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

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY UNDERDUE,

Defendant and Appellant.

H037036

(Monterey County

Super. Ct. No. SS110009)

Defendant Anthony Underdue appeals a judgment of conviction of felony domestic violence (Pen. Code, § 273.5, subd. (a)), and felony false imprisonment (Pen. Code, § 236). On appeal, defendant asserts the trial court erred by admitting seven prior incidents of domestic violence under Evidence Code section 1109.

STATEMENT OF THE FACTS AND CASE

In September 2010, defendant and Shereen Ortiz were outside a pub in Salinas. They were arguing and defendant slapped Ortiz. A witness who was standing across the street and saw the altercation called 911.

Around the same time, the owner of the pub came outside because he heard from one of his employees that someone had hit a woman. The owner saw defendant push Ortiz into a brick wall, then hold her in a “bear hug” and try to drag her down the alley. Ortiz appeared to be scared. The pub owner called 911, and told defendant to let Ortiz

go. Defendant said that Ortiz was his wife, and that the owner should mind his own business.

When Salinas police arrived at the scene, and defendant let Ortiz go and walked away. When an officer interviewed Ortiz, she saw that Ortiz had a bump on her head and was upset. Ortiz told the officer she and defendant had an on-again-off-again relationship and were not currently living together. Ortiz said she ran into defendant at a market, and defendant asked Ortiz to come with him. Ortiz said, “no,” because she thought defendant seemed agitated. Ortiz left the market and went to the pub, and defendant followed her.

When defendant and Ortiz arrived at the pub, they started arguing, and defendant head-butted Ortiz. When Ortiz refused to go with defendant down the alley, he picked her up in a bear-hug and tried to carry her. When the pub owner came out and confronted defendant, he put Ortiz down and walked away. Ortiz told the officer defendant had been violent with her three times prior to the current incident.

At trial on this case, Ortiz recanted her story that she told the police officer, and denied defendant hit her or harmed her in any way outside the pub. Ortiz claimed she was drunk, and fell on the sidewalk, hitting her head. Ortiz claimed she lied to the police officer that day, because she is on felony probation and is not allowed to consume alcohol. Ortiz said that she is an alcoholic with mental problems, which causes her to do and say things she does not remember.

During trial, the court admitted evidence of prior acts of domestic violence committed by defendant. Jane Doe Three testified that she was in a relationship with defendant from 1996 to 1998, and he was abusive with her five times. Specifically, in November 1998, defendant and Jane Doe Three argued because she would not give defendant money. Defendant hit Jane Doe Three on the head and bit her cheek. Jane Doe Three subsequently sought and obtained a restraining order against defendant in 1999.

Jane Doe Two testified she had known defendant for 12 to 13 years and they had children together. Defendant began abusing Jane Doe Two when they were breaking up in 2000 and she was pregnant with her son. Jane Doe Two could not remember details at trial, but there was an incident in 2000 when she was taken to the hospital by ambulance. Five months later, defendant confronted her in front of her house, grabbed her by the ponytail, bit her face and threatened to kill her.

The final prior incidents of domestic violence presented at trial involved Ortiz. In 2007, officers went to a motel room where Ortiz was staying and saw blood on the towels and the floor in the room. Ortiz was with a friend of hers in the room, Aldarryl Jones. Jones told the officers that Ortiz said defendant had injured her. When officers talked to Ortiz, she did not appear to be afraid, and claimed she was jumped by a group of girls. Defendant confirmed Ortiz's story. Defendant was not arrested at the time. During her interview with police regarding the current incident in 2010 that is the subject of this appeal, Ortiz told the officer she lied in 2007, and was not jumped by a group of girls. Ortiz said defendant beat her, and he received a fractured eye and nose, and had to drink from a straw for a long period of time.

The remaining incidents of violence against Ortiz were not specific, and were revealed to the police officer interviewing her for the current case. Ortiz said defendant had been violent with her on three prior occasions, and would slap or punch her, and she would end up with a black eye.

In January 2011, defendant was charged with felony domestic violence (Pen. Code, § 273.5, subd. (a)); felony false imprisonment (Pen. Code, § 236), and attempted kidnapping (Pen. Code, §§ 664/207, subd. (a)). The information further alleged defendant had two prior strike convictions (Pen. Code, § 1170.12, subd. (c)(1)), and that he had served two prior prison terms (Pen. Code, § 667.5, subd. (b)).

After a jury trial, defendant was convicted of felony domestic violence (Pen. Code, § 273.5, subd. (a)) and false imprisonment (Pen. Code, § 236). Defendant was acquitted of the attempted kidnapping charge. Defendant admitted the two strike priors, and one prison prior.

The court dismissed one of defendant's strike priors pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), and sentenced him to 10 years four months in state prison.

DISCUSSION

In this appeal, defendant asserts the trial court erred in admitting evidence of prior incidents of domestic violence. Four of the incidents were against the same victim as the present case, Ortiz, and three were against two other victims 10 to 12 years prior to the incident in this case. Defendant argues the admission of the evidence violated his right to a fair trial under the due process clauses of the Fifth and the Fourteenth Amendments. In addition, he asserts admission of the evidence was unduly prejudicial and requires reversal of the judgment under state law.

Here, the court admitted the prior incidents of domestic violence under 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.*)

If the evidence of other incidents of domestic violence is deemed admissible, the jury is permitted, but not required, to consider it as evidence that the defendant has a propensity to commit acts of domestic violence and as substantive evidence that he committed the charged offense. (CALCRIM No. 852.) The jury was so instructed in this case.

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 were extremely probative given the fact the Ortiz recanted her story at trial, and denied that defendant abused her outside the pub. Moreover, the prior incidents were not more inflammatory than the charged conduct in this case. Here, Ortiz was injured in the face, head and arms. The 2007 incident between Ortiz and defendant in the motel resulted in similar injuries of a fractured eye and nose. The 1998 incident with Jane Doe Three left her with a knot on the back of her head, and a bite on her cheek. In addition, Jane Doe Two was bit on the face and choked, injuring her neck in the 2000 incident with defendant.

We do not find the prior incidents of domestic violence admitted in this case to be remote or dissimilar to the allegations in the present case. The evidence was highly relevant given Ortiz's testimony at trial, and clearly showed a propensity to commit the crimes in this 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 at p. 637.) Admission of the evidence was not unduly prejudicial, and did not result in an unfair trial.¹

DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.

¹ Because we do not find defendant forfeited the issue of the admissibility of the prior incidents of domestic violence on appeal, we need not address defendant's argument that he was denied effective assistance of counsel.