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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOAQUIN MENDIETTA,

Defendant and Appellant.

F068092

(Super. Ct. No. F12909409)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Edward Sarkisian, Jr., Judge.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Stephen G. Herndon, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Joaquin Mendieta of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), corporal injury to a child's parent (Pen. Code, § 273.5, subd. (a)),

and two counts of cruelty to a child by endangering health (Pen. Code, § 273a, subd. (b)). Allegations of great bodily injury (Pen. Code, § 12022.7, subd. (e)) and personal use of a deadly weapon were found true (Pen. Code, § 12022, subd. (b)(1)). In a bifurcated proceeding, the trial court found true allegations that Mendiotta had suffered two prior serious felony convictions (Pen. Code, § 667, subd. (a)(1)) and two prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)). The trial court sentenced Mendiotta to state prison for 24 years.

On appeal, Mendiotta claims prejudicial error in admitting statements he made during two recorded telephone calls from jail. He also claims ineffective assistance of counsel for trial counsel's failure to object to a detective's testimony concerning Mendiotta's drug use. We find no prejudicial error and affirm.

STATEMENT OF THE FACTS

On October 22, 2012, Tamar Pizarro went next door to her neighbors, Maria Rios and Mendiotta, to borrow a cell phone to make a call. As Pizarro approached the door, she heard Mendiotta say, "You're cheating on me." When Mendiotta opened the door for Pizarro, Rios ran out; her head was bleeding and she was "hysterical." Rios said Mendiotta had hit her on the head. Rios went to a neighbor's and Pizzaro returned home.

Rios ran to the home of Shelley Hayworth, who called 911, a recording of which was played for the jury. In the call, Hayworth relayed that Rios had said her husband had hit her on the head with a cooking pot and she was bleeding. Rios expressed concern for her two young children who were still in the home, and it was not known whether Mendiotta was still there.

When Police Officer Loren Kasten responded to the scene, he contacted Hayworth and Rios. Rios had blood on her hands and around her neck. She was "very scared," crying and shaking, and said she had been hit in the head with a cooking pot. Rios was concerned about her children who were still in the home. Officer Kasten and Rios walked back to Rios's house and found her two-year-old and seven-month-old child

sitting on the living room floor. There was no one else in the house. Officer Kasten observed pieces of a broken broom handle with blood on it, blood splatter on the bathroom wall, a T-shirt with blood on it, a pool of blood in the kitchen, and a dented metal pot. Officer Kasten collected information about Mendiotta from Rios and then took her to the hospital. The jury was shown pictures taken that day of Rios' injuries.

A follow-up investigation was conducted on November 16, 2012, by Detective Bryan Craft after Mendiotta was taken into custody. When Detective Craft first spoke to Mendiotta that day, Mendiotta "spontaneously" said that there had been an argument over another man who had come to the house, that he saw blood, panicked and ran. Wishing to build a rapport with Mendiotta, Detective Craft asked Mendiotta about his relationship with Rios. Mendiotta said he and Rios had been together for six years and had two children. Suspecting Mendiotta was using narcotics, Detective Craft questioned Mendiotta on any recent drug use. Mendiotta admitted he had used marijuana the previous night and, after first denying recent methamphetamine use, said he had used methamphetamine six days earlier.

Mendiotta then waived his rights and said he had caused Rios' injuries. Mendiotta told Craft that he grabbed Rios to question her about another man when she was in a fetal position between the refrigerator and the wall. When he saw blood all over his own hands, he told Rios to get up and clean herself up. When he went to answer a knock at the door, Rios ran passed him and began yelling for someone to call the police. Mendiotta grabbed his shoes and fled the scene.

When Craft asked how Rios was injured, Mendiotta maintained that he had not hit her on the head, only on the arm with the broom handle. According to Mendiotta, she then fell between the wall and the refrigerator, although Mendiotta said he may have thrown her down. Mendiotta admitted swinging a cooking pot, claiming it hit Rios in the arm and hit the wall and refrigerator, but not Rios's head. Mendiotta then began to cry and said he had been upset because a man had come to the door asking for Rios.

When Craft asked if Mendietta could have hit Rios on the top of the head as he was hitting her arm, Mendietta said that, if he did, he did not mean to hurt her. Mendietta said he “just went off” and “was enraged.” Mendietta fled because he did not want to be caught by the police when he was “all bloody.”

The parties stipulated that two telephone calls were made to Rios by Mendietta from jail. Slightly redacted recordings of the calls were played for the jury. In both calls, the operator informed the parties that they were being recorded.

DISCUSSION

I. TELEPHONE CALLS FROM JAIL

Mendietta contends that the trial court prejudicially erred when it admitted certain statements into evidence from the two recorded jail telephone calls. We find no prejudicial error. Because we address Mendietta’s argument on the merits, we need not address his alternate claim that trial counsel was ineffective for failing to adequately object to admission or redaction of the statements.

Prior to trial, the prosecutor sought to introduce the two jail telephone calls between Mendietta and Rios into evidence.¹ Both telephone calls were rambling and often unintelligible. In the first call, Mendietta reminds Rios to get money from his mother she owes him, and the two then argue about why their oldest child, who was removed from Rios’s home, was not currently living with Rios. Mendietta states Rios does not care what he is going through, a statement Rios refutes. The two then argue about whether Rios is going to come to court to testify. In the second call, Mendietta again focuses on the fact that his own mother owes him money and does not care about him, that Rios does not care about him, and that he misses his children. He tells Rios she can be “with somebody else” and she can testify against him, if that is what she wants. He said he would not be calling her again.

¹ In the reporter’s transcript, the first call is referred to as 3-A and the second as 2-A.

The trial court reviewed the recordings at length, in the presence of both counsel, and solicited counsels' comments on the probative import and potential prejudicial effect of the objected to statements. The prosecutor argued for admission of the statements, stating they were "in essence, adopted admissions throughout." Trial counsel argued specific statements made during the calls were irrelevant, misleading, and more prejudicial than probative under Evidence Code² section 352. At the end of this process, the trial court stated it would review the transcripts before ruling. The following day, the trial court found the majority of the objected to statements admissible, stating they were not confusing or misleading, and that they were more probative than prejudicial under section 352. The trial court redacted one statement.³ The trial court reserved ruling on two of the statements pending an upcoming section 402 hearing. Following that hearing, the trial court found the remaining statements admissible.

Mendietta now contends the trial court erred when it admitted into evidence, or in the alternative, failed to redact the following statements made during the two telephone calls: (1) "I'm not calling no more. I'm not going to see you no more. Forget it. I'm just going to take a fucking deal right here." (2) "You just said something you couldn't say, okay and we're already being recorded. I'm going to get in trouble for this phone call already. I can't call you no more." Rios responded by saying she will "get the money back today," to which Mendietta states, "We'll I guess so. I was leaving you messages, that's all I was doing. Okay now this conversation has fucked me over. Is that your intention or what?" (3) "You go to court, I'm taking a deal." (4) "I'm going to the hole, I'm going to the hole. Right, next person that fucks with I'm fucking them off." (5) "You fucked me on in the last phone call." (6) "And don't tell me shit about Bryan Craft.

² All further statutory references are to the Evidence Code unless stated otherwise.

³ Mendietta's statement "I'm looking at 25 fucking years here" was redacted because it broached the subject of punishment and could be misleading to the jury.

And don't tell me shit about Bryan Craft cause he's just trying to fuck me anyways. I'm already fucked on that last phone call. I hope you understand it. I'm not just saying that, you understand that?"⁴

Mendietta contends these statements were improperly admitted because the statements did not fall within the hearsay exception as adoptive admissions or admissions, they were irrelevant, and more prejudicial than probative. Respondent agrees that the statements were not adoptive admissions, as the prosecutor argued below, but were instead "relevant admissions," were more probative than prejudicial and properly admitted. We agree with respondent.

The trial court is vested with broad discretion in determining the admissibility of evidence. (*People v. Karis* (1988) 46 Cal.3d 612, 637 (*Karis*)). This is particularly true where, as here, underlying that determination are questions of exceptions to the hearsay rule, relevancy, and undue prejudice. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.) The lower court's determination will be reversed only upon a finding of abuse of that discretion. (*People v. Edwards* (1991) 54 Cal.3d 787, 820; *Karis, supra*, at p. 637.)

We first consider whether the statements fall within an exception to the hearsay rule. "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (§ 1200, subd. (a).) "Except as provided by law, hearsay evidence is inadmissible." (§ 1200, subd. (b).) When offering the telephone calls into evidence, the prosecutor argued that the statements by Mendietta were admissible as adoptive admissions exceptions to the hearsay rule. Section 1221 defines an adoptive admission as "[e]vidence of a statement offered against a party" which is not made inadmissible by the hearsay rule "if the statement is one of which the party, with knowledge of the content

⁴ In an earlier statement, Rios tells Mendietta he was in jail because he talked to Bryan Craft (the detective) and, had he not, he "would've been out free."

thereof, has by words or other conduct manifested his adoption or his belief in its truth.” (§ 1221.) “[A] typical example of an adoptive admission is the accusatory statement to a criminal defendant made by a person other than a police officer, and defendant’s conduct of silence, or his words or equivocal and evasive replies in response. With knowledge of the accusation, the defendant’s conduct of silence or his words in the nature of evasive or equivocal replies lead reasonably to the inference that he believes the accusatory statement to be true.’ [Citation.]” (*People v. Silva* (1988) 45 Cal.3d 604, 623-624.) We agree with both Mendieta and respondent’s stance on appeal that the statements in question do not fall within the adoptive admission exception to the hearsay rule.

However, while the statements were not adoptive admissions, they were instead admissions under section 1220, which creates an exception to the hearsay rule for the admission of a party. “The exception to the hearsay rule for statements of a party is sometimes referred to as the exception for *admissions* of a party. However, ... section 1220 covers all *statements* of a party, whether or not they might otherwise be characterized as admissions. [Citations.]” (*People v. Horning* (2004) 34 Cal.4th 871, 898, fn.5.) Section 1220 simply states that “[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.” (§ 1220.) Thus, in a criminal case, if the evidence is of statements, the defendant was the declarant, the statements are offered against him, and he is a party to the action, the hearsay rule does not make the statements inadmissible. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1049.)

We review the trial court’s ruling allowing Mendieta’s statements, not its reasoning. Therefore, the trial court’s “ruling must be upheld if the [testimony] was admissible under any hearsay exception.” (*People v. Smith* (2005) 135 Cal.App.4th 914, 923, overruled on other grounds in *People v. Garcia* (2008) 168 Cal.App.4th 261, 291.)

Thus, while the statements clearly fall within the admission exception to the hearsay rule, for such a statement to be admissible against a party as an admission, the statements must be relevant and assert facts which would have a tendency in reason either (1) to prove some portion of the proponent's cause of action, or (2) to rebut some portion of the party declarant's defense. (*People v. Allen* (1976) 65 Cal.App.3d 426, 433.) Here the statements were relevant – that is, “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (§ 210.) Mendiotta's repeated verbal intimidation of Rios in the statements was consistent with his physical assault of her, as was his lack of concern for her well-being. Collectively his statements exhibited his consciousness of guilt.

Having found the statements relevant, we finally address whether the trial court abused its broad discretion in concluding the probative value of the statements was not clearly outweighed by undue prejudicial effect. Mendiotta argues the admission of his statements was prejudicial because it portrayed him as “foul-mouthed, angry, overly dramatic, self-pitying, disrespectful to his mother, self-absorbed, ready to do violence in jail, and as lazy and unemployed, all of which amounted to unauthorized character assassination”⁵ We disagree.

Section 352 provides that “[t]he court in its discretion may 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

⁵ Mendiotta also argues this evidence constituted “unauthorized character assassination in violation of Evidence Code section 1101,” which precludes admission of character traits to prove conduct on a specific occasion unless it comes within certain exceptions. (§ 1101, subs. (a) & (b).) However, because Mendiotta made no objection below on this ground he has forfeited this issue on appeal. (*People v. Doolin* (2009) 45 Cal.4th 390, 437.) Even were we to address the issue on the merits, we would find no error. The statements were not admitted to show character traits to prove conduct on a specific occasion, but rather reflected Mendiotta's awareness of his guilt. (*People v. Burns* (1987) 196 Cal.App.3d 1440, 1455.)

prejudice, of confusing the issues, or of misleading the jury.” The standard of review for a trial court ruling under section 352 is deferential abuse of discretion. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) As our Supreme Court explained in *Karis*, “undue prejudice” within the meaning of section 352 refers not to evidence that proves guilt, but to evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis. (*Karis, supra*, 46 Cal.3d at p. 638.) “Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent’s position or shores up that of the proponent. The ability to do so is what makes evidence relevant.... [E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction.” (*People v. Doolin, supra*, 45 Cal.4th at pp. 438-439.)

Setting aside Mendieta’s telephone statements, which he claims show him in a bad light, there was evidence before the jury that Mendieta admitted to Detective Craft he grabbed Rios hair and saw blood, he admitted striking her on the arm with the broom handle, causing her to fall between the wall and the refrigerator, and admitted he may have thrown her down. He admitted swinging a pot at Rios, hitting her on the arm. He acknowledged that it was possible that he had hit her on the head but, that if he did, he did not mean to do so. And he admitted fleeing the scene because he did not want the police to catch him “all bloody.” There was also physical evidence of Rios’s injuries before the jury in the form of Detective Craft’s testimony, the testimony of Mendieta’s neighbors, the state of the Rios home right after the incident, and photographs of Rios’s injuries. Given the abundant evidence of Mendieta’s actions against Rios that was properly admitted in this case, the trial court, which carefully considered the issue, could reasonably conclude Mendieta’s telephone statements would not unduly inflame the

emotions of the jury. We do not find that the trial court abused its discretion under section 352 in admitting the evidence.

Even assuming *arguendo* the evidence was erroneously admitted, we conclude any error was harmless. Review of a trial court's exercise of discretion under Evidence Code section 352 is based on the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Alcala* (1992) 4 Cal.4th 742, 790-791.) The trial court's judgment may be overturned only if "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of error." (*Watson, supra*, at p. 836.)

Here, Mendiotta fails to meet his burden of showing reasonable probability he would have obtained a more favorable result in this matter absent the assumed evidentiary errors. We previously set forth the compelling evidence of Mendiotta's guilt and we are satisfied beyond a reasonable doubt that even without the disputed statements the jury would have reached the same result.

II. TESTIMONY OF DRUG USE

Mendiotta next contends he received ineffective assistance when counsel failed to object to admission of Detective Craft's testimony concerning Mendiotta's drug use. Mendiotta specifically argues the drug use was unrelated to the case and improper character evidence under section 1101. We find no prejudicial error.

Detective Craft testified at trial that he spoke with Mendiotta on November 16, 2012, approximately three weeks after the incident, while Mendiotta was in custody. Wanting to build a rapport with Mendiotta, Detective Craft sidestepped the crime and asked Mendiotta a few questions about his relationship with Rios. In response, Mendiotta stated he had been with Rios for six years and that they had two children together. Thinking Mendiotta was "possibly using narcotics," Detective Craft asked Mendiotta if he had recently used any drugs. Mendiotta said he had smoked some marijuana the night before. When asked about methamphetamine use, Mendiotta first said he had not used

methamphetamine during the month of November, but then stated he had used it six days earlier. Trial counsel made no objection to questions about Mendietta's drug use.

Mendietta bears the burden of demonstrating the inadequacy of trial counsel. (*People v. Vines* (2011) 51 Cal.4th 830, 875.) In order to sustain his claim of ineffective assistance of counsel, Mendietta must show (1) that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) that counsel's acts or omissions resulted in prejudice. (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) A court deciding an ineffective assistance claim does not need to address the elements in order, or even to address both elements if the defendant makes an insufficient showing on one. (*Strickland v. Washington* (1984) 466 U.S. 668, 697.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed." (*Ibid.*) To show ineffective assistance of counsel, appellant must show that he "suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]" (*People v. Gray* (2005) 37 Cal.4th 168, 207.)

Mendietta attacks his trial counsel's failure to object to Detective Craft's testimony concerning Mendietta's self-acknowledged drug usage. While we note that "[f]ailure to object rarely constitutes constitutionally ineffective legal representation" (*People v. Boyette* (2002) 29 Cal.4th 381, 424), we dispose of Mendietta's argument "on the ground of lack of sufficient prejudice." (*Strickland, supra*, 466 U.S. at p. 697.) The very brief testimony on the subject of Mendietta's drug use, which took place after the incident in question, was insignificant when compared to the ample evidence of Mendietta's guilt, including Mendietta's own admission to Detective Craft and the ample testimonial and physical evidence. There is no reasonable probability that, had trial counsel acted to exclude these few statements, a different outcome would have resulted.

We reject Mendietta's ineffective assistance of counsel claim.

DISPOSITION

The judgment is affirmed.

FRANSON, J.

WE CONCUR:

GOMES, Acting P.J.

DETJEN, J.