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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL DUARTE CERNA,

Defendant and Appellant.

G044610

(Super. Ct. No. 07NF2623)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Thompson, Judge. Affirmed.

Susan D. Shors, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Kristen Kinnaird Chenelia, Deputy Attorney General, for Plaintiff and Respondent.

Angel Duarte Cerna appeals from a judgment after a jury convicted him of first degree murder. Cerna argues the trial court erred by admitting evidence of prior acts of domestic violence pursuant to Evidence Code 1109.¹ We find no merit to his contention and affirm the judgment.

FACTS

In April 2006, Cerna married Gabriela Herrera (Gabriela) and moved into the Anaheim apartment she shared with her sons, 14-year-old I.V. and nine-year-old J.R. After the marriage, I.V. sensed his mother was sad and saw her cry often.

On November 5, 2006, after J.R. heard Gabriela and Cerna arguing, Gabriela told J.R. she had a miserable life. J.R. asked why, and Gabriela motioned towards Cerna. J.R. later saw his mother crying. About 9:00 p.m., I.V. saw Gabriela eating. Later that night, I.V. was awakened by a woman's scream. I.V. looked out his bedroom door, saw his mother's bedroom door was closed, and went back to sleep.

When I.V. and J.R. woke up the next morning, Gabriela was gone, which was unusual because she normally made her sons breakfast and drove J.R. to school on her way to work. Gabriela's car was not in the driveway, and her purse, car keys, and cellular telephone were gone. I.V. called Gabriela's cell phone three times but only got her voicemail. He also tried to contact her at work, but she was not there. In Gabriela's bedroom, the boys did not find the usual mess she made getting ready for work. Pictures of Cerna were missing from the bedroom mirror, a ripped pillow lay on Gabriela's bed, and the belt to Gabriela's robe look ripped. I.V. and J.R. stayed home from school and called family members to try to find their mother.

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

Cerna returned home at lunchtime. Cerna told I.V. and J.R. that he dropped off Gabriela at work and did not know where she was. He went into his bedroom and closed the door. Cerna left 20 minutes later.

Gabriela's sister filed a missing persons report at 3:00 p.m. Cerna reported Gabriela missing at 3:34 p.m. Cerna moved out of the apartment two days later. Four days later, Cerna told his employer he was quitting his job and moving to Canada.

Police first interviewed Cerna three days after Gabriela went missing.² Cerna said Gabriela had been in bed when he left for work³ on the morning she disappeared. He stated that when he returned home at lunch, I.V. and J.R. were home from school and told him they could not find their mother. Cerna said he called Gabriela's work twice, but she was not there and he went to look for her. He stated that after he spoke with Gabriela's family, he filed a missing person's report with the police. He told police Gabriela disappeared several times before and usually stayed away for about a day. He said she was depressed because of the stress of her job and took medicine for "psychology problems." She recently told him she hated people, including her children, and wanted to get away from everything. She also talked about dying. He said strange men had been harassing Gabriela, and someone slashed her car tires twice in the last few months. Cerna admitted they had argued about his ex-wife and children, but he denied any involvement in her disappearance. He denied hitting her or arguing with her the night before her disappearance. Cerna claimed he moved out of their apartment because he could not pay the rent.

² Police conducted recorded interviews with Cerna in November 2006, February 2007, and July 2007. All three interviews were later played for the jury. The jury was also provided with transcripts of the interviews.

³ At the time, Cerna had two jobs. During the day he worked delivering auto parts in Buena Park. At night, he worked as a security guard.

The next morning, Cerna met Natividad Herrera (Natividad), his ex-girlfriend and mother of his children. Cerna told her that he had a fight with his girlfriend, and when he pushed her against the wall, she fainted. He told Natividad his girlfriend had disappeared and he may have killed her. Cerna asked Natividad for help getting out of the country.⁴

That night, Cerna met his friend Celso Torres. Cerna showed Torres a picture of Gabriela and he looked sad, but he did not mention Gabriela's disappearance. Three months earlier, Cerna told Torres that Gabriela had died in bed from a heart attack. The next day, Torres learned Gabriela was missing and called Cerna. When Torres asked him about Gabriela, Cerna responded cryptically and hung up the telephone. Cerna did not respond to Torres's subsequent telephone calls.

On November 10, police discovered Gabriela's body⁵ on a freeway embankment in Los Angeles. She wore a small halter top and a pair of small black shorts, but no shoes or jewelry. Maggots covered her body. Because of advanced decomposition, an autopsy was difficult. The medical examiner found no signs of blunt force trauma. He concluded the cause of death was asphyxia, most likely from smothering, but he could not rule out strangulation. He could not determine a time of death, but concluded she ate rice and beans less than two hours before she died.⁶

Investigators examined Gabriela's apartment on November 16. They found no signs of a struggle and no forced entry. A pillowcase on Gabriela's bed contained

⁴ The trial court described Natividad's testimony as "all over the map."

⁵ Police did not identify the body until six weeks later on December 30.

⁶ Another pathologist, who reviewed the autopsy report, testified concerning smothering and how long it would take for a person to die of smothering.

only pillow stuffing.⁷ Investigators found no significant blood evidence in the apartment. On November 30, police found Gabriela's car in a parking lot in Baldwin Park. The car appeared to have been parked for some time and displayed no signs of forced entry. Crime scene investigators found no blood or other biological evidence in the car.

Police interviewed Cerna again on February 1, 2007. Cerna said he knew nothing about Gabriela's disappearance. He claimed he never told anyone Gabriela died before she disappeared and would not joke about it. Cerna told police Gabriela had been acting distant in the weeks leading up to her disappearance. He said she used drugs and took medication for depression. He told police several men had been following and harassing Gabriela. He admitted they argued the night before her disappearance concerning his ex-wife. That night, Gabriela called him a stupid idiot and revealed she had been cheating on him. She apologized, he forgave her, and they went to sleep. The next morning, Cerna said Gabriela was awake when he left for work. Cerna said he called Gabriela at work twice that morning but was told she was not there and he went home at lunch. Cerna said he looked for her.

The following week, Natividad agreed to wear a wire and speak with Cerna.⁸ Cerna claimed he did not kill Gabriela. Cerna stated he pushed Gabriela, she hit him, and he lost control. Cerna told Natividad that he was going to El Salvador.

Cerna lived with a friend until July 2007. Cerna told his friend he had a girlfriend who died after he left her but he denied killing her. Later, the friend learned it was Cerna's wife. Cerna said their relationship was not good because she had another lover.

⁷ Gabriela's sons later testified a pillow had been inside the pillow case the day before her disappearance.

⁸ The recording was mostly inaudible. Natividad testified concerning the conversation.

Police arrested Cerna on July 20, 2007. After the police advised him of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, Cerna explained that the night before Gabriela disappeared she was angry at him and they argued, but they made amends before bed. He added that the next morning, Gabriela was still upset about his ex-wife, but he kissed her and left for work. Cerna claimed he did not hit or push Gabriela the night before she disappeared. Cerna admitted that in August and November he told Torres that Gabriela died, but he was “playing around” and “joking.” Cerna said he previously lived in Los Angeles. He could not explain how Gabriela’s cell phone could have been used near his work on the day she disappeared. He denied telling Natividad he thought he killed a woman and said she lied because she wanted to be his girlfriend. Cerna denied any role in Gabriela’s murder.

An information charged Cerna with murder (Pen. Code, § 187, subd. (a)). Before trial, the prosecutor moved to admit evidence of Cerna’s prior acts of domestic violence against his first wife, Sarai Anaya. Cerna opposed the motion based on the grounds there was no evidence of domestic violence between Cerna and Gabriela independent of the homicide and admission of the evidence violated his due process rights.

At a section 402 hearing, the prosecution presented Anaya’s testimony, as well as the written statement of Anaya’s sister-in-law. In addition to the five incidents Anaya later described at trial that are discussed in detail anon, Anaya described other acts of violence Cerna committed during the marriage. In 2001, Cerna threatened and punched their nine-year-old son. A year later, Cerna threatened to kill three of their six children because the family was struggling to pay the rent. The prosecutor also made an offer of proof concerning testimony Anaya’s sister-in-law would provide detailing another incident of domestic violence during which the sister-in-law saw Cerna choke Anaya and push her over a couch.

After considering the moving papers and Anaya's testimony, the trial court preliminarily opined the threshold issues of admissibility concerning admission of the evidence were satisfied. The prosecutor argued the probative value of the evidence was high and the evidence would not evoke an emotional bias against Cerna with the jury. Defense counsel contended the evidence was indeed inflammatory and based on the circumstantial evidence of guilt in the case, the jury would certainly despise Cerna based on the fact he beat his 16-year-old wife and kids. The prosecutor replied the evidence was not so egregious as to render the evidence unduly prejudicial and the testimony would not consume an undue amount of time. The trial court raised the issue of section 1109, subdivision (e)'s limitation that evidence be no more than 10 years old subject to the interest of justice. The prosecutor replied that limitation would only affect the incidents that occurred before 1996. The prosecutor, however, sought admission of all the evidence because it was a continuous course of conduct starting immediately after the marriage began. Defense counsel argued the trial court should exclude any evidence before 1996.

The trial court, after summarizing counsels' arguments, stated he was particularly concerned with the evidence regarding Cerna threatening to kill his children. Defense counsel added any testimony concerning Cerna choking Anaya, including from the sister-in-law, was unduly prejudicial. The prosecutor believed it to be more probative because it was similar to how Gabriela died. When the court asked whether admission of the evidence placed an undue burden on Cerna to defend against this evidence, both counsel stated, "No." The trial court asked whether admission of the evidence would confuse the issues, defense counsel responded, "Other than I just think it's tying it up with the [section] 352 argument, no, [he] [did not] see anything else." Both counsel stated there were no less prejudicial alternatives. The trial court stated it would recess for lunch and rule that afternoon.

When back on the record, the trial court stated it would admit most of the evidence subject to certain exceptions. The court reasoned: “I think the charged offense, murder, is an offense that involves domestic violence within the meaning of . . . section 1109 and Penal Code section 13700. I think the People have established the existence of these prior acts of domestic violence by [a] preponderance of the evidence through the testimony and offer of proof. I’ve carefully considered the probative value of these prior acts of domestic violence vis-a-vis the other factors that I’m required to consider, and I’ve carefully exercised my discretion under . . . section 352 in making these rulings.” The court opined the 1992 and 1995 incidents were not too remote and that evidence was part of a continuing course of conduct that in the interest of justice should be admitted. The court added evidence of the 1998, 2001, and 2004 incidents was admissible. The court concluded Anaya’s testimony was probative and “would not necessitate [an] undue consumption of time or create a substantial danger of undue prejudice or confusing the issues or misleading the jury.”

The trial court excluded evidence of Cerna’s threats to kill his children, as well as other references to physical violence towards his children, because of its potential to inflame and confuse the jury. The court also excluded as cumulative the testimony of Anaya’s sister-in-law.

At trial, the prosecutor offered Anaya’s testimony. Anaya testified Cerna regularly abused her during their 12-year marriage, which began in 1992 when she was 16 years old; the marriage produced six children. She specifically described five incidents. In 1992, three days after their wedding, Cerna kicked and punched Anaya when she told him that she did not know how to cook breakfast. In 1995, Anaya saw Cerna kissing another woman. Later that day, Cerna found out Anaya told the other woman he was married. He punched, kicked, and choked Anaya until she almost lost consciousness. Cerna stopped choking Anaya when her mother knocked on the front door. A few years later, Anaya angered Cerna by asking for rent money. Cerna took

Anaya into the bathroom and hit her in the stomach and kicked her legs. Cerna also hit her face into the toilet seat until one of their children interrupted the beating by knocking on the bathroom door. In 2001, Cerna punched Anaya in her stomach and arms and kicked her legs after she accepted money from their pastor, despite Cerna initially telling Anaya to accept the money. In 2004, Cerna threw a shoe at one of their children. When Anaya tried to intervene, Cerna pushed and kicked her. Anaya never reported any of the abuse to the police or to her family. Anaya and Cerna divorced in 2005.

Gabriela's sister, Maria Herrera (Maria), testified that a few months before Gabriela's disappearance, she heard Cerna say he trained with El Salvadorian guerrillas and knew how to kill someone without leaving a trace. Maria testified she talked to Cerna at 1:24 p.m. on the day Gabriella disappeared, and Cerna told her he had reported Gabriela missing to police. Maria later found out Cerna had not made a report. When she asked Cerna about the inconsistency, he told her that he called police but the computer system was down, and he could not make a report. She said Cerna acted strange and would not make eye contact with her the night of Gabriela's disappearance. Cerna told her Gabriela was asleep when he left for work. Maria also testified Cerna stopped returning telephone calls from Gabriela's family after November 8.

A cellular telephone expert testified Gabriela's cell phone was used at 7:40 a.m., 7:42 a.m., and 7:45 a.m. on the day she disappeared. To make the calls, the cell phone accessed a cell tower less than half a mile from Cerna's Buena Park workplace. Cerna clocked in that morning at 6:54 a.m. After his arrest, Cerna denied he used Gabriela's cell phone that morning. When Cerna called police at 3:34 p.m. to report Gabriela missing, he told the dispatcher he was calling from Buena Park and he had last seen his wife that morning before he went to work.⁹ The cell phone expert testified the

⁹ The 911 telephone call was played for the jury.

911 call originated in Baldwin Park near the parking lot where Gabriela's car was later found.

Gabriela's friend and landlord testified she called Cerna on November 8 to ask about unpaid rent. Cerna told her that he and Gabriela were moving out of the apartment. He did not mention Gabriela's disappearance. Cerna's friend testified that on November 8, Cerna called him to help Cerna move. Cerna told the friend the apartment belonged to his female cousin. While at the apartment, Cerna told his friend not to answer the door if anyone knocked.

Police testified about several interviews they conducted with Natividad as prior inconsistent and consistent statements. In one interview, Natividad told police she had breakfast with Cerna on the morning of November 9, and Cerna told her he killed someone. In another interview, Natividad said Cerna told her that his wife slapped him and he lost control, but he did not kill her. Finally, Natividad told police about a church in Los Angeles where Cerna attended that was close to where Gabriela's body was found.

Cerna offered the testimony of an expert entomologist who analyzed a sample of seven maggots taken from Gabriela's body, and concluded the oldest maggot had been approximately 79 hours old when Gabriela was found. He later testified his conclusion did not show Gabriela's body had been exposed to the elements for only 79 hours because older maggots could have existed. He was unable to determine a time of death.

The jury convicted Cerna of first degree murder. The trial court sentenced Cerna to 25 years to life in prison.

DISCUSSION

Section 1109

Cerna argues the trial court abused its discretion in admitting the prior domestic violence evidence pursuant to section 1109 because it lacked probative value and was unduly prejudicial, and its admission violated his due process rights. He also

contends the trial court erred by instructing the jury with CALCRIM No. 852, which permitted the jury to conclude that because he assaulted Anaya, he must have murdered Gabriela. None of his contentions have merit.

Section 1101, subdivision (a), prohibits the use of disposition or propensity evidence to prove a defendant's conduct on a specific occasion. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*)). However, section 1109, subdivision (a)(1), provides, “[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by [s]ection 1101 if the evidence is not inadmissible pursuant to[s]ection 352.”

Section 352, however, authorizes a trial court to exclude prior sexual offenses evidence. Section 352 provides: “The 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 prejudice, of confusing the issues, or of misleading the jury.” We review a trial court's ruling for an abuse of discretion. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1313-1314 (*Jennings*)).

Probative Value

The enactment of “section[] . . . 1109 dramatically revised the law of evidence in . . . domestic violence cases by making prior offenses admissible to prove the defendant's propensity to commit a charged offense.” (*People v. James* (2000) 81 Cal.App.4th 1343, 1346.) Thus, when a defendant is charged with “an offense involving domestic violence,” evidence of past domestic violence is admissible to establish the defendant's propensity to commit the charged offense. (§ 1109, subd. (a)(1).)

We conclude Cerna's history of domestic violence was probative to show his propensity to commit domestic violence against his intimate partners, including Gabriela. Cerna maintained he was a loving husband who could not have murdered his wife. However, Anaya's testimony demonstrated Cerna was prone to violent rages when angry. Several of the incidents Anaya described, such as the choking incident in 1998, involved acts of violence so serious they could have caused death. Gabriela was murdered by smothering or choking. Additionally, the probative value of Anaya's testimony was increased because the incidents she described were completely independent of Gabriela's murder. The short length of time between the conduct Anaya described and Gabriela's murder also increased the probative value of Anaya's testimony. Although two of the incidents occurred more than 10 years before Gabriela's murder, only two years elapsed between the time Cerna last assaulted Anaya and the time he married Gabriela. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211 [source of evidence is independent of charged offense and amount of time between uncharged acts and charged offense].)

Cerna argues the prior uncharged assaults lacked probative value because they were too dissimilar to the charged offense of murder. While we agree dissimilarities existed, they did not render Anaya's testimony irrelevant. Before the Legislature enacted section 1109, the admissibility of other crimes evidence under section 1101, subdivision (b), depended mainly on the degree of similarity between the charged and uncharged offenses. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 401-402.) However, under section 1109, prior domestic violence evidence is probative even if it involves different victims or different conduct than the charged offense. It is enough that both the charged and uncharged offenses are acts of domestic violence within the meaning of section 1109. Murder of a spouse is an act of domestic violence. (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233-1234 [murder] (*Brown*); *People v. Johnson* (2000) 77 Cal.App.4th 410, 419-420 [murder] (*Johnson*).)

Next, Cerna asserts prior acts of assault, requiring only a general criminal intent, are *never* relevant to prove murder, which requires a specific intent to kill with malice aforethought. In *Brown, supra*, 192 Cal.App.4th at page 1237, the court rejected a similar argument stating “a defendant’s pattern of prior acts of domestic violence logically leads to the inference of malice aforethought and culpability for murder[.]” because “murder is ‘the ultimate form of domestic violence.’”

Finally, Cerna claims Anaya’s testimony was not probative because it was not accompanied by corroborating evidence he similarly battered Gabriela. But section 1109 was enacted precisely “‘because of the acute difficulties of proof associated with frequently uncooperative victims and third-party witnesses who are often children or neighbors who may fear retaliation from the abuser and do not wish to become involved.’” (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333.) “If we fail to address the very essence of domestic violence, *we will continue to see cases where perpetrators of this violence will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner.*” (*Johnson, supra*, 77 Cal.App.4th at p. 419, italics added.) Essentially, Cerna is attempting to take advantage of the very “difficulties of proof” section 1109 was created to remedy.

Prejudicial Effect

“Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s).” (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.) “The weighing process under section 352 depends upon the trial court’s consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules.” (*Jennings, supra*, 81 Cal.App.4th at p. 1314.)

Applying these rules to this case, we conclude the evidence was not *unduly* prejudicial. The incidents described by Anaya were no more egregious than the smothering death of Gabriela, and posed no danger of confusing the jury. The testimony concerning the prior domestic violence was short and included five discrete instances of domestic violence. In addition, the trial court limited the evidence by expressly excluding inflammatory or confusing details, such as Cerna's violence towards his children. We also reject Cerna's contention the evidence was prejudicial because of the risk the jury would misuse it as propensity evidence. Section 1109 expressly authorizes the admission of propensity evidence concerning domestic violence. Finally, although two of the incidents Anaya described, one in 1992 and one in 1995, occurred more than 10 years before Gabriela's murder, Cerna does not claim they were too remote and thus we do not address this issue.

Cerna claims the trial court's admission of the prior domestic violence evidence was unduly prejudicial in light of the circumstantial nature of the case against him. Even if we agreed the case against Cerna was weak, that fact has no bearing on the trial court's analysis of prejudicial effect under sections 1109 and 352. "The supposed weakness of the rest of the case would be relevant to the question of prejudice if there were error, but it provides no reason to exclude this particularly probative evidence." (*People v. Loy* (2011) 52 Cal.4th 46, 64.)

Moreover, we will only "disturb a trial court's exercise of its discretion under section 352 . . . upon a finding that its decision was palpably arbitrary, capricious and patently absurd." (*Jennings, supra*, 81 Cal.App.4th at p. 1314.) To the contrary, the record before us indicates the trial court conducted an extensive and conscientious analysis regarding the admissibility of the proffered evidence under sections 1109 and 352, and only made its ruling after carefully balancing any prejudicial effect of the evidence against its probative value. The court's statements and observations

demonstrate a keen awareness of the relevant issues before it. Accordingly, we find no abuse of discretion.

We conclude the trial court did not err by admitting Cerna's prior acts of domestic violence under section 1109. The record before us indicates the trial court carefully exercised its discretion under section 352 before it admitted the domestic violence evidence.

Due Process

Cerna contends the propensity inference allowed by section 1109 is *per se* unconstitutional in a highly circumstantial case because it reduces the prosecutor's burden of proving the charged offense beyond a reasonable doubt. There is no authority for this contention. As Cerna concedes, it is well settled the admission of propensity evidence comports with due process because the trial court must first carefully weigh the evidence under section 352. (*Falsetta, supra*, 21 Cal.4th at p. 917 [section 1108]; *People v. Johnson* (2010) 185 Cal.App.4th 520, 529-530 [section 1109 does not offend due process; cases cited therein].) Further, "section 1109 does not lessen the prosecution's burden of proof, because a *properly instructed jury* will be told the defendant is presumed innocent and the prosecution must prove him guilty beyond a reasonable doubt in order for the jury to convict." (*Johnson, supra*, 77 Cal.App.4th at p. 420, italics added.)

CALCRIM No. 852

Finally, Cerna claims the trial court erroneously instructed the jury with CALCRIM No. 852. He maintains the trial court erred by instructing the jury with CALCRIM No. 852, which "permit[s] the jury to find the uncharged acts of domestic violence (assault) proved appellant's propensity to commit murder with express or implied malice." In his reply brief, Cerna emphasizes "[he] has not challenged the language of the instruction itself, just its employment at trial to apply the domestic violence to the elements of murder."

Courts have routinely rejected similar instructional challenges. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1014-1015 [rejecting an analogous challenge to CALJIC No. 2.50.01, an instruction explaining the application section 1108]; *People v. Johnson* (2008) 164 Cal.App.4th 731, 738-740 [CALCRIM No. 852 proper in murder case]; *People v. Reyes* (2008) 160 Cal.App.4th 246, 251-252 [rejecting due process challenge to CALCRIM No. 852].) We find no error in the trial court's instructions. They make clear the propensity inference is but one factor the jury should consider, and they specify the murder charge must still be proved beyond a reasonable doubt.

DISPOSTION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.