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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DARREN MOORE,

Defendant and Appellant.

2d Crim. No. B271051  
(Super. Ct. No. BA432280)  
(Los Angeles County)

A jury convicted Darren Moore of battery causing serious bodily injury (Pen. Code, § 243, subd. (d)), assault with force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(4)), and attempting to dissuade a witness (Pen. Code, § 136.1, subd. (a)(2)). The jury also found true an allegation that Moore personally inflicted great bodily injury on his victim (Pen. Code, § 12022.7, subd. (a)). During subsequent proceedings, the trial court found true allegations that Moore had two prior strike convictions (Pen. Code, § 667, subd. (a)(1)). It sentenced him to concurrent sentences of 25 years to life in state prison on the assault and dissuasion charges, and stayed sentencing on the

battery charge pursuant to Penal Code section 654. The court also imposed a three-year enhancement on the great bodily injury allegation and five-year enhancements on each of the prior convictions.

Moore contends that the judgment should be reversed because the trial court erroneously admitted a cell phone recording of two unidentified voices discussing the assault. We affirm.

### BACKGROUND

In December 2014, Moore boarded a Los Angeles bus with a female companion and small child. They moved to the back of the bus, and placed their stroller and baby carrier in front of the bus's rear door. Moore announced, "Nobody touch my door, this is my door." When the bus arrived at the next stop, people had to walk to the front of the bus to exit. A man in the back asked Moore if he could exit through the rear door. Moore repeated that it was his door and told the man not to touch it. Moore also told the man not to touch his daughter. He then grabbed the man's shirt, pushed him onto a seat, and started to punch him. He pushed the man out the back door. The man fell onto the sidewalk and blacked out.

A crowd gathered around the victim outside the bus. Someone in the crowd flagged down a police officer. The officer tended to the victim as several members of the crowd tried to speak to the officer. Moore told them to "shut the fuck up" and said to the officer that the victim had moved his child while they were on the bus.

At trial, Moore's female companion denied that he told the crowd to shut up, and reiterated Moore's claim that the victim touched the child. The bus driver testified that Moore

punched and kicked the victim and pushed him onto the sidewalk.

The bus's surveillance cameras and a cell phone video captured Moore's assault. The cell phone recorded this exchange between two unidentified voices<sup>1</sup>:

“[Declarant 1]: Where police?

“[Declarant 2]: Such angry man.

“[Declarant 1]: Someone needs to arrest that wretch.

[¶]

“[Declarant 1]: Hey, don't let him leave! Let's not let him leave.

“[Declarant 2]: No, there he goes. He leaves.”

When the People sought to introduce the cell phone video at trial, Moore complained that it would be “inappropriate to have this heckling crowd giving their [*sic*] opinion as to who should get arrested and what he did or didn't do.” The trial court admitted the recorded statements as spontaneous statements. (Evid. Code, § 1240.)<sup>2</sup>

## DISCUSSION

Moore first contends that the trial court erroneously admitted the recorded statements because the statements do not qualify under the spontaneous statement exception to the hearsay rule. (§ 1240.) We disagree.

“The crucial element in determining whether an out-of-court statement is admissible as a spontaneous declaration is

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<sup>1</sup> The statements were translated from Spanish to English.

<sup>2</sup> All further unspecified statutory references are to the Evidence Code.

the mental state of the speaker.” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 811.) Accordingly, a spontaneous statement is admissible if: (1) there was “some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting”; (2) the utterance was made before there was time to “contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance”; and (3) the utterance relates to “the circumstance of the occurrence preceding it.” (*People v. Poggi* (1988) 45 Cal.3d 306, 318, citations omitted.) Whether these requirements are met is a question of fact. (*People v. Smith* (2007) 40 Cal.4th 483, 519.)

The trial court properly admitted the recorded statements under section 1240. Moore’s assault was an event startling enough to cause nervous excitement. The declarants made their statements just seconds later. And their statements related to Moore and his assault. The requirements of section 1240 were met.

Moore claims that it was impossible for the trial court to determine the speakers’ mental states because it did not know their identities or whether they observed the assault. This claim is unpersuasive. Section 1240 does not require identification of the declarant. (*People v. Anthony O.* (1992) 5 Cal.App.4th 428, 436.) Rather, all that is required is a “persuasive inference” that the declarant witnessed the event to which his or her statement relates. (*Ungefug v. D’Ambrosia* (1967) 250 Cal.App.2d 61, 68.) The declarants’ statements about Moore being angry and needing to be arrested were made seconds after the assault, while Moore was still shouting. One declarant says they should not let Moore leave, and the other says that Moore is, in fact, leaving. The

congruence of the declarants' statements and the action shown on the video supports the reasonable inference that they observed the assault.

Moore next argues that the trial court should have excluded the recorded statements as inadmissible opinion or character evidence. We again disagree.

Moore forfeited both arguments because he did not object to the admission of the recording on these grounds during the trial. (*People v. Doolin* (2009) 45 Cal.4th 390, 437 (*Doolin*) [character evidence]; *People v. Chatman* (2006) 38 Cal.4th 344, 397 [opinion evidence].) And we would reject Moore's claims even if he had lodged proper objections. Lay opinion testimony is admissible if the opinion is "[r]ationally based on the perception of the witness" and "[h]elpful to a clear understanding of [the witness's] testimony." (§ 800.) Moore claims that the first of these requirements is unmet because it is unknown what the declarants observed. But what a witness observed can be shown by circumstantial evidence and the reasonable inferences drawn from it. (*People v. Hamilton* (2009) 45 Cal.4th 863, 929.) Here, the circumstantial evidence supports a finding that the declarants observed Moore's assault. The trial court did not admit improper opinion evidence.

Nor did the trial court admit improper character evidence. Evidence of a person's character is "inadmissible when offered to prove his or her conduct on a specified occasion." (§ 1101, subd. (a).) Evidence is admissible, however, to help the jury assess witness credibility. (*Id.*, subd. (c).) The declarants' statements that Moore was "angry" and a "wretch" helped the jury to assess the credibility of Moore's female companion (who

testified that he did not shout at the crowd) and the People's witnesses (who testified that he did).

Moore next claims that, even if the recorded statements were admissible, the trial court should have sustained his objection under section 352. We reject this claim.

"The court in its discretion may exclude evidence if 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." (§ 352.) Evidence is probative if it helps to establish or negate the credibility of a witness. (*Doolin, supra*, 45 Cal.4th at pp. 438-439.) Evidence is unduly prejudicial if it "tends to evoke an emotional bias against the defendant as an individual and . . . has very little effect on the issues." (*People v. Karis* (1988) 46 Cal.3d 612, 638, citation omitted.) The trial court has broad discretion in balancing these factors. (*People v. Lewis* (2001) 26 Cal.4th 334, 374.)

The trial court did not abuse its discretion when it admitted the recorded statements. The statements tended to show that Moore was the aggressor, which negated his companion's claim that he was defending his child. They also bolstered the credibility of the victim, bus driver, and police officer who testified that Moore acted aggressively. Any emotional bias the statements might have evoked against Moore was minor as compared to the video evidence of the assault. The trial court properly balanced these factors when it admitted the statements.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Anne Harwood Egerton, Judge  
Superior Court County of Los Angeles

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