed the supplemental opposition but was still going to allow the Evidence Code section 1109 evidence.

After these proceedings, defendant's counsel was relieved, and a new trial judge handled the trial. The new trial judge stated for the record that the People sought to admit (pursuant to Evidence Code section 1109) the preliminary hearing testimony from the prior incident and recognized that Powell testified at the prior hearing. Further, the trial court noted the case was eventually dismissed after the preliminary hearing. Defense counsel complained that Powell's testimony was "all over the place." The People wanted to admit the preliminary hearing transcript, testimony of the investigating officer, and photographs to prove the prior incident.

After the trial court reviewed the preliminary hearing transcript, defendant argued the evidence that a crime had occurred based on Powell's testimony was "iffy." Defense counsel also referenced a letter written by Powell that the entire prior incident was a "lie," but the trial court did not have the letter.

Defense counsel complained the transcript was confusing. The trial court responded, “Maybe. I think that goes more to weight than admissibility. It is an act of domestic violence. It’s not remote. It’s, again, the same person. She testified at the preliminary hearing, so the hearsay is lessened, because she testified at that. There are pictures, I understand, that were taken at the time. Those are referred to in the transcript, and I believe the Court has seen copies of these, as well.” The trial court ruled, “So there’s substantial evidence that the . . . prior incident may have occurred sufficient to allow it to be admitted. So over the defense’s objection, I’m going to allow the People to admit the prior incident between the victim and [defendant] under Evidence Code section 1109.”

The following testimony was presented at trial.

San Bernardino Police Officer Troy Forsythe was dispatched to 355 West Baseline in San Bernardino on March 19, 2009, around 1:00 a.m. When he arrived at the location, Powell came running to his patrol car, and defendant was walking away from the area. Powell was crying and pointing at defendant. Officer Forsythe ordered defendant to come back to him. Defendant became “extremely animated,” jumping up and down, complaining that Powell was going to get him locked up.

Officer Forsythe described Powell’s demeanor as extremely upset, and she appeared to have been in a fight. She had a scrape to the left side of her neck, her left eye was red and swollen, her upper lip was red and swollen, and she complained of pain in

her chest. There were no injuries observable on defendant. Powell did not receive medical treatment.

Thereafter, a portion of Powell's testimony given at the preliminary hearing on April 7, 2009, was read to the jury. Powell did not want to testify. She was staying in defendant's van at the time of the prior incident; she had been staying with him for over five months.

On the night of March 18, 2009, defendant and Powell got into a fight because he had a new girlfriend. Powell left the van. In the early morning hours of March 19, 2009, she went back to the van to pick up her things. When she arrived, there was a young lady sitting in the passenger's seat. Both Powell and defendant were drunk, and they started arguing.² Powell was upset because she discovered he was cheating on her.

Powell pushed defendant, and then defendant hit her in the upper body 20 to 30 times. Powell immediately stated that this was a lie and that she had been drunk. She did not know if defendant used an open hand or fist. Powell then called the police. She admitted that she suffered injuries and that photographs taken of her that night accurately depicted those injuries.

Powell admitted lying in her statements to police. Defendant did not hit her 20 to 30 times, and she lied about him beating her up all of the time. She lied to get back at defendant.

² A break was taken at this time because Powell was crying.

Powell admitted that she had some prior misdemeanor convictions. She and defendant had had previous arguments that resulted in the police being called. She did not recall going to jail for domestic violence with defendant but had been arrested for domestic violence with her ex-husband. She wanted defendant to be held responsible but did not want him punished too severely.

B. *Analysis*

The confrontation clause of the Sixth Amendment to the United States Constitution provides that in all criminal prosecutions the accused shall have the right to confront witnesses against him. (*Idaho v. Wright* (1990) 497 U.S. 805, 813 [110 S.Ct. 3139, 111 L.Ed.2d 638].) In *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], the Supreme Court held that out-of-court testimonial statements must be excluded under the confrontation clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine him or her. (*Id.* at pp. 59, 68.)

“California permits the use of the prior testimony of a witness against a criminal defendant only when the unavailability of the witness and the reliability of the testimony are established. [Citation.] A witness is deemed unavailable if he or she is deceased. [Citation.] The testimony is deemed reliable if ‘[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.’ [Citation.]” (*People v. Carter* (2005) 36 Cal.4th 1114, 1172.)

“““[F]ormer testimony of an unavailable witness is permitted under Evidence Code section 1291 and does not offend the confrontation clauses of the federal or state Constitution -- not because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of confrontation at trial [citation], but because the interests of justice are deemed served by a balancing of the defendant’s right to effective cross-examination against the public’s interest in effective prosecution.””” (*People v. Carter, supra*, 36 Cal.4th at pp. 1172–1173.)

Here, defendant complains that, at the time the preliminary hearing for the prior incident was conducted on April 7, 2009, his counsel did not have discovery as to Powell’s prior convictions. Hence, his counsel could not adequately cross-examine Powell, and Powell’s credibility could have been “impugned much more effectively” had that information been available.

The records submitted in the trial court show that Powell had been granted probation in 2003 for some type of drug offense for which she was to complete a residential substance abuse program and that she had been convicted of forgery (§ 475, subd. (a)) in 1990. Another document shows an inquiry on May 14, 2009, to Kern County from the San Bernardino County District Attorney’s Office regarding a May 24, 2001, conviction for a violation of section 245, subdivision (a)(1). Further, attached was a copy of a police report that described an incident of domestic violence between Powell and another man, Charles. Information was returned from Kern County that Powell pleaded guilty to battery. There was also information regarding a disorderly conduct

conviction in 2001 from Kern County. Finally, there was a document regarding probation being granted to Powell on September 30, 2003, wherein she was to stay away from Charles.

Although the documents have dates on the bottom, there is no proof of when those documents were sent to the public defender assigned to handle the prior incident. Defendant points to a statement included in the opposition to the admission of the Evidence Code section 1109 evidence made by defense counsel at the instant trial that the notes in the file for the prior incident show that discovery was received, including police reports, on May 22, 2009. Defendant's counsel then attached the records described above, but they were not accompanied by proof that these were the documents received on May 22, 2009.

There simply is no confirmation of the veracity of these statements that counsel who represented defendant in the prior incident did not have access to Powell's entire prior record. We cannot rely on defendant's speculation or a claim that notes from defense counsel's file showed there was a delay in turning over discovery.

In fact, the record shows that some information regarding Powell's record was available at the preliminary hearing. On direct examination, the People asked Powell if she had some previous misdemeanor convictions and she responded, "Yes." It is inconceivable that the People would have had this information but not have turned it over to defense counsel. Additionally, on cross-examination, defense counsel asked Powell, "[Y]ou have been arrested for domestic violence in the past, but not with [defendant]?"

Powell admitted a prior incident of domestic violence involving her ex-husband. Defense counsel asked, “You had a conviction as a result of that?” Powell responded “Yeah.”

It is clear defense counsel had access to some records at the preliminary examination, if not all. Powell was subjected to cross-examination regarding her history of domestic violence and misdemeanor convictions. Defendant has failed to show not only that the discovery was unavailable, but also that cross-examination would have been more effective had more information been available.

Nonetheless, even if the preliminary hearing testimony violated defendant’s rights of confrontation due to ineffective cross-examination, such error was clearly harmless beyond a reasonable doubt because the evidence on the charged offense was compelling. (See *People v. Cage* (2007) 40 Cal.4th 965, 991-992 [applying harmless error standard to violation of confrontation right].)

The evidence that defendant committed the instant crime was overwhelming. Westerhold, a disinterested third party, observed Powell and defendant arguing. He saw defendant grab Powell by the neck with one hand, take a step toward her, and then punch her in the head. Powell fell to the ground and was not moving. When police arrived, Powell was hysterical and had pain in her neck and head. She had an abrasion on her head and later had redness and bruising on her neck. Defendant had no injuries. This evidence alone was more than substantial to find defendant guilty of the charges of corporal injury to a spouse and assault by means of force likely to cause great bodily injury.

On the other hand, Powell's testimony regarding the prior incident was confused and scattered. She admitted that she lied about defendant hitting her 20 to 30 times and that she was just jealous because she found out he was cheating on her. The jury was instructed with CALCRIM No. 852, that they may consider the prior incident only if the People proved by a preponderance of the evidence that defendant in fact committed the uncharged domestic violence.³ The jury may have disregarded the evidence in its entirety. Moreover, the prior incident presented a bigger picture of the tumultuous relationship between defendant and Powell and gave defense counsel an argument that Powell and defendant had a history of fighting, that Powell was a drunk, and that defendant should only be guilty of a lesser charge.

Based on the overwhelming evidence of defendant's guilt in this case, we find any violation of his federal constitutional rights to confront witnesses or due process rights was harmless beyond a reasonable doubt.

IV

SENTENCING ON PRIOR CONVICTIONS

Defendant contends that he was erroneously sentenced on two of the prior convictions under both section 667, subdivision (a)(1) and section 667.5, subdivision (b). The People concede the error.

³ The jury instructions were read to the jury but were not reported. The trial court stated on the record that the instructions would be read verbatim and that they need not be reported.

It was found true that defendant had two prior serious felony convictions pursuant to section 667, subdivision (a)(1) as follows: a burglary in case No. A530769 in 1983, and a robbery in case No. KA004517 in 1990. Defendant committed the robbery after being released on the burglary conviction. The trial court also found these prior convictions true within the meaning of section 667.5, subdivision (b). Defendant was sentenced on both prior convictions to five years under section 667, subdivision (a)(1), plus one year for the convictions pursuant to section 667.5, subdivision (b), for a total of 12 years.

In *People v. Jones* (1993) 5 Cal.4th 1142, the Supreme Court concluded that a section 667.5, subdivision (b) enhancement cannot be imposed for the prior offense underlying a prior prison term in addition to a section 667, subdivision (a) enhancement for the same prior offense. (*Jones*, at pp. 1149-1150, 1152-1153.) If the trial court imposes both enhancements, we can strike the lesser enhancement on appeal. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1203; *People v. Jones* (1998) 63 Cal.App.4th 744, 750.)

We follow *People v. Jones, supra*, 5 Cal.4th 1142 and find that defendant could not be sentenced consecutively under both sections 667, subdivision (a)(1) and 667.5, subdivision (b) based on a single prior conviction. Here, defendant was sentenced twice on the prior robbery and burglary convictions. We will order that the sentence be modified to strike the one-year enhancements for these convictions.

VI

DISPOSITION

The judgment is modified to strike two of the one-year enhancements imposed under section 667.5, subdivision (b) for the prior robbery and burglary convictions. The trial court is directed to amend the minute order from sentencing and prepare a new abstract of judgment. The amended abstract of judgment should be forwarded to the California Department of Corrections and Rehabilitation. We otherwise affirm the judgment in its entirety.

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RICHLI
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.