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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.

BENJAMIN SOLIS,

Defendant and Appellant.

G047066

(Super. Ct. No. 11WF1908)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

Julie Sullwold, 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, Eric A. Swenson and Elizabeth M. Carino, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Benjamin Solis of kidnapping (count 1; Pen. Code, § 207, subd. (a)); misdemeanor domestic violence battery (count 3; Pen. Code, § 243, subd. (e)(1)); possession of fictitious instruments (count 4; Pen. Code, § 476); aggravated assault (count 5; Pen. Code, § 245, subd. (a)(1)); and child abuse and endangerment (count 6; Pen. Code, § 273a, subd. (b)).¹

The court found true the allegations defendant had suffered one prior strike conviction (Pen. Code, §§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1)) and one prior serious felony conviction (Pen. Code, § 667, subd. (a)(1)), and had served one prior prison term (Pen. Code, § 667.5, subd. (b)). The court sentenced defendant to state prison for an aggregate term of 18 years 4 months.

On appeal defendant contends the court violated his constitutional rights and abused its discretion by admitting evidence of his uncharged acts of domestic violence. He further claims insufficient evidence supports the finding he committed assault with a deadly weapon in the form of a souvenir baseball bat. We affirm the judgment.

FACTS

Counts 3 and 5: Domestic Violence Battery and Aggravated Assault

Around August 7, 2011, defendant lived at his mother's home with his girlfriend, Neary Eng,² and his seven-year-old son, Marc. Eng accused defendant of

¹ The jury acquitted defendant of count 2 (making criminal threats). The jury also acquitted him of count 3 (domestic battery with corporal injury) and convicted him instead of the lesser included offense of domestic violence battery.

² Eng did not testify at trial. Instead, her preliminary hearing testimony was read to the jury under Evidence Code sections 1290 and 1291, after the court found she was absent from the trial despite the prosecutor's reasonable diligence to procure her attendance by the court's process. (Evid. Code, § 240, subd. (a)(5).) All further statutory

“kicking it with some girls.” Defendant, angered by Eng’s nagging, chased her as she ran away. He swung a 15-inch wooden Angel’s souvenir bat at her. Marc saw defendant hit Eng twice with the bat and heard her scream.

Defendant’s sister stopped him from chasing Eng and drove her away. Eng’s friend, Marilen Calma, took Eng to Calma’s house. Eng told Calma’s boyfriend, Paul Khap, that “she had been in a domestic violence incident where she was hit with a bat by [defendant].” Khap saw a bruise on Eng’s right shoulder.

Count 1: Kidnapping

Two days later, defendant texted Calma that he was coming over to pick up Eng (who had stayed at Calma’s house). Calma told defendant to wait before coming over. Instead of waiting, defendant went to Calma’s house with Marc.

Eng went in a bedroom and stayed there. She told Calma she did not want to talk to defendant, so Calma relayed the message to defendant.

Defendant, who was angry, went in the house and said to Eng, “Let’s go home.” Eng replied, “I don’t want to go home yet.” “I don’t have a home.” Defendant and Eng argued and yelled at each other. Defendant grabbed one or both of Eng’s hands or wrists. Eng tried to break free by pushing defendant away. Defendant told Eng that “she knew what would happen to her if she didn’t go home with him.”

Defendant picked up Eng, threw her over his shoulder, and carried her out to his truck. On the way, Eng struggled with defendant, hit him in the back and called him an “ass,” and angrily told him several times to put her down, but he did not. Eng did not want to leave Calma’s house, where she felt safe. Eng feared for her safety, not knowing what defendant would do.

references are to the Evidence Code.

Defendant threatened Calma by saying that “if anybody got in his way, . . . he would slash them.” Calma was in fear because defendant was “a big man” and “capable of following through with the threat.” Once defendant had left her house with Eng and Marc, Calma phoned 911 to report the incident.

Defendant put Eng in the back seat of his truck next to Marc, and drove toward a gas station. While defendant was driving, Eng asked him to stop and let her out, but defendant did not stop. Defendant and Eng argued. Even though the truck was moving, Eng tried to open the door several times. Defendant tried to pull Eng to keep her from getting out. Defendant pulled the truck over, got out, opened Eng’s door, grabbed her by her shirt, and ripped her shirt and bra in the process. Eng screamed as defendant twice grabbed and ripped her shirt apart. Eng covered her chest with her arms so Marc would not see her exposed body.

Defendant got back in the driver’s seat and drove to the gas station. Before they arrived at the station, Eng promised defendant she would not leave. Defendant and Eng made up at the gas station.

Defendant drove them back to his mother’s house. Eng put on a new shirt and then she and Marc got back in the truck to run an errand with defendant. The police stopped the truck. An officer saw half a pink bra and a shredded green lace blouse in the vehicle. When an officer spoke to Marc, defendant told Marc not to say anything. At the police station, a female employee examined Eng and observed no visible marks on her body.

Count 4: Possession of Fictitious Instruments

In defendant’s wallet, an officer found a \$100 bill that appeared to be counterfeit. When officers searched defendant’s bedroom, they found three \$100 bills in a safe. All four \$100 bills were counterfeit.

Count 6: Child Abuse and Endangerment

During trial, defense counsel conceded that defendant committed misdemeanor child abuse against Marc by exposing him to these experiences.

Uncharged Acts

Maria Gomez is Marc's mother and defendant's former girlfriend of six or seven years. Gomez testified at trial about three prior acts of domestic violence defendant committed against her.

On July 4, 2003, defendant and Gomez argued while they were at Gomez's ex-sister-in-law's home. When Gomez and defendant returned to Gomez's home, defendant searched Gomez's purse and found an old phone number. Defendant questioned Gomez, who told him it was an old friend's phone number. Defendant accused Gomez of lying, insulted her, and told her to get her stuff and get out. When Gomez tried to leave, defendant grabbed her arm and dragged her by her hair to the front yard. Gomez's sister-in-law tried to calm defendant down, but he said, "No, 'F' this." Gomez and her sister-in-law got into a car. Defendant pulled out a knife and slashed a tire. He tried to "get at" Gomez while she was in the car. As a result of this incident, defendant pleaded guilty to criminal charges.

On June 9, 2005, defendant, Gomez, and Marc were living in defendant's mother's home. Marc, who was a baby at the time, woke up crying. Defendant, who had just woken up, was cranky and said, "[S]hut that kid up." Defendant asked Gomez to make him lunch, but Gomez refused. Defendant said, "You [fucking bitch], you better make me my lunch." After Gomez again refused, defendant grabbed the back of her neck and said, "[W]hat's your problem [bitch?]" Gomez tried to get away, but defendant threw her and she hit her head on Marc's crib. Defendant grabbed her by the throat and squeezed, making it difficult for her to breathe. Gomez sustained bruising on the neck and forehead. As a result of this incident, defendant pleaded guilty to criminal charges.

On September 15, 2005, Gomez and Marc, not defendant, were living at defendant's mother's house. Defendant went there to see Marc who was a baby. Defendant and Gomez argued in the bedroom. Marc started to cry. Defendant's sister took Marc out of the bedroom. Defendant threw Gomez on the ground and on the bed, and kicked, punched, insulted, and spit on her, as well as getting on top of her on the bed. Afterwards, defendant apologized to Gomez. Gomez sustained some bruises, and reported the incident to the police.

DISCUSSION

Section 1109 Is Constitutional

Pursuant to section 1109, Gomez testified about defendant's uncharged acts of domestic violence. Defendant contends section 1109 violates the federal due process clause, alleging that propensity evidence is inherently only slightly probative, at best, and is inherently prejudicial.³ But defendant acknowledges that "the California Supreme Court has held [in *People v. Falsetta* (1999) 21 Cal.4th 903] that a statute permitting propensity evidence is" constitutional. He also concedes that the "United States Supreme Court has not yet answered 'the question whether a state law permitting admission of propensity evidence would violate due process principles.'" He further recognizes we "may be bound by *Falsetta*." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We independently review defendant's due process challenge to section 1109

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The Attorney General contends defendant forfeited his constitutional challenge to section 1109 by failing to specifically object on that ground below. Defendant argues his broad objection under section 352 preserved his constitutional challenge. To forestall an ineffective assistance of counsel contention in a subsequent habeas corpus petition, we address defendant's constitutional challenge to section 1109 on the merits.

(*Samples v. Brown* (2007) 146 Cal.App.4th 787, 799) and presume the statute “is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears” (*People v. Falsetta, supra*, 21 Cal.4th 903, 913 (*Falsetta*)).

Under section 1101, character evidence is inadmissible when offered to prove a defendant’s “conduct on a specified occasion” (*id.*, subd. (a)), with the exception of “evidence that a person committed a crime . . . when relevant to prove” a defendant’s motive, identity, or some other fact besides the defendant’s propensity to commit such conduct (*id.*, subd. (b)).

In domestic violence cases, section 1109 creates an exception to section 1101’s prohibition against propensity evidence. Under section 1109, when a defendant is accused of a domestic violence offense, “evidence of the defendant’s commission of other domestic violence” is not excluded under section 1101 if not inadmissible under section 352. (§ 1109, subd. (a)(1).)

In *Falsetta, supra*, 21 Cal.4th 903, our Supreme Court rejected a due process challenge to section 1108, which permits the admission in a sex offense case of evidence of a defendant’s other sex crimes to show the defendant’s propensity to commit such acts. (*Falsetta*, at p. 907.) *Falsetta* held “section 1108 is constitutionally valid” because, although it “represents a deviation from the historical practice of excluding such ‘propensity’ evidence [citation], the provision preserves trial court discretion to exclude the evidence if its prejudicial effect outweighs its probative value [citation].” (*Ibid.*)

Sections 1108 and 1109 are parallel statutes; the Legislature “modeled” section 1109 on section 1108. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333 (*Brown*)). Courts of Appeal have recognized that, “as in sexual offense cases, special evidentiary rules are justified [in domestic violence cases] because of the distinctive issues and difficulties of proof in this area” (*id.* at p. 1333), and that *Falsetta*’s reasoning applies equally “to prior acts of domestic violence” under section 1109 (*People v. Johnson* (2000) 77 Cal.App.4th 410, 419). The legislative history of section 1109

“recognizes the special nature of domestic violence crime, as follows: ‘The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked. 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. Since criminal prosecution is one of the few factors which may interrupt the escalating pattern of domestic violence, we must be willing to look at that pattern during the criminal prosecution, or we will miss the opportunity to address this problem at all.’” (*Johnson*, at p. 419.)

In *People v. Hoover* (2000) 77 Cal.App.4th 1020, the Court of Appeal held that “section 1109, like section 1108, does not violate the due process clause.” (*Id.* at p. 1029.) *Hoover* reasoned that “the policy considerations favoring the exclusion of evidence of uncharged domestic violence offenses are outweighed in criminal domestic violence cases by the policy considerations favoring the admission of such evidence” (*id.* at p. 1028), the admission of relevant evidence offends due process only if the evidence is so prejudicial as to render the defendant’s trial fundamentally unfair (*id.* at p. 1027), and the trial judge’s section 352 weighing process ensures “that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury” (*Hoover*, at pp. 1028-1029).

Defendant contends section 352 provides only an illusory safeguard because the prejudicial effect of propensity evidence will always outweigh its probative value. But the purpose of the general rule against the admission of propensity evidence is to “guard[] against *undue* prejudice” (*Falsetta, supra*, 21 Cal.4th at p. 916, italics

added.) As discussed in more detail in the next section, “[t]he prejudice which exclusion of evidence under section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.” (*People v. Zapien* (1993) 4 Cal.4th 929, 958.)

Accordingly, we agree with the uniform appellate holdings that section 1109 does not violate the due process clause. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310 (*Jennings*); *People v. Hoover, supra*, 77 Cal.App.4th at p. 1029; *Brown, supra*, 77 Cal.App.4th at p. 1334; *People v. Johnson, supra*, 77 Cal.App.4th at p. 420; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096.)

The Court Did Not Abuse Its Discretion Under Section 352 by Admitting Gomez’s Testimony on Uncharged Conduct

In response to the People’s pretrial motion, the court ruled that evidence of defendant’s uncharged acts was admissible, as was evidence of his guilty pleas to two of the incidents. But the court ruled inadmissible, as more prejudicial than probative, any documents related to the associated convictions (including any prison records, charging documents, and plea forms) and also ruled inadmissible any information on whether defendant admitted to a felony or a misdemeanor. The court expressly weighed the section 352 factors and found that the facts of the prior offenses were very similar to the instant facts, the incidents were relevant as propensity evidence and were relatively close in time, the nature of the prior incidents was not inflammatory, and defendant’s guilty pleas to two of the incidents took “any speculation about the prior incidents away from the jury.” The court concluded that with the limitations it had imposed, the evidence of the three incidents was more probative than prejudicial. The court *excluded* evidence of defendant’s prior criminal threats against his sister, to which defendant had pleaded guilty.

“Section 1109 conditions the introduction of prior domestic violence evidence on an evaluation under section 352 of whether the evidence is more probative than prejudicial.” (*Jennings, supra*, 81 Cal.App.4th at pp. 1313-1314.) “The “prejudice” referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, “prejudicial” is not synonymous with “damaging.”” (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) “We will not overturn or disturb a trial court’s exercise of its discretion under section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd.” (*Jennings*, at p. 1314.)

The section 352 factors to be considered by a trial court depend upon “the unique facts and issues of each case” (*Jennings, supra*, 81 Cal.App.4th at p. 1314.) Among the relevant factors regarding propensity evidence are (1) whether the propensity evidence is stronger and more inflammatory than evidence of the defendant’s charged acts; (2) whether the uncharged conduct is similar enough to the charged behavior to tend to show defendant did in fact commit the charged offense; (3) the degree of certainty of the uncharged offense’s commission; and (4) “the likelihood of confusing, misleading or distracting the jurors from their main inquiry.” (*Id.* at p. 1314; *People v. Harris* (1998) 60 Cal.App.4th at pp.738-740 [regarding propensity evidence of other sex crimes under section 1108].)

Of these factors, the ““principal factor affecting the probative value of an uncharged act is its *similarity* to the charged offense.”” (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531, italics added.) Section 1109 “reflects the legislative judgment that in domestic violence cases, as in sex crimes, similar prior offenses are ‘uniquely probative’ of guilt in a later accusation.” (*Johnson*, at p. 532.)

Defendant acknowledges his prior conduct with Gomez was similar to the charged offenses in that he “had altercations with Gomez while in a domestic relationship

with her.” But he contends “the prior acts were very dissimilar to the charged offenses” because the prior conduct was “exceedingly violent” compared with his chasing Eng with a miniature baseball bat. He argues the prior crimes were therefore more inflammatory than the current offenses.

The court did not abuse its discretion under section 352 by admitting the evidence of his abuse of Gomez. Defendant’s prior conduct was similar to the charged behavior in that both showed how his uncontrollable temper resulted in violence toward a woman living with him. Although the prior acts evidence involved somewhat greater violence than the charged offenses, it was not so inflammatory as to override the evidence’s probative value. The prior acts evidence was also probative because Calma and Khap changed their stories from what they told the police and because Eng did not testify at trial. Furthermore, because the jury was informed that defendant had already been punished for his prior conduct, this “substantially mitigate[d] the kind of prejudice usually associated with the introduction of prior bad act evidence.” (*Jennings, supra*, 81 Cal.App.4th at p. 1315.) The court excluded evidence of whether the prior offenses were felonies or misdemeanors and of defendant’s prior criminal threat against his sister. The court’s admission of the challenged evidence was not arbitrary or capricious.

Substantial Evidence Showed Defendant Assaulted Eng with a Deadly Weapon

Defendant contends insufficient evidence supports his conviction for assault with a deadly weapon. He argues the People presented no evidence that the bat was inherently dangerous or was used in a way capable of causing or likely to cause great bodily injury.

For purposes of aggravated assault, “a ‘deadly weapon’ is ‘any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.’” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) Whether an object is a deadly weapon is a question of fact. (*People*

v. Moran (1973) 33 Cal.App.3d 724, 730.) “In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue.” (*Aguilar*, at p. 1029.) “One may commit an assault without making actual physical contact with the person of the victim; . . . whether the victim in fact suffers any harm is immaterial.” (*Id.* at p. 1028.)

Because defendant challenges the sufficiency of the evidence, we “review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We presume “in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence.” (*People v. Lee* (2011) 51 Cal.4th 620, 635.) “It is of no consequence that [one witness’s] testimony differed in some respects from [another witness’s], or that the testimony of each differed to a certain extent from what he had told police.” (*Ibid.*) “““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.””” (*People v. Kraft* (2000) 23 Cal.4th 978, 1054.)

Here, substantial evidence showed defendant assaulted Eng with a 15-inch wooden bat. He swung the bat at her a couple of times as she ran from him. He hit her back twice. Eng screamed when defendant hit her with the bat. She told Calma that she (Eng) was hurt and her back hurt. Khap observed a bruise on Eng’s shoulder.

Defendant relies on *People v. Beasley* (2003) 105 Cal.App.4th 1078, but that case is distinguishable. The weapon in *Beasley* was a broomstick, but the record did “not indicate whether the broomstick was solid wood or a hollow tube made of metal, fiberglass, or plastic.” (*Id.* at p. 1087.) Here, the evidence showed the bat was wooden

and 15-inches long. “While it certainly would have been good practice for the People to have introduced [more] evidence concerning the nature of the [bat] and its ability to inflict substantial injury [citation], such evidence is not essential to establish the deadly nature of the weapon [citation].” (*People v. Brown* (2012) 210 Cal.App.4th 1, 8.) The jury could have reasonably inferred the bat was made of solid or sturdy wood, since it did not break on contact and it caused Eng pain. The jury reasonably found defendant’s manner of wielding the bat made it a deadly weapon.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

O’LEARY, P. J.

RYLAARSDAM, J.