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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL CARLOS GUDINO,

Defendant and Appellant.

B271693

(Los Angeles County
Super. Ct. No. VA133041)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Higa, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.

The jury convicted defendant and appellant Manuel Carlos Gudino in count 1 of first degree murder (Pen. Code, § 187, subd. (a))¹ and in count 2 of possession of a firearm by a convicted felon (§ 29800, subd. (a)(1)). The jury also found true the allegation that defendant had personally and intentionally fired a handgun in count 1 resulting in death or great bodily injury. (§ 12022.53, subd. (d).) Defendant admitted he suffered a prior conviction within the meaning of the three strikes law. (§§ 1170.12, subds. (a)–(d), 667, subds. (b)–(i).)

The court granted defendant’s motion to strike his prior conviction for purposes of three strikes sentencing. It sentenced defendant to 25 years to life in count 1, plus a consecutive term of 25 years to life for the use of a firearm. The court imposed a concurrent term of two years in count 2.

Defendant contends the trial court erred by refusing to instruct the jury on voluntary manslaughter, refusing to instruct that provocation may decrease first degree murder

¹ All further statutory references are to the Penal Code unless otherwise indicated.

to murder in the second degree, and admitting evidence of defendant's prior acts of intimate partner battery.

We affirm the judgment.

FACTS

Defendant lived across the street from his sister, Sandra Gudino,² the victim, Jose Gonzalez, and their two children. Defendant lived with his and Sandra's parents and Sandra's two children from a previous relationship.

Sandra was getting ready to leave for work on November 27, 2013, at approximately 5:30 a.m. She and Gonzalez got into an argument over who would be using Sandra's car that day. The argument continued as they went outside. Gonzalez threatened to break the car window if Sandra tried to leave, and then got on top of the car to prevent her from driving away. Sandra called 911.

Sandra and Gonzalez argued throughout the 911 call. Gonzalez accused Sandra of trying to run him over with the car the day before. He spoke to the 911 operator at one point and stated that he was upset about what happened the day before, but that he was not going to hit Sandra. He was going to get Sandra's mother from the house across the street. He told the operators Sandra's mother witnessed Sandra trying to hit him with the car. Gonzalez wanted

² Because defendant and Sandra Gudino share the same last name, we refer to her as Sandra throughout this opinion.

Sandra's mother to tell the officers what she had witnessed. He told Sandra she would be arrested.

Sandra testified that defendant came outside at about this point in the call. Gonzalez told defendant, "Your sister dragged me down the fucking street."³ Sandra saw defendant leave the front porch and walk down the stairs. His demeanor was calm. Sandra heard gunshots. She saw Gonzalez walking back to her. She ran toward Gonzalez, yelling "No, no, Manuel! No! Manuel! Stop! Stop! No Manuel, don't!" Defendant walked past Sandra and said, "Motherfucker." "Fuck him." "Shut the fuck up." Sandra continued to scream her brother's name and yell "No!" She shouted for someone to call an ambulance. The 911 operator heard gunshots in the background and told another operator to "upgrade" the call and send an ambulance.

Los Angeles Sheriff's Department Deputies Carlos Mejia and Christopher Oakley were dispatched to the scene. They found Gonzalez laying on the ground, covered in blood. There were two bullet casings lying next to his feet. Sandra was administering CPR to Gonzalez. She told the deputies that Gonzalez had been shot, she did not see the shooter, but she saw a burgundy car drive past just after the shots were fired. Defendant was standing nearby. He reported that someone in a burgundy vehicle shot Gonzalez.

³ The recorded 911 call was played for the jury. All quotes cited in the facts are contained in the transcript of the audio recording and were verified by Sandra at trial.

Deputy Oakley observed that Sandra and defendant's version of events was inconsistent with the placement of the bullet casings, which would have been in the street if Gonzalez had been shot from a moving car. The deputy reviewed the recording of the 911 call. In it, Sandra could be heard shouting: "Manuel, no. No, Manuel." Defendant had been identified as Manuel by a family the deputies spoke to at the scene. The deputies arrested defendant soon after Deputy Oakley reviewed the call.

Gonzalez died of a gunshot wound to the front left shoulder, which perforated his aorta and left lung, and exited on the right side of his back. He sustained a second, non-fatal gunshot wound to the chest.

Defendant confessed to the murder in a recorded conversation with an undercover informant. He confided that he wiped the bullets clean of fingerprints before loading the gun. Defendant said his "conscience [was] clean." When the informant asked if he had killed Gonzalez in "the heat of passion," he answered "Nah." "Just a disrespect, homie, you know? I don't tolerate that."

At trial, Sandra testified that she did not see the shooting or a gun. She turned to look at Gonzalez because she heard gunshots. Gonzalez did not hit her during the argument or put his hands on her in any way. He had a spray can in his hand, but no weapon.

On cross-examination, Sandra testified that, between 2009 and Gonzalez's death, he had physically abused her on about four occasions, giving her black eyes, a bloody lip, and

knocking out one of her teeth. Defendant and Sandra saw each other approximately four times a week during the period when Gonzalez was abusing her. The injuries Sandra suffered were visible, but Sandra concealed their cause from her family, including defendant. She would rush inside her house so that her family would not see her.

In 2009, defendant and his father confronted Gonzalez after he choked Sandra for putting mustard on his sandwich. Gonzalez pushed defendant's father, which started a physical altercation between defendant and Gonzalez. The fight ended when defendant's mother shouted for the men to stop. Neither man suffered visible injury. Sandra had "some marks" on her neck. Defendant and Gonzalez were able to get back on "good terms" following the incident. Outside of this single incident, Sandra had never seen defendant and Gonzalez argue or get into a physical altercation. They did not appear to have any problems with each other.

Defendant's former wife testified that defendant had physically abused her on one occasion in 2009. After calling her cell phone multiple times without response, defendant tried to drive his car into his ex-wife's vehicle, and then followed her to their babysitter's house. He chased his ex-wife, pulled her hair, and banged her head on a dresser multiple times before a neighbor physically intervened.

DISCUSSION

Provocation Instructions

Defendant argues that the trial court erred in refusing to instruct the jury regarding provocation—specifically, in refusing to instruct on (1) voluntary manslaughter, and (2) provocation as a basis for reducing first degree murder to second degree murder, as described in CALJIC No. 8.73. We conclude that the trial court did not err, but that regardless, the evidence against defendant was so overwhelming that he cannot establish prejudice.

“‘[T]he trial court normally must, even in the absence of a request, instruct on general principles of law that are closely and openly connected to the facts and that are necessary for the jury’s understanding of the case.’ (*People v. Carter* (2003) 30 Cal.4th 1166, 1219.) The obligation to instruct includes giving instructions on lesser-included offenses when warranted by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)” (*People v. Valentine* (2006) 143 Cal.App.4th 1383, 1386–1387.) However, the trial court has a “correlative duty to refrain from instructing on irrelevant and confusing principles of law” (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250.)

“A pinpoint instruction ‘relate[s] particular facts to a legal issue in the case or “pinpoint[s]” the crux of a defendant’s case, such as mistaken identification or alibi.’ (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) A trial court

must give a pinpoint instruction, even when requested, only if it is supported by substantial evidence. (*People v. Marshall* (1997) 15 Cal.4th 1, 39.)” (*People v. Ward* (2005) 36 Cal.4th 186, 214–215.) We independently review whether an instruction should have been given. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

“Murder is the unlawful killing of a human being with malice aforethought. (See § 187, subd. (a).) A murder, however, may be reduced to voluntary manslaughter if the victim engaged in provocative conduct that would cause an ordinary person with an average disposition to act rashly or without due deliberation and reflection.’ [Citation.] [¶] Heat of passion has both objective and subjective components. Objectively, the victim’s conduct must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.] . . . [¶] Subjectively, ‘the accused must be shown to have killed while under “the actual influence of a strong passion” induced by such provocation. [Citation.]” (*People v. Enraca* (2012) 53 Cal.4th 735, 758–759 (*Enraca*).)

“[E]ven when provocation is inadequate to negate the existence of malice so as to reduce the offense to manslaughter, the trial court must nonetheless instruct . . . on second degree murder if there is evidence from which the jury could find that the defendant’s decision to kill was a direct and immediate response to the provocation such that the defendant acted without premeditation and

deliberation.” (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1705 (*Fenenbock*).)

“Generally, it is a question of fact for the jury whether the circumstances were sufficient to arouse the passions of the ordinarily reasonable person. [Citations.] However, where the provocation is so slight or so severe that reasonable jurors could not differ on the issue of adequacy, then the court may resolve the question. [Citations.]” (*Fenenbock, supra*, 46 Cal.App.4th at p. 1705.)

There was not substantial evidence of provocation in this case. Sandra testified that there was only one occasion on which defendant witnessed Gonzalez physically harming her, and that incident took place in 2009, four years before the murder. She testified that afterwards defendant and Gonzalez were able to get back on “good terms,” and did not appear to have any problems with each other. Gonzalez and Sandra were engaged in a verbal altercation when defendant came outside on the day of the murder. Gonzalez never harmed Sandra or put his hands on her in any way. Defendant’s demeanor was calm as he walked down the porch stairs. He did not say anything to Gonzalez, and Gonzalez did not initiate an argument with him. Defendant walked straight over to Gonzalez and shot him twice in the chest area. There is simply no evidence that Gonzalez did anything that could have “““cause[d] [an] ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.’ [Citations.]” [Citation.]’

[Citation.]” (*Enraca, supra*, 53 Cal.4th at p. 759.) Nor is there any evidence that defendant was subjectively inflamed or reacting without thought.

In any event, defendant has not established prejudice. The trial court instructed the jury on first and second degree murder under CALJIC No. 8.20. “If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder in the first degree.” The jury was admonished that “a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.” (CALJIC No. 8.20.) The trial court also instructed: “If any juror is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether the murder was of the first or of the second degree, that juror must give defendant the benefit of that doubt and find that the murder is of the second degree.” (CALJIC No. 8.71.) We “presume ‘that jurors understand and follow the court’s instructions.’ [Citation.]” (*People v. Wilson* (2008) 44 Cal.4th 758, 803.) Here, the jurors were instructed that if defendant did not act with the “clear, deliberate intent” to kill Gonzalez “formed upon pre-existing reflection,” they must find him guilty of second degree murder. (CALJIC No. 8.20.) The jury

returned a verdict of murder in the first degree, clearly signaling that it believed, unanimously and beyond a reasonable doubt, that defendant's actions were not "a mere unconsidered and rash impulse." (*Ibid.*)

Moreover, the evidence supporting defendant's conviction for first degree murder was overwhelming. Defendant spoke to the confidential informant at length about his commission of the murder. He said that he wiped the bullets clean with a tee shirt before loading the gun. When the informant asked if he acted in the heat of passion, he brushed off the suggestion and answered that he shot Gonzalez because Gonzalez was being disrespectful and he could not tolerate the behavior. Defendant was composed when he walked directly over to Gonzalez and shot him not once, but twice in the chest. The evidence indicates that defendant made a considered decision to kill Gonzalez, and then carried out his plan in a calculated manner.

Prior Acts of Intimate Partner Battery

"Where a person's character or a trait of his character is at issue it may be proven by any permissible evidence including opinion testimony, evidence of reputation, or evidence of a specific instance of the person's conduct. (Evid. Code, § 1100.) Evidence of a person's character, however, is generally not admissible to prove his conduct on a specific occasion. (Evid. Code, § 1101, subd. (a).) There are statutory exceptions to this general rule. A defendant may

introduce evidence of a victim's character or a trait of his character to prov[e] his conduct on a specific occasion (except as limited in sex offense cases). (Evid. Code, § 1103, subd. (a)(1).)" (*People v. Clark* (1982) 130 Cal.App.3d 371, 383–384, overruled on another ground by *People v. Blakeley* (2000) 23 Cal.4th 82, 92–93.) "[I]f, as in the present case, a defendant offers evidence to establish that the victim was a violent person, thereby inviting the jury to infer that the victim acted violently during the events in question, then the prosecution is permitted to introduce evidence demonstrating that . . . the defendant was a violent person, from which the jury might infer it was the defendant who acted violently." (*People v. Fuiava* (2012) 53 Cal.4th 622, 696.)

"[Evidence Code] section 352 permits [the trial court] to exclude evidence if in the court's discretion 'its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' Like all proffered evidence, character evidence is subject to exclusion under that section. [Citation.]" (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448.)

We review the trial court's ruling admitting evidence under Evidence Code sections 1103 and 352 for abuse of discretion. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118 ["When a trial court overrules a defendant's objection[] that evidence is . . . inadmissible character evidence, we review

the ruling[] for abuse of discretion”]; *People v. Cox* (2003) 30 Cal.4th 916, 955 [“An appellate court applies the abuse of discretion standard to review any ruling by a trial court on the admissibility of the evidence”].) Under this standard of review, “as long as there exists a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside [Citations.]” (*People v. Clark* (1992) 3 Cal.4th 41, 111, quoting *People v. Crandell* (1988) 46 Cal.3d 833, 836.)

Prior to presentation of evidence, the defense informed the prosecution that it intended to elicit testimony from Sandra regarding Gonzalez’s past physical abuse of her. The prosecutor then notified the defense that if it elicited such testimony, the prosecution would move to have evidence of defendant’s prior acts of violence against his ex-wife, and his assault with a deadly weapon against a peace officer admitted in response, pursuant to Evidence Code section 1103, subdivision (b).⁴

⁴ Evidence Code, section 1103, subdivision (b), provides: “In a criminal action, evidence of the defendant’s character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible . . . if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence”

The court held a hearing to determine whether the prosecution would be permitted to present evidence of defendant's prior acts of violence. Defense counsel argued that such evidence was inadmissible under Evidence Code section 1103, because the defense sought to present evidence of Gonzalez's prior acts for the purpose of demonstrating defendant's state of mind at the time of the shooting, not to demonstrate that Gonzalez acted in conformance with those acts on the day of the murder. Counsel also argued that defendant's prior acts had no relevance and should be excluded under Evidence Code section 352.

The prosecutor noted that he did not think "you could unwind the character evidence if you are bringing in character evidence for another purpose." The court agreed and stated that it was "looking at it that way." The court tabled the matter of admission of defendant's prior violent acts to consider additional legal precedent on the issue.

Sandra testified concerning Gonzalez's acts of violence against her on cross-examination. Afterwards, the parties were heard on the issue of defendant's prior violent acts a second time. Defense counsel repeated his earlier arguments. The prosecutor argued that the defense had not demonstrated defendant had knowledge of more than the one incident involving defendant in 2009. Absent a connection, the evidence served only to tarnish Gonzalez's character. The prosecutor asserted that the defense's use of the prior acts to demonstrate defendant's mindset could not be separated from its effect of demonstrating that Gonzalez

was acting in conformance with his prior acts of violence. The court admitted the evidence of defendant's prior acts of violence against his ex-wife as relevant, but excluded evidence of his assault with a deadly weapon on a peace officer.⁵

Defendant contends the trial court abused its discretion in admitting the evidence of his prior act of violence under Evidence Code section 1103, subdivision (b), because the defense sought to admit evidence of Gonzalez's prior acts only for the purpose of establishing defendant's state of mind, and not for the purpose of showing that Gonzalez acted in conformance with his prior conduct on the day of the murder. He asserts the evidence supports the defense theory that "Gonzalez had a *history* of abusing [defendant's] sister, and that his *history of abuse* provoked

⁵ Defendant suggests that the trial court did not properly analyze admission of the evidence under Evidence Code section 352. The court is not required to perform an explicit on-the-record analysis. All that is required is that the record, as a whole, shows the court was aware of the requirement that it weigh probity and prejudice and in fact did so. (*People v. Mendoza* (2000) 24 Cal.4th 130, 178; *People v. Riel* (2000) 22 Cal.4th 1153, 1187–1188.) We conclude that the trial court did so here. The court elicited details of both offenses and determined that defendant's physical attack on his wife was relevant, and that his attempt to back over a peace officer with his car during the same incident was not. The court's consideration of the probative value of the incidents and their potential prejudicial effect is implicit in its decision.

[defendant] into killing [] Gonzalez.” This argument lacks merit.

To reduce first degree murder to second degree or murder to manslaughter, the defendant must show that he acted under the “direct and immediate” influence of provocation. (*Fenenbock, supra*, 46 Cal.App.4th at p. 1705.) Provocation has also been found sufficient where “taunts directed to [defendant] and other conduct, ‘support[] a finding that defendant killed in wild desperation induced by . . . long continued provocatory conduct.’ ([*People v. Borchers* (1958)] 50 Cal.2d [321,] 329.)” (*People v. Berry* (1976) 18 Cal.3d 509, 515.)

The only incident defendant was aware of occurred four years before the murder and did not result in serious injury to Sandra. Afterwards, defendant and Gonzalez resumed their prior cordial relationship and appeared to get along. Evidence of a single incident that occurred four years earlier is not an adequate basis for demonstrating either direct and immediate provocation or long continued provocatory conduct. Thus, Sandra’s testimony as to this one event was not relevant to defendant’s state of mind. Moreover, Sandra testified to numerous incidents of violence that had no evidentiary connection to defendant at all. The evidence of those events was purely inflammatory. Sandra’s testimony on these prior acts tended to demonstrate that Gonzalez was the kind of person who beat and injured his partner regularly, and that he was acting in conformance with his prior acts of violence on the day of the murder. It showed

the victim's bad character, not the defendant's state of mind. The trial court did not err in allowing the prosecutor to introduce evidence of defendant's own violent acts under Evidence Code section 1103, subdivision (b).⁶

Alternatively, defendant argues the court abused its discretion because the evidence was more prejudicial than probative under Evidence Code section 352. We disagree. Evidence is admissible under Evidence Code section 1103, subdivision (b), for the purpose of showing the defendant's violent character. Defendant's ex-wife's testimony that defendant tried to cause a car accident, chased her and then beat her head against a dresser until physically stopped by another person because she ignored his phone calls tends to show that defendant had a violent temper out of proportion to the perceived "provocation" and that he caused serious injury as a result. It is highly probative of his behavior in this case, where defendant displayed a violent reaction to a verbal argument in which he was not personally involved. The trial court did not abuse its discretion by admitting the prior acts evidence under Evidence Code section 352.

⁶ Prior to Sandra's testimony, the trial court indicated that it viewed Gonzalez's prior acts of violence as character evidence, which was inextricable from any other purpose the evidence may have properly served. If defense counsel had wished to obtain a ruling that the evidence was solely admissible for the purpose of demonstrating his state of mind, he had the opportunity to do so prior to cross-examining Sandra and opening the door to rebuttal character evidence.

Finally, even if admission of defendant's prior acts of violence was error, any error would be harmless in light of the overwhelming evidence of defendant's guilt, as discussed above.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P.J.

KIN, J.*

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