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

THE PEOPLE,

Plaintiff and Respondent,

v.

MARVIN CHARLES FOSTER,

Defendant and Appellant.

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In re MARVIN C. FOSTER,

on Habeas Corpus.

H036323

(Santa Clara County  
Super. Ct. No. CC961878)

H037741

(Santa Clara County  
Super. Ct. No. CC961878)

Defendant Marvin Charles Foster appeals a judgment of conviction following a jury trial during which he was found guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), and inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)).

Defendant asserts the trial court erred by (1) admitting evidence of prior incidents of domestic violence under Evidence Code section 1109; (2) incorrectly instructing the jury with CALCRIM No. 852; (3) allowing the prosecution to amend the dates of offense during trial; (4) ordering restitution; and (5) ordering no contact with the victim under Penal Code section 136.2. In addition, defendant

asserts he was denied effective assistance of counsel for his attorney's failure to object to certain testimony, and that the conviction for assault with a deadly weapon is not supported by substantial evidence.

Defendant also brings a petition for writ of habeas corpus asserting ineffective assistance of counsel that we ordered consolidated with the appeal.

#### **STATEMENT OF THE FACTS AND CASE**

In November 2009, defendant and the victim in this case, Raquel Cole were living together in San Jose. On November 17, 2009, defendant came home from work with a drink in his hand, and gave Ms. Cole \$20.00, telling her to go to the store and buy him two beers and a half pint of bourbon. Ms. Cole went to the store and made the purchases, and returned change in the amount of \$10.00 to defendant. Defendant gave the \$10.00 to a person who was working on his car.

Throughout the night, defendant drank alcohol and smoked crack cocaine. After a while, defendant accused Ms. Cole of stealing his drugs and \$20.00 from his wallet. Defendant slapped Ms. Cole in the face and pushed her down onto the couch, where he straddled her and punched her repeatedly in the eyes. Defendant tore Ms. Cole's clothes looking for drugs, and ripped a large portion of her hair out above her ear. Defendant kicked Ms. Cole in the ribs, arm and shin, and threatened to kill her and members of her family if she went to the police.

On November 18, 2009, defendant came home from work, and accused Ms. Cole of stealing his drugs and his money. Defendant picked up a box containing an electric grill, and threw it against Ms. Cole's left temple. The box weighed approximately 20-30 pounds. Defendant then picked up a 12-inch frying pan and hit Ms. Cole on the legs with it four or five times. Defendant picked up a 12-inch plastic flashlight containing batteries and hit Ms. Cole on the head three times where he had pulled out her hair previously. After the attack, her eyes were

swollen shut, and she had bruises on her arms and legs. Ms. Cole did not leave her RV or tell anyone about the attack for a few days because she was embarrassed, and she was afraid defendant would kill her.

On November 22, 2009, Ms. Cole called family members, who took her to the hospital where she was treated for her injuries, and she spoke to the police.

During the trial, the prosecutor admitted evidence of prior acts of domestic violence committed by defendant. Ms. Cole stated that in the summer of 2009, defendant was angry with her because she accidentally dented the door of his van. Defendant kicked Ms. Cole two times in the lower back, held her against a car and choked her with one hand. Ms. Cole also stated there were four or five other times that defendant was violent with her, but she could not recall the details.

Letha Adams testified that she was defendant's girlfriend in the early 1990's for between one and one half to two years. During that time, Ms. Adams worked as a prostitute because defendant wanted her to. The two lived together at a motel in San Jose, where they were both using drugs. One day when they were using drugs together, defendant attacked Ms. Adams in the motel room, slapping her in the face and punching her three or four times. Defendant also hit Ms. Adams in the forehead with a lamp. Defendant would not let Ms. Adams leave the motel room, and kept her there for hours. Ms. Adams sought medical treatment for her injuries, including stitches to her face from defendant's attack. Ms. Adams ended the relationship with defendant after the attack in the motel room.

In May 2010, defendant was charged by information with assault with a deadly weapon other than a firearm (Pen. Code, § 245, subd. (a)(1)), inflicting corporal injury on a spouse or cohabitant (Pen. Code, § 273.5, subd. (a)), and dissuading or attempting to dissuade a witness by use of force or threat of force

(Pen. Code, § 136.1, subd. (c)). The information also alleged defendant had suffered three prior serious felony convictions (Pen. Code, § 667, subd. (a)), three prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), and had served three prior prison terms (Pen. Code, § 667, subd. (b)).

Defendant was convicted after jury trial of assault with a deadly weapon and inflicting corporal injury on a spouse or cohabitant. The trial court found all the prior conviction allegations true, and two of the prior prison terms to be true.

The trial court denied defendant's motion to dismiss the prior strike allegations, and sentenced defendant to 65 years to life in state prison.

### **DISCUSSION**

Defendant asserts the trial court erred by (1) admitting evidence of prior incidents of domestic violence under Evidence Code section 1109; (2) incorrectly instructing the jury with CALCRIM No. 852; (3) allowing the prosecution to amend the dates of offense during trial; (4) ordering restitution; and (5) ordering no contact with the victim under Penal Code section 136.2. In addition, defendant asserts he was denied effective assistance of counsel for his attorney's failure to object to certain testimony, and that the conviction for assault with a deadly weapon is not supported by substantial evidence.

#### ***Evidence Code section 1109***

Defendant asserts the admission of prior domestic violence evidence under Evidence Code section 1109 violated due process under the Fourteenth Amendment. "With regard to appellant's argument that [Evidence Code] 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 [Evidence Code] section 1108, a parallel statute which

addresses prior ‘sexual offenses’ rather than prior ‘domestic violence,’ and upheld that provision against due process challenge. [Citation.]” (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310.)

Although the Supreme Court has not addressed the constitutionality of Evidence Code section 1109, post-*Falsetta* cases from the Courts of Appeal have subsequently upheld the constitutionality of Evidence Code section 1109 against similar due process challenges. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1332-1334 (*Brown*).

We agree with the reasoning and the results in *Brown, supra*, 77 Cal.App.4th 1324, and need not repeat the discussion here. “In short, the constitutionality of [Evidence Code] section 1109 under the due process clauses of the federal and state constitutions has now been settled.” (*People v. Jennings, supra*, 81 Cal.App.4th at p. 1310.)

#### ***Evidence of Prior Conduct***

Defendant argues the trial court erred in admitting evidence of defendant’s attack on Ms. Adams. He claims there was not substantial evidence to support a finding that Ms. Adams was a “ ‘spouse, former spouse, cohabitant, or person with whom [he] has had a child or is having or had had a dating or engagement relationship’ ” as is required by Evidence Code section 1109.

Here, the trial court did not abuse its discretion in admitting the evidence as defined as domestic violence. Ms. Adams testified that she was defendant’s girlfriend for between one and a half to two years, and that they lived together in a motel in San Jose. In addition, defendant admitted that he and Ms .Adams had a “domestic partnership.” This evidence was sufficient for the court to conclude that Ms. Adams fell within the definition of Evidence Code section 1109 for the purpose of domestic violence.

***Evidence Code Sections 1109 and 352***

Defendant asserts the trial court's admission of the evidence of the attack on Ms. Adams was unduly prejudicial, and was an abuse of discretion.

Evidence Code section 1109, which provides, in relevant part: "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." (Evid. Code, § 1109, subd. (a)(1).) Evidence Code section 352 allows a court in its discretion to exclude evidence if "its probative value is substantially outweighed by the probability that its admission will . . . (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

A trial court's exercise of this discretion under Evidence Code sections 1109 and 352 "will not be disturbed on appeal absent a clear abuse, i.e., unless the prejudicial effect of the evidence clearly outweighs its probative value. [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 637.) The prejudice in question is not the prejudice that flows from relevant, highly probative evidence; rather, it is the prejudice caused by evidence that "uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*Id.* at p. 638.) Prejudicial is not synonymous with damaging. (*Ibid.*)

We find that there was no abuse of discretion in this case. In determining whether to admit prior acts of domestic violence, the court considers such factors as whether the prior acts are more inflammatory than the charged conduct, the possibility that the jury might confuse the prior acts with the charged acts, the recentness of the prior acts, and whether the defendant has already been convicted

and punished for the prior acts. (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.)

Here, defendant's prior acts of domestic violence upon Ms. Adams were extremely probative, and were not more inflammatory than the charged conduct in this case. Here, Ms. Cole was injured in the face, head, arms and legs. The incident between Ms. Adams and defendant in the motel resulted in similar injuries, and arose from a similar scenario in which defendant was using drugs and became angry with her and attacked her physically.

We do not find the prior incidents of domestic violence against Ms. Adams admitted in this case to be remote or dissimilar to the allegations in the present case. We will not disturb the trial court's exercise of discretion in admitting this evidence, because the probative value of the evidence clearly outweighs its prejudicial effect. (*People v. Karis, supra*, 46 Cal.3d 612, 637.)

***CALCRIM No. 852***

Defendant argues the court erred in instructing the jury with CALCRIM No. 852, because the instruction allows the jury to "infer propensity and guilt from specific evidence of prior acts of domestic violence."

In *People v. Reyes* (2008) 160 Cal.App.4th 246, 252 (*Reyes*), the court rejected a similar argument as defendant makes here, and stated that CALJIC No. 2.50.02, the predecessor to CALCRIM No. 852 with nearly identical language, has repeatedly been held constitutional. The *Reyes* court noted that CALCRIM No. 852 goes beyond its predecessor by clarifying that the "People must still prove each element of every charge beyond a reasonable doubt." (*Reyes, supra*, 160 Cal.App.4th at p. 252.)

We find CALCRIM No. 852 to be constitutional, and that the court did not err in giving the instruction.

### ***Cumulative Error***

Defendant asserts there was cumulative error. In assessing cumulative error, the critical question is “whether defendant received due process and a fair trial.” (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) As discussed above, the trial court did not err in its admission of defendant’s prior attack on Ms. Adams, or in instructing the jury. As there were no errors that would have impacted defendant’s due process and fair trial rights, there was therefore no cumulative error in this case.

### ***Ineffective Assistance of Counsel***

Defendant asserts he was denied effective assistance of counsel because his attorney did not object to Ms. Adams’s testimony on foundational and constitutional grounds.

“Defendant has the burden of proving ineffective assistance of counsel. (*People v. Malone* (1988) 47 Cal.3d 1, 33.) To prevail on a claim of ineffective assistance of counsel, a defendant ‘ “must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.” ’ (*People v. Hart, supra*, 20 Cal.4th at p. 623.) A court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. (*Strickland v. Washington* (1984) 466 U.S. 668, 689.)” (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

“If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus. (*Id.* at pp. 266-267.)” (*People v.*

*Carter* (2003) 30 Cal.4th 1166, 1211.)

“Moreover, prejudice must be affirmatively proved; the record must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ (*Strickland v. Washington, supra*, 466 U.S. at p. 694.)” (*People v. Maury, supra*, 30 Cal.4th at p. 389.)

There is nothing unreasonable about defense counsel choosing not to object to Ms. Adams’s testimony on foundational or constitutional grounds. As discussed above, there was substantial evidence to support the court’s conclusion that Ms. Adams qualified as a victim under the domestic violence statute. Moreover, the constitutionality of Evidence Code section 1109 is settled. We find defense counsel’s conduct of not objecting to the testimony in this case was reasonable, and was not ineffective.

#### ***Petition for Writ of Habeas Corpus***

In a separate writ petition, defendant asserts he was denied effective assistance of counsel for the failure to object to Ms. Adams’s testimony as discussed above. As we stated, we do not find counsel’s conduct was unreasonable or ineffective. Therefore, we will deny the petition.

#### ***Amendment of the Information During Trial***

Defendant asserts the trial court abused its discretion when it allowed the prosecutor to amend the information during trial to change the date from “on or about November 21, 2009,” to “on or about and between November 17th, and November 22nd, 2009.” Defendant asserts this change implicitly vouched for Ms. Cole’s testimony by making the information conform to her testimony.

There was no abuse of discretion in this case. It is well settled that “[Penal Code] [s]ection 1009 authorizes amendment of an information at any state of the proceedings provided the amendment does not change the offense charged in the original information to one not shown by the evidence taken at the preliminary examination.” (*People v. Winters* (1990) 221 Cal.App.3d 997, 1005.) Here, the change in date on the information did not change the offense charged, and was not an abuse of discretion.

***Substantial Evidence of a Deadly or Dangerous Weapon***

Defendant asserts there was insufficient evidence that he used a deadly or dangerous weapon in this case.

“When the sufficiency of the evidence is challenged on appeal we review the entire record in the light most favorable to the judgment below to determine whether the judgment is supported by evidence which is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.]” (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1603, disapproved on other grounds in *People v. Palmer* (2001) 24 Cal.4th 856, 861-866.) To be substantial, the evidence must be “of ponderable legal significance . . . [,] reasonable in nature, credible and of solid value.” (*People v. Johnson* (1980) 26 Cal.3d 557, 576; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

Defendant argues the box containing the grill, the frying pan and the flashlight were not deadly weapons to support the conviction. “As used in [Penal Code] section 245, subdivision (a)(1), 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.’ (*In re Jose R.* (1982) 137 Cal.App.3d 269, 275-276.) Some few objects, such as dirks and

blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. (*People v. Graham* (1969) 71 Cal.2d 303, 327, disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 32.) Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. 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. (*In re Jose R.*, *supra*, 137 Cal.App.3d at p. 276; see *People v. Nealis* (1991) 232 Cal.App.3d Supp. 1, 4, fn. 2 [citing California decisions holding various objects, not deadly per se, to be deadly weapons under the particular circumstances].)” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.)

Here, Ms. Cole’s testimony, coupled with the evidence of her injuries, support the conclusion that all of the three objects defendant used to beat her were deadly or dangerous weapons. Specifically, Ms. Cole testified that defendant threw the box containing the grill, and weighing approximately 20 to 30 pounds at her temple when he was standing right in front of her. Considering this evidence in the light most favorable to the judgment, as we are charged to do, we find this to be sufficient to support a conviction for assault with a deadly weapon. (See, e.g., *People v. Fierro* (1991) 1 Cal.4th 174, 251, disapproved on other grounds in *People v. Letner* (2010) 50 Cal.4th 99 [defendant striking the victim with a telephone receiver was sufficient to support a conviction for assault with a deadly weapon].)

In addition, defendant’s use of a 12-inch flashlight that contained batteries to hit Ms. Cole on the head three or four times causing a lump was sufficient to support the conviction for assault with a deadly weapon. (See, e.g., *People v.*

*Martinez* (2005) 125 Cal.App.4th 1035, 1043 [beating with a flashlight sufficient to support conviction for assault with a deadly weapon].)

Finally, defendant inflicted bruises on Ms. Cole's legs by beating her with the 12-inch frying pan. Bruising is considered great bodily injury (see, e.g., *People v. Escobar* (1992) 3 Cal.4th 740, 750), and a frying pan has been used to commit murder (see, e.g., *People v. Arcega* (1982) 32 Cal.3d 504, 524). Considering the evidence of defendant's use of the pan, as well as Ms. Cole's injuries from the attack, in the light most favorable to the judgment, we find there was substantial evidence to support the conviction for assault with a deadly weapon.

### ***Restitution Order***

Defendant argues the trial court's order that he pay restitution in the amount of \$1,571.30 directly to the victim in this case must be set aside because here is no substantial evidence to support the amount of loss. Defendant did not object to the order at the time of sentencing.

We review a restitution order for abuse of discretion. (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 992 (*Thygesen*)). "Under that standard, we are required to keep in mind that even though the trial court has broad discretion in making a restitution award, that discretion is not unlimited. While it is not required to make an order in keeping with the exact amount of loss, the trial court must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary and capricious. [Citations.]" (*Ibid.*)

A trial court will not be found to abuse its discretion merely because its order does not reflect the exact amount of the loss. (*People v. Balestra* (1999) 76 Cal.App.4th 57, 64.) The victim is not required to supply sworn proof or detailed documentation of costs and expenses. (*In re S.S.* (1995) 37 Cal.App.4th 543, 547,

fn. 2.) “When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court. [Citation.]” (*People v. Dalvito* (1997) 56 Cal.App.4th 557, 562.)

In *People v. Foster* (1993) 14 Cal.App.4th 939, 946, the court held that a property owner’s statements in a probation report about the value of her stolen property should be accepted as prima facie evidence of the value for purposes of restitution. “However, *People v. Vournazos* (1998) 69 Cal.App.4th 988, 958-959 . . . applied the substantial evidence test in concluding that a hearsay probation report was insufficient evidence upon which to base a restitution award.” (*People v. Thygesen, supra*, 69 Cal.App.4th at pp. 992-993.)

Here, the court based its decision to order the restitution amount on the prosecutor’s statement in court. This was not sufficient evidence to support the order. (*People v. Thygesen, supra*, 69 Cal.App.4th at pp. 992-993.) Therefore the matter must be remanded for a hearing to determine the amount of restitution that should be ordered.

#### ***No Contact Order***

In this case, the trial court ordered defendant to stay away from Ms. Cole pursuant to Penal Code section 136.2 at the sentencing hearing. However, Penal Code section 136.2 only applies during the pendency of trial. Therefore, the no contact order must be stricken, and the Attorney General concedes this point.

#### **DISPOSITION**

The judgment is amended, and the matter is remanded to the trial court for a restitution hearing to determine the amount of restitution that should be ordered in this case. The no contact order pursuant to Penal Code section 136.2 is stricken.

As amended, the judgment is affirmed.

The petition for writ of habeas corpus is denied.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.