

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCUS RAMON SANTOS,

Defendant and Appellant.

G045819

(Super. Ct. No. 10SF0388)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Walter P. Schwarm, Judge. Affirmed.

Richard Schwartzberg, 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, Peter Quon, Jr. and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Marcos Ramon Santos guilty of assault with a deadly weapon. The trial court sentenced him to the middle term of three years in prison. On appeal, Santos argues there was insufficient evidence to support his conviction. In addition, he argues the court erred in allowing him to be impeached with his prior convictions without sanitizing them. We conclude his contentions lack merit, and we affirm the judgment.

I

A. The Prosecution's Case

One evening Jamie Cervantes (Cervantes) was standing outside his car in the Laguna Hills Mall parking lot. His wife Cassandra Mancilla (Mancilla) was in the car's back seat, breastfeeding their two-month old child. Cervantes saw a Mercedes pull into a nearby parking space. Santos was in the front passenger seat and a woman was driving. Cervantes noticed Santos exit the car, argue with the woman driver, and throw trash from a fast food restaurant on the ground. While leaning against his car, Cervantes made eye contact with Santos, and then put his head back and closed his eyes.

Cervantes saw Santos get back into the passenger side of the car and start to drive away. As he was leaving, Santos looked out the car and said to Cervantes, "What bitch?" Cervantes did not reply. He could hear Santos tell the female driver to stop their car. The car stopped and Santos got out and ran over to Cervantes, who opened his car door so it separated him from Santos. Cervantes recalled Santos was saying, "He handles his shit and he was going to fuck me up." Cervantes told Santos, "I don't know you. You don't know me. Why do you want to fight with me for [*sic*]?"

At that point, Mancilla got involved in the altercation. She got out of the car and started arguing with Santos. She admitted swearing at Santos, told Santos to "get a fucking job" and calling him "the 'N' word a couple of times." Santos responded by telling Cervantes to "tell your bitch to shut the fuck up. This is between me and you." Cervantes told his wife to get back into the car and be quiet, but she did not listen and kept arguing with Santos.

Santos then returned to his car and grabbed something “shiny” from the middle by the ashtray. Mancilla heard Santos say as he came back, ““Oh, I’m going to kick your ass. I’m going to fuck you up.”” When Santos got closer, approximately four or five feet away, Cervantes saw Santos holding a metal and pointed object. Cervantes thought it might have been a bicycle spoke. Cervantes started jumping around in a zigzag motion, and he backed away from Santos. Santos made two or three jabbing motions with the metal object in Cervantes’s direction and then pulled his hand back towards his body. Cervantes said Santos was angry and swearing at him.

Cervantes told Santos, ““Oh, man, relax. I’m going to call the cops.”” Cervantes saw his cellular telephone was locked so he only pretended to call the police. Mancilla got out of the car, holding her baby, and began yelling at Santos to leave. Santos turned towards her and made a jabbing motion towards her with the metal object. Cervantes jumped in between Santos and his wife and told her to get back in the car. She got back in the car and then yelled to people exiting the nearby store to call the police. Meanwhile, Cervantes pretended to be talking to the police on his cellular phone. Santos abruptly left them alone and drove away.

Based on Cervantes’ description of Santos and his car, police located Santos in Lake Forest later that night. They found a screwdriver in between the front seat and the console of Santos’s Mercedes. Santos was arrested and charged with two counts of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).)

B. The Defense Case

Santos testified he was at the mall with his friend for an hour. When they came out to the car, he had to push it out of the parking space because the reverse gear was not working. As he pushed the car, his friend threw trash out of the window. While he was pushing the car, he saw a man leaning on a nearby car laughing at him. Santos recalled the car door was open and a baby was screaming and crying inside. When

Santos walked back to the passenger side of his own car, he heard Cervantes laugh some more and also say “pinche mayate” or “fucking nigger.”

Santos was upset. He got into his car and rolled down the passenger side window. He asked Cervantes, “What did you say?” He denied calling Cervantes a bitch. As Santos’s friend continued to drive away, Santos overheard Mancilla scream from inside the car, “That’s right. We don’t want nothing” and “Nigger.”

Santos’s friend stopped the car and asked, “Did she really just say that?” Santos got out of the car to confront Cervantes and demand an apology. Santos said he walked to Cervantes and as he was trying to talk, Mancilla repeatedly yelled from the inside of the car, over and over again like a child, “Nigger, nigger, nigger, shut up.” She also told Santos, “Go back where you came from” and, “We don’t want your f-ing kind around here.” Santos asked Cervantes, “Are you going to let your girl talk like this?” He also called Mancilla a bitch and told her to shut up. He then walked away and threw his hands up in the air. He returned to his car and intended to leave.

However, Santos changed his mind when he heard Mancilla yell, “That’s right. You don’t want none you [*sic*] fucking nigger. Go back to where you fucking came from. We don’t want your fucking kind around here. Nigger, nigger, nigger.” Santos heard Cervantes tell his wife to get in the car.

Santos walked back to Cervantes’s car. He intended to tell Cervantes and Mancilla to go ahead and “jump me” and to “do it now” because there were lots of people standing around. Santos said he wanted the people to see Cervantes and Mancilla hit him. Santos admitted he would have fought them back.

Santos said that as he approached the car, Cervantes began to bounce around when he was five to seven feet away. Santos stated he intended to talk to Mancilla, not Cervantes. However, when Santos saw Mancilla was breastfeeding the child, he changed his mind, and decided it would be better to have the people around them hear him speak to her. Santos said he felt good after telling Mancilla she was being

immature and she had no class. He told Mancilla she should have more respect for the baby and herself. He held out his hand to shake Cervantes's hand, but Cervantes jumped back. Santos heard Mancilla scream out, "He has a knife." Santos threw his hands up in the air because he wanted the people around to see there was no knife. Santos said he did not have a knife or a screwdriver. Cervantes refused to shake Santos's hand. Santos returned to his car and drove home.

Santos said he wanted to stay longer but his friend was from Arizona and on probation, which meant any contact with the police would have been a violation because she was not supposed to leave the state. Santos explained the screwdriver in his car was used to operate his broken stereo. On cross-examination, Santos admitted having previously brandished a deadly weapon in October 2002.

The jury found Santos guilty of one count of assault with a deadly weapon (relating to Cervantes) and not guilty of the second count (relating to Mancilla). The court denied Santos's request to reduce the conviction to a misdemeanor. It sentenced him to the middle term of three years in prison.

II

A. Sufficiency of the Evidence

Santos argues there was insufficient evidence he assaulted Cervantes with a deadly weapon. Although at trial he denied jabbing any object at Cervantes, Santos contends on appeal that the prosecution's evidence merely proved he "exhibited" a screwdriver four or five feet away from Cervantes, which should have amounted to only the misdemeanor crime of brandishing a weapon. We disagree.

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

[Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence.

[Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]" [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

An information charged Santos with two counts of violating Penal Code section 245, subdivision (a)(1) (assault with a deadly weapon), and the trial court instructed the jury with CALCRIM No. 875, stating, "To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person;

"2. The defendant did that act willfully;

"3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;

"AND

"4. When the defendant acted, he had the present ability to apply force with a deadly weapon other than a firearm to a person."

Santos correctly surmises the “dividing line between mere preparation and the act of brandishing and the commission of assault with a deadly weapon is a fine one.” He explains, the crime of brandishing requires evidence a person “draws or exhibits any deadly weapon . . . in a rude, angry, or threatening manner” (Pen. Code, § 417, subd. (a)(1).) He asserts this definition more accurately describes what the prosecution’s evidence proved in this case.

To support his theory, Santos asserts his case is analogous to the very old case *People v. Dodel* (1888) 77 Cal. 293. Our Supreme Court reversed an assault conviction because the defendant was not near enough to strike the victim with a knife. (*Id.* at pp. 293-294.) In *Dodel*, defendant went to a “saloon” and “[a]fter some words” drew a knife. (*Id.* at p. 293). The court reasoned the testimony showed defendant was “not at any time near enough to [the victim] to strike him with [the knife], and that he moved away from [the victim] and not toward him; and the testimony fails to show directly that defendant made any attempt to strike with or use his knife.” (*Id.* at pp. 293-294.) The court held, to warrant a conviction for assault, defendant “must have the intent to strike, the ability to do so, and must have made the attempt to strike.” Because the jury was not adequately instructed on this point, the case was remanded for a new trial. (*Id.* at pp. 294-295.)

We find the case distinguishable for several reasons. The *Dodel* defendant backed away from the victim, did not attempt to use the knife, and he was not near enough to strike. In contrast, Santos was walking towards the victim and was just a few feet away when he made a jabbing motion with the screwdriver in the victim’s direction. Santos was in striking range if he had continued moving forward or if the victim had not moved back and zigzagged away. Santos certainly had the ability to cause injury and was

attempting to use the weapon by repeatedly jabbing the screwdriver in the victim's direction.¹

Another significant distinction is the *Dodel* case addressed an instructional error. Reversal was not based on a finding the evidence was insufficient. There was sufficient evidence to support the conviction in this case. “An assault occurs whenever “[t]he next movement would, *at least to all appearance*, complete the battery.” [Citation.]” (*People v. Williams* (2001) 26 Cal.4th 779, 786.) “We do not understand this statement to mean that for the crime of assault to occur, the defendant must in every instance do everything physically possible to complete a battery short of actually causing physical injury to the victim.” (*People v. Raviart* (2001) 93 Cal.App.4th 258, 266.) Instead, defendant need only have the present ability to injure the victim. “Once a defendant has attained the means and location to strike immediately he has the “present ability to injure.” The fact an intended victim takes effective steps to avoid injury has never been held to negate this “present ability.” [Citation.]” (*Id.* at p. 267.)

Santos, enraged by the racial slurs, advanced towards Cervantes in a highly threatening manner. He yelled, “I’m going to fuck you up” as he approached Cervantes the second time. And when in close proximity, Santos began jabbing his weapon, prompting Cervantes to take evasive action. It was reasonable for Cervantes to believe Santos was advancing towards him with the intent to strike and that he needed to take steps to avoid injury. Santos was one long stride and one more jab away from inflicting injury. Santos’s next movement, “at least to all appearances,” would have completed the

¹ Santos asserts he was four or five feet away from Cervantes. This is not completely accurate. The victim testified Santos was at that distance when he first “noticed something” in Santos’s hands. Cervantes was not asked how close Santos was when he made the jabbing motion. However, he was asked, “[W]hat is the closest he got to . . . you [with] that [metal pointed] object?” Santos replied, “three feet.” Regardless of whether Santos was three feet or four feet from Cervantes, either distance was in close proximity and sufficient to be considered striking distance in light of the fact Santos was walking angrily towards the victim. He was one stride from being in direct contact.

battery. We conclude there was substantial evidence to support the jury verdict Santos assaulted Cervantes with a deadly weapon.

B. Impeachment with Prior Convictions

Before trial, the prosecutor requested permission to impeach Santos, if he testified, with his prior convictions for (1) felony assault in 1998, (2) misdemeanor domestic assault in 2007, and (3) misdemeanor brandishing a deadly weapon in 2004. Santos's counsel objected the evidence was more prejudicial than probative, the brandishing conviction did not amount to an act involving moral turpitude, and the assault was too remote. In addition, counsel requested any convictions used to impeach Santos be sanitized and be referred to only as prior crimes of moral turpitude.

The court ruled all the convictions involved moral turpitude but the assault conviction was too remote and would unduly prejudice Santos. The court told the prosecutor it could use either the brandishing or the domestic assault conviction for impeachment purposes, but not both. The court explained it was limiting the prosecution to one prior because it was concerned the jury would misuse two convictions to infer Santos had a violent character. The court stated the prosecutor could ask Santos if he had been convicted of the prior crime, but she could not ask questions about the facts of that case.

Before Santos testified, the prosecutor informed the court she intended to impeach Santos with his 2004 brandishing of a deadly weapon conviction. Santos's counsel renewed his motion for the court to sanitize the nature of the conviction. The court refused. As part of the closing instruction, the court gave the jury CALCRIM No. 316 [using prior convictions to evaluate a witness's credibility].

On appeal, Santos argues the court abused its discretion by failing to sanitize any reference to his prior conviction for brandishing a weapon. "A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words,

discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]” (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) In this case, it cannot be said the court abused its discretion.

“While before passage of Proposition 8, past offenses similar or identical to the offense on trial were excluded, now the rule of exclusion on this ground is no longer inflexible [citations]” (*People v. Tamborrino* (1989) 215 Cal.App.3d 575, 590 (*Tamborrino*)). Indeed, “There is no automatic limitation on the number or nature of prior convictions of crimes involving moral turpitude that may be used to impeach a witness. (*People v. Muldrow* (1988) 202 Cal.App.3d 636, 646-647 [no abuse of discretion in admission for impeachment of six prior felony convictions, three identical to charged offense]; . . . *People v. Stewart* (1985) 171 Cal.App.3d 59, 65-66 [no abuse of discretion in ruling three prior robbery convictions admissible to impeach robbery defendant]). . . . Although we must, of course, scrutinize with care the impeachment use of prior convictions of crimes identical to a charged offense because of the heightened prejudice, no rule dictates their exclusion.” (*People v. Johnson* (1991) 233 Cal.App.3d 425, 459.)

Here, Santos testified he approached Cervantes to seek an apology and he was not holding a weapon. Cervantes told a much different story. Santo’s credibility was very much at issue in the case. The trial court could properly conclude that admission of one past criminal conviction was necessary to inform the jury fully as to his credibility. “No . . . defendant who elects to testify in his own behalf is entitled to a false aura of veracity.” [Citation.]” (*Tamborrino, supra*, 215 Cal.App.3d at p. 590.)

In addition, the record demonstrates the trial court carefully considered relevant factors in reaching its determination, and in weighing the potential prejudicial effect of the priors, limited the prosecutor to using just one for impeachment purposes. In short, the court did take steps to minimize the degree of potential prejudice arising from Santos’s three prior convictions. We find no abuse of discretion.

As noted by the Attorney General, Santos relies on several cases in which the trial court chose to sanitize the prior convictions. (Citing *People v. Sandoval* (1992) 4 Cal.4th 155, 178 [exercising its discretion under Evidence Code section 352, court did not abuse its discretion in sanitizing prior conviction]; *People v. Clark* (1996) 45 Cal.App.4th 1147, 1157-1158 [court was not required to further sanitize possession of drugs for sale conviction beyond being referred to as a “drug related” conviction].) These cases held the court did not abuse its discretion in deciding to sanitize references to the prior convictions. However, they did not address the issue of whether the court would have abused its discretion if *it had refused* a request to sanitize. While these courts, and others, recognize sanitizing any references to prior convictions reduces the potential for prejudice, there is no authority holding sanitizing is always required. The court in this case reduced the number of prior convictions that could be discussed before the jury which greatly reduced the potential for prejudice. It also gave a limiting instruction regarding the use of such evidence. We find no error.

III

The judgment is affirmed.

O’LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.