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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.

OMAR ALEJANDRO HERNANDEZ  
FLORES,

Defendant and Appellant.

G045038

(Super. Ct. No. 10NF2206)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
W. Michael Hayes, Judge. Affirmed as modified and remanded with directions.

Gregory S. Cilli, 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, William M. Wood and  
Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Omar Alejandro Hernandez Flores appeals from the judgment entered after a jury found him guilty of one felony count of domestic battery with corporal injury. The jury also found true an enhancement allegation that defendant personally inflicted great bodily harm in committing that offense. Defendant argues the trial court's admission of evidence of prior domestic violence under Evidence Code section 1109 and instruction to the jury as to that evidence pursuant to CALCRIM No. 825 violated his constitutional due process rights. (All further statutory references are to the Evidence Code unless otherwise specified.) Defendant also contends the trial court erred in imposing a \$1,200 restitution fine and a \$1,200 parole revocation restitution fine at the sentencing hearing.

We affirm the judgment as modified to reduce the fines as described *post*. Section 1109 is not unconstitutional. The trial court did not err by admitting evidence of defendant's prior instance of domestic violence under section 1109 or by instructing the jury with CALCRIM No. 825. As conceded by the Attorney General, the restitution fine and parole revocation restitution fine were calculated in error. The trial court should have imposed a \$1,000 restitution fine and a \$1,000 parole revocation restitution fine. We therefore remand the matter and direct the trial court to modify the judgment accordingly.

## FACTS

In July 2010, defendant lived with his girlfriend, Ana M., in Anaheim. Ana worked as a waitress in a bar; her duties included drinking and dancing with customers. During the evening of July 18, defendant hung out at the bar and drank alcohol, while Ana worked. A bartender observed defendant appear to become jealous when he saw Ana with a male customer. The bartender saw defendant grab Ana under her arms and drag her out of the bar; Ana left her purse behind at the bar.

At 2:30 a.m. on July 19, Officer Flora Palma was dispatched to an intersection in response to a 911 call placed by Ana. When Palma arrived at that location, she saw Ana waving at her and holding a bloody cloth to her nose; Ana also had blood on her clothing. Palma saw that Ana's nose was very swollen and the bridge of her nose appeared to be shifted to one side. Palma testified that Ana's nose injury was one of the worst nose injuries she had seen in her career. (Ana was later diagnosed with a fracture of the nasal bone.) Ana appeared frightened and nervous to speak to Palma.

Ana told Palma that her boyfriend (defendant) had waited for her in the bar to finish her shift when he became upset that she was dancing with another man. Defendant told her she needed to leave and he pushed her out of the bar with both hands on her back. He told her to get into the car; she complied and he began to drive to their residence. During the drive, defendant yelled at Ana, called her a prostitute, and said that she was cheating on him. After he stopped at a red light, he punched her in the rib cage. He parked the car near their residence and before they got out of the car, he "continued to yell and get more angry and call her a prostitute." Defendant then punched Ana four times in the face and three more times in the rib cage area.<sup>1</sup> He also pulled her hair. They both got out of the car; defendant went into their residence and Ana stayed outside and called 911.

Palma looked inside the car and saw "blood spatter . . . everywhere in the front, along the dashboard, the middle console, the passenger side dash, front seats, [and] back seats." Palma "also noticed some chunks of black hair on the floorboard in the back seat," which Ana said was her hair. Defendant had an "abrasion mark on his index-finger knuckle" that was "consistent . . . with someone who has punched someone."

Palma asked Ana whether there had been any prior incidents of domestic violence between her and defendant. Ana told Palma that a month earlier, defendant

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<sup>1</sup> Ana later told a detective that defendant had also bent back her fingers, causing her hand to hurt.

became upset when he thought she was cheating on him, and punched her twice in the forehead, causing a “pretty significant bump.” Ana said she was afraid to contact the police then, because she was “scared of [defendant] and [defendant] going to jail.”

At trial, Ana told a different story from the one she had told Palma.<sup>2</sup> Ana testified that defendant had not been upset with her the night of July 18, he had been in a good mood that night, and he was not “a jealous guy.” Ana testified she was very drunk and did not remember defendant calling her a prostitute or whether he hit her. She said she was mad at defendant that night because he would not give her the keys to the car. She also testified defendant told her that night that he did not want to see her anymore. Ana explained that when she told defendant not to come closer while she was on the phone with the 911 dispatcher, it was because she was “afraid even of [her]self,” not because defendant was threatening her. Ana could not remember what she told Palma on July 19. Ana denied that defendant had hit her in the head a month before the July 19 incident, explaining, “we were always playing.” Ana is no longer with defendant. She testified she is not afraid of him.

Defendant testified that he took Ana out of the bar because she was so drunk. He said he apologized to the customer she had been with and helped her out of the bar and into the car. He told Ana that they were going to get something to eat so that “[her] drunkenness can go away.” Defendant testified he went inside a nearby restaurant and when he came out, he saw Ana fighting with two women. He said one woman had Ana by the hair and the other was hitting her. He separated the women and helped Ana back into the car. He testified that Ana started hitting his chest with her fist and said, “why were you not there to protect me.” As he drove home, she “was still, like, wanting

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<sup>2</sup> The prosecution’s investigator, John Beerling, testified that he spoke with Ana shortly before she testified at trial. At the beginning of their conversation, Ana denied making the statements she had made to Palma. She eventually told Beerling that what she had told Palma was true. She cried, and told Beerling she was afraid of defendant and his family.

to hit [him], like pulling on [him].” Defendant testified he hit the cassette player inside the car “from being so angry.”

Defendant further testified that after Ana “started to go crazy,” he told her, “you know, this is the last—this is the last I will endure of you. That’s it. It’s the last thing, and I’m leaving you. I’m leaving you now.” Ana grabbed the telephone and as she started to call 911, she told defendant, “[y]ou’ll see what I’m capable of.” Defendant went inside their residence but came back outside to retrieve Ana. She refused to go inside and demanded the car keys, but he refused to give them to her. Defendant told the police officers that Ana had gone crazy and he had not hit her. He also testified that he had never hit Ana.

## BACKGROUND

Defendant was charged in an information with one felony count of domestic battery with corporal injury in violation of Penal Code section 273.5, subdivision (a) (the charged offense). The information contained an enhancement allegation, pursuant to Penal Code section 12022.7, subdivision (e) and within the meaning of Penal Code sections 1192.7 and 667.5, that defendant personally inflicted great bodily injury on Ana “under circumstances involving domestic violence as described in Penal Code section 13700(b), during the commission and attempted commission” of the charged offense.

The jury found defendant guilty of the charged offense and also found the enhancement allegation true. The trial court sentenced defendant to a total prison term of five years by imposing the two-year low term on the charged offense and a consecutive three-year term for the enhancement allegation. The court also imposed a \$1,200 restitution fine pursuant to Penal Code section 1202.4 and a \$1,200 parole revocation restitution fine pursuant to Penal Code section 1202.45.

## DISCUSSION

### I.

#### THE TRIAL COURT DID NOT ERR BY ADMITTING EVIDENCE OF DEFENDANT'S PRIOR DOMESTIC VIOLENCE OR BY INSTRUCTING THE JURY AS TO THAT EVIDENCE WITH CALCRIM No. 825.

Defendant argues the trial court erred by admitting evidence of defendant's prior domestic violence under section 1109 and by instructing the jury with CALCRIM No. 852 as to that evidence, on the ground his constitutional rights to due process were violated. Specifically, he challenges the admission of the evidence of Ana's statement to Palma that defendant had hit her twice in the forehead a month before the July 19, 2010 incident. For the reasons we will explain, defendant's arguments are without merit.

Section 1109, subdivision (a)(1) provides: "Except as provided in subdivision (e) or (f),<sup>[3]</sup> in 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 Section 1101 if the evidence is not inadmissible pursuant to Section 352."

Defendant's argument that evidence admitted under section 1109 violates his due process rights was rejected in *People v. Jennings* (2000) 81 Cal.App.4th 1301. In *People v. Jennings*, the court stated, "[w]ith regard to appellant's argument that section 1109 runs afoul of the due process provisions of the federal and state constitutions, this contention has already been rejected by the courts. In *People v. Falsetta* (1999) 21 Cal.4th 903 . . . (*Falsetta*), our Supreme Court addressed the constitutionality of section 1108, a parallel statute which addresses prior 'sexual offenses' rather than prior

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<sup>3</sup> Section 1109, subdivision (e) states: "Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice." Section 1109, subdivision (f) states: "Evidence of the findings and determinations of administrative agencies regulating the conduct of health facilities licensed under Section 1250 of the Health and Safety Code is inadmissible under this section."

‘domestic violence,’ and upheld that provision against due process challenge. [Citation.] Although the Supreme Court has not addressed the constitutionality of section 1109, at least three recent post-*Falsetta* cases from the Courts of Appeal have subsequently upheld the constitutionality of section 1109 against similar due process challenges.” (*Id.* at p. 1310; see *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1120 [admission of prior acts of domestic violence in prosecution for attempted murder did not violate due process rights]; *People v. Price* (2004) 120 Cal.App.4th 224, 240-241 [rejecting the defendant’s federal and state constitutional facial due process challenges to the admission of propensity evidence pursuant to section 1109]; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1094-1097 [admission of prior acts of domestic violence in prosecution for murder did not violate due process rights].)

Section 1108, the statute parallel to section 1109, permits evidence of prior sexual offenses to be admitted in a criminal action in which the defendant is accused of a sex offense. In *People v. Falsetta* (1999) 21 Cal.4th 903, 910, the defendant argued section 1108 violated his constitutional right to due process. Our Supreme Court disagreed, concluding that “[s]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under . . . section 352. [Citation.] . . . This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. [Citation.] With this check upon the admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that . . . section 1108 does not violate the due process clause.’ [Citation.]” (*People v. Falsetta, supra*, at pp. 917-918, italics omitted.) Section 1109 contains the same section 352<sup>4</sup> safeguard against the use of evidence of prior acts of

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<sup>4</sup> Defendant does not argue in this appeal that the prior domestic violence evidence should not have been admitted under section 352. We therefore do not address that issue.

domestic violence in cases where the admission of such evidence could result in a fundamentally unfair trial. In his opening brief, defendant acknowledges the California Supreme Court's rejection of the same argument challenging section 1108, which involves the admission of evidence of prior sexual offenses in *People v. Falsetta*, and observes "that this court is bound by *People v. Falsetta*" under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. Therefore, we conclude section 1109 does not violate the right to due process.

The trial court instructed the jury on the use of the prior domestic violence evidence with CALCRIM No. 852.<sup>5</sup> In *People v. Reyes* (2008) 160 Cal.App.4th 246,

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<sup>5</sup> The jury was instructed with CALCRIM No. 852 as follows: "The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically: that the defendant hit the victim in the head about a month previous to this incident. [¶] *Domestic violence* means abuse committed against an adult who is a cohabitant. [¶] *Abuse* means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else. [¶] The term *cohabitants* means two unrelated adults living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as husband and wife, (5) the parties[] registering as domestic partners, (6) the continuity of the relationship, and (7) the length of the relationship. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit Domestic Battery with Corporal Injury, as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Domestic Battery with

253, the appellate court rejected the defendant's argument that CALCRIM No. 852 violated his constitutional due process rights. Defendant does not cite any legal authority holding otherwise. Defendant states in his opening brief that he has challenged "the admission of the prior act of domestic violence and the instruction of the jury with CALCRIM number 852" as violative of his "federal guarantee of due process only to preserve the claim for federal review."

We find no error.

## II.

### WE REDUCE THE RESTITUTION FINE AND THE PAROLE REVOCATION RESTITUTION FINE TO \$1,000 EACH.

Defendant argues the \$1,200 restitution fine and the \$1,200 parole revocation restitution fine were erroneously calculated. He argues each fine should have been in the amount of \$1,000. In the respondent's brief, the Attorney General states: "[Defendant] is correct and this Court should order the restitution fine and parole revocation restitution fine each be reduced to \$1000 with directions to the trial court to so amend the Abstract of Judgment and to forward the corrected abstract to the California Department of Corrections and Rehabilitation." For the reasons we explain, we agree that both fines should be so reduced.

The version of Penal Code section 1202.4 that was in effect at the time of the sentencing hearing (former Penal Code section 1202.4) provided that "[i]n every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." (Former Pen. Code, § 1202.4, subd. (b).) Former Penal Code section 1202.4, subdivision (b)(2) provided that "[i]n setting a felony restitution fine, the court may determine the amount of the fine as the product of two

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Corporal Injury. The People must still prove the charge of every charge beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose."

hundred dollars (\$200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.”

The reporter’s transcript from the sentencing hearing shows the trial court considered imposing a six-year prison term, but ultimately imposed a five-year term of imprisonment. At the sentencing hearing, the court stated: “Pursuant to Penal Code section 1202.4(b)(1), you’re ordered to pay a restitution fine to the state restitution fund in the amount of \$1,200 computed at \$200 for each year of imprisonment times the number of felony counts as provided in Penal Code section 1202.4(b)(2).” As explained in the respondent’s brief, “[c]learly, the trial court intended to impose the statutory minimum of \$200 for each year of the five-year sentence imposed for the restitution fine . . . .” It appears the restitution fine was inadvertently calculated based on the tentative six-year prison term instead of the five-year prison term ultimately selected by the court. Hence, the restitution fine should be reduced from \$1,200 to \$1,000.

Penal Code section 1202.45 provides in relevant part: “In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4.” The trial court, therefore, should have imposed a parole revocation restitution fine in the amount of \$1,000 as well.

We remand to the trial court to reduce the restitution fine and parole revocation restitution fine, accordingly.

#### DISPOSITION

We remand the matter and direct the trial court to modify the judgment to reflect a restitution fine and a parole revocation restitution fine, each in the amount of \$1,000. We affirm the judgment as modified. The trial court is further directed to

prepare an amended abstract of judgment, and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.