

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER ESTRADA,

Defendant and Appellant.

E057387

(Super.Ct.No. RIF1104205)

OPINION

APPEAL from the Superior Court of Riverside County. Michael S. Hider, Judge.
(Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Alan S. Yockelson, 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, and William M. Wood and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant and appellant Javier Estrada was convicted of inflicting corporal injury on a spouse (Pen. Code, § 273.5, subd. (a)), false imprisonment (Pen. Code, § 236), and making a criminal threat (Pen. Code, § 422). The trial court found true the allegation that defendant had two prison priors (Pen. Code, § 667.5, subd. (b)) and one strike prior (Pen. Code, §§ 667, subs. (c) & (e)(1) and 1170.12, subd. (c)(1)). After striking the one prison prior, the trial court sentenced defendant to at total of nine years eight months in state prison. On appeal, defendant contends the trial court erred in admitting evidence of his prior convictions and in instructing the jury on flight.

I. STATEMENT OF FACTS

In November 2011, defendant and his wife (Jane Doe) were living apart. Defendant resided across the street from Doe's home, where she lived with their children. On the evening of November 26, 2011, Doe went to defendant's house and brought him dinner. Defendant became upset with Doe, wanting to know where she had been. Defendant prevented Doe from leaving, and then proceeded to beat her. When he was finished, he stood up and told her "this [is] going to end right now." Holding an ice pick in his hand, defendant told Doe she had "five seconds to grab the other ice pick." Defendant left the bedroom and turned up the volume of the music to loud. Doe feared that defendant was going to kill her, so she escaped through a hole in the wall where a water heater had been removed.

As Doe ran to her house, defendant was chasing her with an ice pick in his hand. She was able to get inside, lock the doors, and call 911. Doe told the 911 operator that

her husband had just beaten her up, took the keys to her car, and was coming at her with an ice pick.

Riverside County Sheriff's Deputy Richard Sayles arrived to find Doe "extremely distraught." The deputy observed Doe's injuries and called American Medical Response (AMR) to the scene. The deputy went to defendant's home and announced loudly, "Riverside County Sheriff's Department, open the door." The deputy heard music playing inside and noted that after announcing his presence, the volume went up. No one answered the door. A K-9 unit arrived and the deputies breached the door. Defendant was no longer there. A search of defendant's home revealed an ice pick and a hole in the back bedroom wall large enough for a person to crawl through.

In January 2012, Doe spoke with John Lake, a defense investigator, and told him that defendant had accidentally hit her in the face. She claimed she "went ballistic" when defendant told her he had cheated on her. He attempted to calm her down; however, she was very angry and tried to leave. She tried to get away from defendant when she was accidentally hit in the face. Returning to her house, she tripped in a gopher hole and sustained more injuries. She told the investigator that defendant never attacked, punched, kicked or threatened her. When she got home and saw her injuries, she became upset and called the police.

On July 12, 2012, despite being personally ordered by a judge to return to court, Doe failed to appear. On July 17, Doe testified to the same story she had told the defense investigator. She testified that she had lied to the police and that defendant had never

threatened or scared her that night. The defense attorney introduced a photograph showing gopher holes in defendant's front yard.

II. EVIDENCE CODE SECTION 1101, SUBDIVISION (b)

Defendant contends the trial court abused its discretion in admitting evidence of his prior convictions for assault and false imprisonment under Evidence Code sections 1101, subdivision (b) and 352, for the purpose of showing intent and absence of mistake or accident. Furthermore, he asserts that his due process right to a fair trial was violated.

A. Further Background Facts

Prior to trial, the prosecutor moved to admit evidence that in November 1998, defendant kidnapped and assaulted his then girlfriend under similar facts. In the prior offenses, defendant grabbed his girlfriend by the hair and arm during a heated argument and threw her down. He jumped on top of her and began punching her in the stomach. He forced her into a separate room and asked her if she was ““ready to die tonight.”” Scared for her life, she tried to run, but defendant grabbed her and dragged her back. He held a carving knife to her face, tried to choke her, and gagged her with a shirt over her mouth and face. He bound her legs and feet with a vacuum cleaner cord and again threatened to end her life. While the victim remained bound on the floor, defendant left the room and blockaded the door with furniture. When he returned, defendant forced his girlfriend to give him information about her new boyfriend and forced her to call him and to end the relationship. As a result his conduct, defendant was convicted of two felonies: assault with a deadly weapon or by means likely to produce great bodily injury (former Pen. Code, § 245, subd. (a)(1)) and false imprisonment (Pen. Code, § 236).

Here, Doe's story about how she had sustained her injuries changed. She retracted her initial claims against defendant and now claims that her anger and a gopher hole caused her injuries. Specifically, she claimed that defendant never intended to hit her in the face; rather, she had sustained her injuries by accident when he was holding her and then when she fell into a gopher hole. Thus, the prosecutor argued that the evidence was highly relevant to show defendant's intent and lack of mistake. The prosecutor argued that the prior victim should be allowed to testify, or in the alternative, defendant's prior convictions should be admitted. Defense counsel countered with the fact that this was a single instance and it was remote. He argued that defendant had not committed to a mistake defense and more likely would argue Doe was "actively lying." When asked to explain the harm under Evidence Code section 352 from allowing into evidence that defendant was convicted of Penal Code former section 245, subdivision (a)(1) and section 236, defense counsel stated: "It's still that fundamental fairness issue, Your Honor. This is old stuff. It happened one time. The fact that something small comes in, the State is offering to allow itself to be moderated or modulated. Still damage done. Anything coming in along these lines is going to put in the jury's mind once before bad, now bad. And we just think that's too deep a hole to be starting out with." The trial court ruled that it would allow evidence of defendant's prior convictions but not testimony from the prior victim.

During trial, the court took judicial notice that in 1998 defendant was convicted of two separate crimes: assault likely to produce great bodily injury and false imprisonment. The court instructed the jury to consider this evidence for the limited

purpose of deciding defendant's intent and whether his alleged actions resulted from mistake or accident. The jury was further instructed to "not conclude from this evidence that the defendant has a bad character or is disposed to commit crime" and that evidence of the uncharged offenses was "not sufficient by itself to prove that the defendant is guilty of the charged crimes."

B. Standard of Review

"Evidence that involves crimes other than those for which a defendant is being tried is admitted only with caution, as there is the serious danger that the jury will conclude that defendant has a criminal disposition and thus probably committed the presently charged offense. [Citations.] We have held that to be admitted, evidence of other crimes must be relevant to some material fact at issue, must have a tendency to prove that fact, and must not contravene other policies limiting admission, such as those contained in Evidence Code section 352. [Citations.]" (*People v. Thompson* (1988) 45 Cal.3d 86, 109.)

We review a trial court's decision regarding admission of evidence of uncharged crimes for abuse of discretion. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018.) A proper exercise of discretion is "neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. [Citations.]' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

C. Analysis

Evidence Code section 1101, subdivision (a) prohibits the admission of evidence of a person's character to prove a person's conduct on a specified occasion. However, evidence of uncharged acts committed by the defendant is admissible to prove some other fact, such as intent or absence of mistake or accident. (Evid. Code, § 1101, subd. (b).) Defendant does not challenge the similarity between his prior crimes and his current charges. Rather, he claims the prior crimes "were not relevant to prove intent or lack of mistake because those things were not at issue." According to the defense, defendant was not relying on absence of mistake or his intent, but on the claim that Doe was "actively lying." The People respond with three points. First, defendant's plea of not guilty placed all elements of the charged crimes at issue, including intent. (*People v. Lindberg* (2008) 45 Cal.4th 1, 23 [defendant's not guilty plea placed all elements of crimes and allegations in dispute at trial].) Second, the defense theory does not dictate what is at issue for purposes of Evidence Code section 1101. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1223 [the defense's focus on one element of a charged offense does not eliminate the prosecution's burden of proving another].) And third, the jury was entrusted with the task of assessing Doe's credibility. Thus, they could either believe her initial statement that defendant was responsible for her injuries, her later claim that it was an accident, or defendant's theory that she had lied about the entire incident. We conclude that evidence of the prior convictions was admissible for purposes of deciding defendant's intent and lack of accident or mistake.

Notwithstanding the above, evidence of prior acts that is admissible to show intent or lack of accident or mistake may be excluded if its probative value is substantially outweighed by the probability that its admission will require undue consumption of time or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. (Evid. Code, § 352.) Prejudice in this context is not the prejudice or damage to a defense that naturally flows from probative evidence; rather, it is evidence that ““uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues.*”” (People v. Gionis (1995) 9 Cal.4th 1196, 1214.) However, nothing in the statute “prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as . . . intent . . .) other than his or her disposition to commit such an act.” (Evid. Code, § 1101, subd. (b).) “In cases . . . where evidence is admitted under Evidence Code section 1101, subdivision (b), the evidence is probative because of its tendency to establish an *intermediary fact* from which the ultimate fact of guilt of a charged crime may be inferred. [Citations.]” (People v. Tran (2011) 51 Cal.4th 1040, 1048 (Tran).)

In *Tran*, our state Supreme Court identified factors that “might serve to increase or decrease the probative value or the prejudicial effect of evidence of uncharged misconduct and thus are relevant to the weighing process required by Evidence Code section 352.” (*Tran, supra*, 51 Cal.4th at pp. 1047-1048.) Probative value is increased, the court said, when the evidence emanates from an independent source and when the uncharged acts [i.e. the prior conduct] resulted in a conviction. Prejudicial effect is increased when there was no conviction for the prior acts and the jury might thus be

confused and tempted to punish the defendant for those acts rather than for the current offense. “The potential for prejudice is decreased, however, when testimony describing the defendant’s uncharged acts is no stronger or more inflammatory than the testimony concerning the charged offense.” (*Ibid.*)

Here, the probative value of the evidence of defendant’s prior similar acts to the issue of his intent or lack of accident or mistake in the present offenses emanated from the fact that they resulted in a conviction. The court’s decision to preclude the prior victim from testifying eliminated the risk of confusion from having to evaluate the prior victim’s testimony and any risk that the prior crimes would be more inflammatory than the charged crimes. Accordingly, we conclude the trial court did not abuse its discretion in deciding to admit evidence of defendant’s prior convictions. Because we have concluded that the evidence was properly admitted, we likewise reject defendant claim that his due process rights were violated.

III. FLIGHT INSTRUCTION

When the deputies finally entered defendant’s home, he was gone. The jury was instructed with CALCRIM No. 372, as follows: “If the defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself.” On appeal, defendant contends that such instruction amounted to prejudicial error because it allowed the jury to make an “impermissible inference of guilt

in violation of his constitutional rights,” and there was insufficient evidence of flight. We reject both of his contentions.¹

A. Further Background Facts

According to the Deputy Sayles, who responded to the 911 call, Doe directed him to the mobilehome, where defendant could be found, in order to get his side of the story. When the deputy knocked on defendant’s door, the deputy heard music playing. After he finished knocking on the door and identified himself, the music was turned up. Because no one answered the door and the music got louder, he called for additional units and waited. As he waited, the deputy heard the volume of the music fluctuate up and down. Then, before additional deputies arrived, the volume stopped fluctuating. The deputy opined that defendant exited through the hole in the back wall of his home just prior to the arrival of backup. However, there is no evidence that Deputy Sayles observed defendant at the scene or the exact time of when defendant may have left.

¹ The People contend defendant has waived any challenge to CALCRIM No. 372 because he failed to object at the trial level. (*People v. Smithey* (1999) 20 Cal.4th 936, 982, fn. 12; *People v. Davis* (2005) 36 Cal.4th 510, 539.) In response, defendant notes that discussions regarding jury instructions were not held on the record. Subsequent to the jury commencing deliberations, the prosecutor made the following comment on the record: “Finally, Judge, just for the record, we all went over these jury instructions in chambers. We all agreed on which instructions to give. If we did not agree or we withdrew, we actually marked it on the instruction, and so the instructions that were read were an agreement between defense counsel and myself.” Thus, defendant contends we should reach the merits of his challenge because (1) since the nature of the in-chambers discussions is not known, “‘forfeit[ing] the claim as invited error’ may not accurately reflect what occurred”; (2) errors in jury instructions are cognizable on appeal regardless of whether or not an objection was made; and (3) failure to object to CALCRIM No. 372 amounts to ineffective assistance of counsel. Without deciding waiver, we address the merits of defendant’s contentions.

B. Standard of Review

“[A] flight instruction is correctly given ‘where there is substantial evidence of flight by the defendant . . . from which the jury could reasonably infer a consciousness of guilt.’ [Citations.]” (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1245.) Because the applicability of the instruction involves the determination of legal principles, we review the matter de novo. (See *People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

C. Impermissible Inference of Guilt

Defendant faults CALCRIM No. 372 with “implicitly [telling] the jurors that the prosecutor actually had introduced evidence of [defendant’s] flight.” Specifically, he argues that “by telling the jurors they *may* find [defendant] fled, the court essentially informed them that *some* evidence of flight was introduced—otherwise they were legally barred from making the finding and should not have been instructed they may make it.” We disagree. The flaw in defendant’s argument is his assumption that the inclusion of CALCRIM No. 372 in the jury instructions establishes a finding of flight. To accept such logic would mean that the use of any specific instruction, i.e., CALCRIM No. 1240 [False Imprisonment] establishes a finding of whatever the instruction concerns, i.e., a false imprisonment. Defendant fails to credit the jurors with the ability to understand and follow the instructions. (See also *People v. Mendoza* (2000) 24 Cal.4th 130, 179-181 [flight instruction is not argumentative nor does it unconstitutionally lessen the prosecution’s burden] and *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1158-1159 [CALCRIM No. 372 does not impermissibly presume the existence of guilt or lower the prosecution’s burden of proof].)

Moreover, CALCRIM No. 372 leaves the factual determination about the meaning of flight to the jury. (*People v. Carter* (2005) 36 Cal.4th 1114, 1182-1183, fn. omitted [discussing CALJIC No. 2.52, predecessor to CALCRIM No. 372, “[t]he instruction did not assume that flight was established, but instead permitted the jury to make that factual determination and to decide what weight to accord it”].) In accordance with the instruction, the jury need not find flight and need not determine that it was indicative of consciousness of guilt. Moreover, the mere fact that it was given is of no consequence. The jury was informed that some of the instructions might not apply; the jurors should not assume the court was suggesting anything about the facts because a particular instruction was given, and the jurors should apply the instructions to the facts “as you find them.” Additionally, the flight instruction emphasized that the evidence of flight from the police was not alone sufficient to establish guilt: “The cautionary nature of the [flight] instruction[] benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory.” (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224.) In light of the cautionary nature of the instruction, we reject defendant’s claim that CALCRIM No. 372 is argumentative.

D. Sufficiency of Evidence

CALCRIM No. 372 “is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt. [Citations.]” (*People v. Ray* (1996) 13 Cal.4th 313, 345.) “[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid

being observed or arrested.” [Citation.]” (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) “The instruction is properly given if the jury could reasonably infer that the defendant’s flight reflected consciousness of guilt. [Citation.]” (*People v. Howard* (2008) 42 Cal.4th 1000, 1020-1021.) “No [flight] instruction should be given to the jury unless adapted to the evidence and circumstances of the case. [Citation.]” (*People v. Fremont* (1937) 22 Cal.App.2d 292, 300.)

Here, defendant argues that because no one saw him in his home, the evidence that he fled was speculative. We disagree. According to the record, when Doe called 911 and was asked where defendant was, she said that she thought he went back to his home. After Doe told Deputy Sayles about defendant’s attack upon her, the deputy wanted to hear defendant’s side of the story. Thus, Doe directed him to defendant’s home. Deputy Sayles heard music playing inside defendant’s home and knocked, announcing his presence. According to the deputy, the music got louder and continued to fluctuate in volume. The deputy called for backup and just prior to their arrival, the music ceased fluctuating in volume. When the deputies gained access into defendant’s home, they found that he was not there. Upon further inspection of the home, they discovered a three-foot hole in the back bedroom wall that would have allowed defendant to escape without Deputy Sayles seeing him. Given these facts, there was sufficient evidence for the jury to conclude that defendant had been inside his home when the deputy arrived but escaped and fled because he knew he was guilty of beating and threatening Doe, and he did not want to be arrested. A flight instruction was warranted. (Pen. Code, § 1127c; *People v. Mendoza, supra*, 24 Cal.4th at p. 179.)

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

CODRINGTON

J.