Filed 4/24/17 P. v. Wright CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH M. WRIGHT, Defendant and Appellant.	B270650 (Los Angeles County Super. Ct. No. MA067126)

APPEAL from a judgment of the Superior Court of Los Angeles County. Daviann L. Mitchell, Judge. Affirmed.

Trenton C. Packer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

Joseph M. Wright (defendant) appeals his conviction for willful infliction of corporal injury within seven years of a previous conviction (Pen. Code, § 273.5, subd. (f)(1)).[1] Defendant contends evidence of telephone calls between him and the victim following his arrest was improperly admitted to his prejudice, and that without the admission of this evidence it was reasonably probable the jury would have found him not guilty. We affirm, finding that the trial court did not abuse its discretion in admitting this evidence, and that even if any error occurred, it was harmless.

STATEMENT OF THE CASE

Defendant was convicted of willful infliction of corporal injury within seven years of a previous conviction (§ 273.5, subd. (f)(1)) for punching his girlfriend Hilda C. (the Victim) in the face. The jury found both that he had battered his girlfriend in October 2015 and that he had a prior misdemeanor domestic violence conviction within seven years of the 2015 battery. The trial court sentenced defendant to a term of five years in state prison. Defendant filed a timely notice of appeal.

STATEMENT OF FACTS

A. Prosecution Evidence

On the evening of October 3, 2015, the Victim called 911 from the Regal Lodge in Lancaster, California, to report that defendant, her ex-boyfriend, had punched her and that she thought her nose might be broken. She also reported she "had to climb out the window" of the motel room in order to make the 911 phone call. Deputy Anderson, the Los Angeles County Sheriff's deputy who responded to the call, arrived to find the Victim upset, with swelling on the left side of her face. The Victim told Deputy Anderson it was

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1 All subsequent undesignated references are to the Penal Code.

defendant who had injured her.[2] Two photographs of her face which Deputy Anderson took then were admitted as evidence; they showed both swelling and bruising on the cheekbone below the Victim's left eye and to the left of her nose.

Defendant was arrested two days later on October 5, 2015, in the presence of the Victim. At that time, the Victim told Los Angeles County Sheriff's Deputy Carter that defendant had hit her several times during the October 3 incident. Deputy Carter took three photographs of the Victim's face which showed a large contusion above and below the left eye and slight swelling to the left side of the Victim's nose. These photos were also admitted at trial. Deputy Carter interviewed defendant on October 5, after obtaining a waiver by defendant of his constitutional rights, recording the interview on her body camera. Defendant told Deputy Carter he and the Victim had "got[ten] into it" at the Regal Lodge, but said this only meant they had had "an argument." He claimed unidentified other men had caused the Victim's injuries.

Defendant's former girlfriend testified at trial that in 2012 defendant had hit her with his fists and with an iron, causing injuries, including causing her to "leak" (bleed) from her forehead. The former girlfriend also testified that in 2001 defendant had become angry and hit her in the face several times and pulled her hair out. The 2012 events resulted in defendant's conviction for misdemeanor domestic violence (§ 273.5, subd. (a)) based on his plea of guilty to that charge.

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[2] The Victim did not testify at trial. Her statements were admitted as spontaneous utterances through the testimony of the sheriff's deputy who responded to the scene and interviewed her. (Evid. Code, § 1240.)

B. Defense Evidence

Defendant testified he dated the Victim, went with her to her room at the Regal Motel on the morning of October 3, 2015, then talked to two men outside of a nearby room, which made the Victim upset, talked to the men again, later returning to room with one of the men. At this time, the Victim was still angry defendant was not spending time with her.

Defendant then left and walked to a nearby storage facility. When he returned, the Victim was outside the motel room talking to the men defendant had been speaking with previously. Defendant testified he got angry, and at that point he packed his things and left, returning to the storage facility where his car was parked. The Victim called him and accused him of being unfaithful. Next, he went to McDonald's to use the free WiFi, and then walked back to the storage facility, where he got a blanket and went to sleep in a park. He denied assaulting the Victim at any time and denied being with Victim when she called 911 on October 3.

Defendant testified the Victim called him throughout the night of October 3, and at one point that night she told him she had been assaulted by one or more of the men with whom they had each spoken earlier that evening. He also testified he slept with the Victim in the motel room on the night of October 4, 2015, and was present with her on the morning of October 5, 2015, the day she again called the police. He had never been violent with the Victim, and had no intention of restarting their relationship after this case was over. He had not talked with or seen the Victim since the day of his arrest.

Defendant admitted his two prior domestic violence convictions, but denied assaulting the victim of those crimes (his former girlfriend) at any other time.

C. Rebuttal Evidence

To impeach defendant's claim that he had not spoken with the Victim since his arrest, the prosecution played an excerpt of (and introduced a partial transcript of) a recorded jailhouse telephone call placed on November 5, 2015, which was made using defendant's inmate number, in which the male voice described himself to the computer telephone system as "Davon" in order to place the call. Deputy Carter testified she recognized the voices on this call as those of defendant and the Victim.

The prosecution also introduced a prison telephone log recording 67 telephone calls placed using various inmate numbers to the same telephone number between November 3, 2015, and the day of trial, January 7, 2016. The deputy who testified concerning this log stated that it is common for inmates to use other inmates' booking numbers when making calls to evade being monitored within the jail (and being charged for these calls). This witness did not listen to the recordings of any of the calls.

CONTENTION

Defendant's contention on appeal is that "[t]he trial court erred when it admitted evidence of jail phone calls despite insufficient foundation" that defendant made either the telephone call the recording of which was played for the jury, or any of the other 66 calls in the call log that was also admitted into evidence. With respect to the tape recording, defendant argues there was only "scant evidence" to establish the identity of the voices on this recording. He also argues there was insufficient evidence to support admission of the call log based on the different inmate numbers listed and the absence of any evidence of the contents of any of these 67 calls.[3]

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[3] Defendant asserts at one point in his argument than no one whose voice may be heard on this call testified at trial. That is clearly an editing

DISCUSSION

A. Applicable Law

The parties agree that rulings on admissibility of evidence are reviewed for abuse of discretion. (*People v. Clair* (1992) 2 Cal.4th 629, 655; *People v. Gordon* (1990) 50 Cal.3d 1223, 1239.)

B. Additional Facts

Out of the presence of the jury, the prosecutor advised the court and defendant's counsel that he intended to introduce as rebuttal to defendant's testimony that defendant had not spoken to the Victim since his arrest the tape recording of the telephone call made by defendant from jail to the Victim. The prosecutor explained that this recording would be authenticated by Deputy Carter. He also advised that he would seek introduction of a telephone log of 67 telephone calls (including the one to be played), offering that these calls were made by defendant, using his inmate identification number, to the Victim. Defendant's trial counsel advised the court he would not stipulate that the voices on the tape were those of defendant and the Victim, or that any such recording existed; nor would he concede that the other calls had been made by defendant. In the ensuing discussion, the court advised counsel of how the testimony would proceed to potentially authenticate the evidence to be offered by the prosecution, including the expectation that the prosecution would play a "snippet" of the taped telephone call and that a prosecution witness (the court was advised it would be Deputy Carter who would testify and identify the voices on the recorded

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error as earlier in the same argument, defendant points out that he testified at trial and thus his voice was heard by the jury. We discuss his contention based on the actual circumstance that he did testify at trial and thus that the jury did have an opportunity to hear his voice and compare it to the voice on the recording which the jury heard.

call) could potentially provide the authentication. Defense counsel expressed no objection to this procedure, but did advise that he would not stipulate to the voice identifications, stating, "They can prove it to the jury. I'm not stipulating."

When the jurors returned to the courtroom, examination of defendant concluded, the defense rested, and the court excused the jury so that it and the lawyers could prepare for rebuttal. Outside the presence of the jury, the court advised counsel that the next matter would be to put Deputy Carter on the stand to authenticate the telephone call. Trial resumed and Deputy Carter identified the voices on the tape recording. A sheriff's detective testified concerning the telephone log. Defendant's counsel cross-examined each witness, making no objection to any of the testimony. When all testimony was concluded and the court asked if the exhibits containing the partial transcript of the telephone call, which Deputy Carter had testified was between defendant and the Victim, and the jailhouse telephone call log were to be admitted, the defense responded, "No objection." The court then admitted both exhibits.

C. The Trial Court Did Not Err by Admitting This Evidence

Although defendant argues he was prejudiced by the admission of this evidence, he fails to acknowledge that he made no objection at trial to any of the testimony offered by the prosecution to which he now objects.

The failure to make this objection at trial waives the issue on appeal. (Evid. Code, § 353; *People v. Barnett* (1998) 17 Cal.4th 1044, 1138.) Assuming arguendo the issue had not been waived, admission of the now challenged evidence was not erroneous. Defendant correctly cites Evidence Code section 403 as the statute which governs our analysis, viz., when the

preliminary fact is "whether [the] person made the statement" sought to be authenticated. (Evid. Code, § 403, subd. (a)(4).)

When a matter is governed by this evidentiary provision, the role of the trial judge is limited. As explained in the Assembly Committee on Judiciary Comment to this statute: "At times, the judge must admit the proffered evidence if there is evidence sufficient to sustain a finding of the preliminary fact, and the jury must finally decide whether the preliminary fact exists. [Citation.] Section 403 covers those situations in which the judge is required to admit the proffered evidence upon the introduction of evidence sufficient to sustain a finding of the preliminary fact." (Assem. Com. on Judiciary, com. reprinted at 29B pt. 1B West's Ann. Evid. Code (2011 ed.) foll. § 403, p. 18.)

With respect to the voice identification made by Deputy Carter, the trial judge did not err. The prosecutor advised the court and defendant's counsel of the nature of the evidence which he intended to adduce, and the trial judge made a determination that there was a sufficient foundation for the jury to hear this evidence. The prosecutor presented evidence sufficient to sustain the required finding for the question of authentication of the voices on the tape to be presented to the jury. The trial judge articulated this conclusion before the jury was returned to the courtroom to hear the tape played. Pursuant to this statute, it was for the jury to make the final determination of whose voices were on the tape recording. There was no abuse of discretion.

With respect to the telephone log of the 67 calls (including the taped call played for the jurors), the prosecutor advised the court and defendant's counsel that the witness to be called would be able to establish how often defendant had called the Victim from the jail through the evidence of the number of calls made to her telephone number and the inmate identification

number attributed to each of those calls. That was also a sufficient proffer. The subsequent testimony included that the telephone number called these 66 additional times was the same as the number at which defendant had telephoned the Victim.

Defendant points instead to the circumstance that several different inmate identification numbers were logged as having made these calls. The question presented is whether the *ultimate testimony*, which is argued to be unpersuasive, can be used to challenge the *preliminary determination* by the trial judge to allow this witness to testify. We do not think so; the decision must be made based on the facts before the court at the time the decision to allow the witness to testify is made. This is the plain meaning of Evidence Code section 403 as amplified by the official comment. What defendant's contention points out is the distinction that must be made between the contents of the initial proffer, on the one hand, and the full evidentiary record on the particular point once that evidence is presented, on the other. That the latter turns out to be unpersuasive, if it does, is a circumstance distinct from whether the initial proffer was sufficient to meet the Evidence Code section 403 threshold. In this case, the initial proffer was sufficient.

D. Any Error in Admitting the Challenged Evidence Was Harmless

"Under California law, error in a criminal case is considered harmless unless the defendant can show it resulted in a 'miscarriage of justice.' (Cal. Const., art. VI, § 13; *People v. Archerd* (1970) 3 Cal.3d 615, 643.) This means the defendant must demonstrate that without the error 'it is reasonably probable a result more favorable' to the defendant would have been reached. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)" (*People v. Whitt* (1990) 51 Cal.3d 620, 671.)

In the present case, even assuming arguendo that admission of the evidence of identity of the voices on the taped telephone call and the jailhouse telephone log was error, there was overwhelming evidence of defendant's guilt. The jury heard the tape recording of the 911 call in which the Victim reported the battery shortly after it occurred; the testimony of the responding officer as to what the Victim excitedly told him on his arrival at the crime scene, including that defendant was the person who had hit her. The deputy observed the Victim's still-agitated state as she recounted the circumstances of the crime. This deputy testified about his own contemporaneous observations of the Victim's injuries. Photographs taken by the responding officer on the day of the battery, and additional photographs taken two days later, were admitted and show the progression of the bruising and swelling to the Victim's face resulting from the battery. There was also testimony, recorded on an officer's body camera, of defendant's own admission following his *Miranda* waiver that he and the Victim "got into it" on the day of the offense.[4] There was no dispute that defendant had suffered a prior misdemeanor domestic violence conviction within seven years. Thus, setting aside the evidence defendant contends should not be admitted, there remained overwhelming evidence of his commission of the offense charged.

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[4] The victim of the events leading to the prior domestic violence conviction also testified as to those events, with respect to the prior conviction for domestic violence.

DISPOSITION

The judgment is affirmed.

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GOODMAN, J.*

We concur:

CHAVEZ, J., Acting P.J.

HOFFSTADT, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.