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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ELBERT EUGENE WARREN, Defendant and Appellant.	2d Crim. No. B230028 (Super. Ct. No. 2010006608) (Ventura County)

Elbert Eugene Warren appeals his conviction, by jury, of dissuading a witness, Keshona Espinoza, from testifying. (Pen. Code, § 136.1, subd. (a)(1).)[1] The trial court sentenced him, as a third strike offender, to a total term in state prison of 25 years to life, plus a consecutive term of five years for a prior prison term. (§ 667, subd. (a)(1).) Appellant contends the trial court prejudicially erred in its instructions to the jury and that the trial court abused its discretion when it denied his request to strike his prior convictions in the interests of justice (§ 1385) and when it used a juvenile adjudication to increase his sentence. We affirm.

Facts

Appellant, his wife Keshona Espinoza and her three-year old daughter, shared a Ventura apartment with Stephanie Bura and her four children. In September

[1] All statutory references are to the Penal Code unless otherwise stated.

2009, Espinoza was five months pregnant. On their drive home from a doctor's appointment, appellant and Espinoza got into an argument. Appellant pulled the car over and got out; the couple shouted insults at each other and Espinoza drove back to the apartment alone.

At about 11:00 that night, appellant returned to the apartment to gather some belongings from the bedroom he shared with Espinoza. The argument resumed. Eventually, Bura separated the two and appellant left. Someone used Espinoza's cell phone to call the Ventura Police Department for assistance. When Ventura Police Officer Dean Cole, Espinoza and Bura were outside waiting for him. Espinoza told Officer Cole that when appellant entered their bedroom, he used both hands to push her against the wall and that her head hit the wall. He pinned her, spat in her face, cursed at her and punched her in the face with his right fist. At that point, Bura entered the room and convinced appellant to leave the apartment. Cole testified that Espinoza was calm during this conversation, but it was obvious she had been crying. He took photographs of the left side of her face, which was slightly swollen. He noted that she also had superficial scratches on her arms, shoulder and chest areas.

Espinoza and her daughter moved out of Bura's apartment the next day, September 23. Later that same day, she saw appellant at the Ventura promenade. Espinoza advised police of his location and watched as he got arrested.

Two days later, Espinoza appeared in court because she had been ordered to appear. The judge ordered her to come back for a future proceeding. Before going to the courtroom, Espinoza submitted a written request to the victim/witness section of the prosecutor's office, asking that the charges against appellant be dismissed because he was her "husband and the father of [her] child." Espinoza understood that she was still required to appear if called by the District Attorney's Office, and that she could be arrested if she did not appear.

Appellant remained in custody. During the next two weeks, he had several telephone conversations with Espinoza that were recorded by the jail authorities. The information alleged that one such conversation, held on October 3, 2009, constituted

dissuading a witness in violation of section 136.1, subdivision (a)(1). Appellant began his October 3 conversation by telling Espinoza to "push three, stupid[,]" to connect the collect call. He cursed at her for not answering her phone the "fifty fuckin' times" he had tried to call her earlier and he repeatedly told her, "you gotta change this fuckin' number. Change the goddamn phone number today. Right now. When you get off the phone with me, change the number." Espinoza told appellant that the District Attorney was calling her repeatedly. He replied, "What did I tell you to do, dummy? Change your number. Remember I told you that?" When Espinoza told him that she had been subpoenaed, he said, "I don't give a fuck." Then, he insisted the subpoena was not valid because it had been served at the wrong address. When Espinoza asked if that meant she didn't need to go back, appellant said. "No, no, damn it. You know better. . . . Well, don't say nothing. Just don't come. Don't talk about it on this phone. Change your goddamn number like I told you right now."

Appellant told Espinoza that the prosecutor was "just talking" when she threatened to put Espinoza in jail for failure to appear. He also told Espinoza that he was "going straight to trial. You're not there, I win. Shut up. Go away. Get the fuckin' number changed. Hurry up. Do you understand what I'm saying?" Espinoza said she did. Appellant continued, "Do I have to explain anything else to you? It doesn't get no easier, and that's the fastest I'm gonna get out 'cause they don't have no fuckin' case. You understand what I'm sayin'?" He told Espinoza to, "shut up talking. Stop fucking talking. Oh, I was there, oh -- shut up already. Hang the fuck up. Change your number. No, this is not Keshona, this is Lisa. What do you want? You understand what I'm saying?" Appellant told Espinoza, "You shouldn't have put me in here[,]" and when she disagreed, he said, "Just do what I say so I can get out. You don't listen to me, that's why I'm in here, cause you don't fuckin' listen. If you fuckin' listened, we wouldn't have no fuckin' problems. Just do what I say. That's all I want you to do. Do what I say, don't question me, do it. That's it babe. That's it. That's all you gotta do." The conversation ended a few minutes later.

On October 7, Espinoza told appellant that she had to go to court the next day. Appellant insisted that she not go. Appellant implied that he knew how to handle the situation because he had already gotten several people "out on a domestic" by making sure that a witness did not appear in court. During this same conversation, appellant read the police report to Espinoza, and the two of them argued about the contents of the report. For example, appellant read, "Warren then used a close right fist to punch Espinoza one time in the left side of her face." Then, he said, "Oh really?" Espinoza responded, "You did hit me that night." Appellant said, "On my mama, I didn't hit you." Espinoza insisted that he had. Appellant continued to read the report, including a statement that he grabbed Espinoza by the arms and slammed her against the bedroom wall. Appellant then said, "You're the one that hit me. When I got to the door, I put the bag down to open the door and you hit me before I left. After -- that's why I grabbed your hair, and told you to fucking cut it out." Espinoza denied that appellant grabbed her hair and he insisted he had, "Yeah. I grabbed the side of your hair, I remember. I grabbed your, your braid." Appellant asked Espinoza to "remember" that he used her braids to bend her head back, so she couldn't spit in his face. He again insisted that he never hit her and that she was the aggressor during the fight.

At the end of their conversation, Espinoza asked appellant if he wanted her to come to court the next day. He replied, "No. I, I don't want you to come at all, but if you're gonna come, you're gonna come. I'm not gonna say nothin'. I can't tell you not to come. If you come against me, you already know what time it is with me. And that's that. You ever come in a courtroom against me, you know what time it is with me. So I don't care. But I should not be talking to you about this at all. So whatever. I'm going. And you're worried about fuckin' two days in jail." Espinoza told him she was not going to go to jail for him. He replied, "Yeah. Well, you're ready to leave your life, huh? Get a divorce, girl. Get a divorce." Espinoza told appellant that she loved him and would "walk through fuckin' hell and high water to get you out." He told her, "No. If you would, you wouldn't be telling me you're going to court tomorrow, dummy. How are you

gonna make a statement like that and then tell me I'm coming to court tomorrow?" The conversation ended moments later.

Espinoza appeared at a hearing in appellant's case on October 8, 2009. She also testified at his preliminary hearing in March 2010 and at his trial, which began in October 2010. On each occasion, Espinoza denied that any violence occurred on the night of September 22, 2009 and said the argument was her fault. At appellant's trial, Espinoza testified that appellant never hit her, or even swung at her. She denied calling the police, even though the 911 call came from her cell phone number. She also denied telling the police officer that appellant hit her with a closed fist or that he shook her and caused her head to slam against the bedroom door. Espinoza testified that she was not intimidated or threatened by anything appellant told her during the telephone calls. She did not believe that he would actually divorce her if she appeared in court. Appellant's angry statements on the telephone were "just him running his mouth." Espinoza changed her telephone number to one that would be less expensive for appellant to call, but she gave the new number to the District Attorney's office.

Appellant testified that he did not hit Espinoza on September 22, or ever. Instead, she was spitting at him and trying to hit him. He pinned her against a wall so that she would not be able to spit on him, but he did not hit her. Appellant asked Espinoza to change her telephone number to one that would be less expensive for him to call. He told her not to come to court because he did not want her to be arrested for lying about this case and previous cases. He was not trying to coerce Espinoza into lying for him; he was trying to get her to tell the truth.

Contentions

Appellant contends: 1. the trial court erred in its instructions to the jury concerning the definitions of a crime "victim" or "witness" for purposes of the dissuading offense; 2. the trial court failed to instruct the jury that appellant's status as a family member of Espinoza's creates a presumption that he acted without malice; 3. the trial court abused its discretion when it denied his request to strike any of his prior convictions; and 4. use of a juvenile adjudication as a prior "strike" violated appellant's

rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. None of these contentions has merit.

Discussion

Instructional Error

The jury found appellant guilty of dissuading a victim or witness from testifying in violation of section 136.1, subdivision (a)(1). The statute prohibits "[k]nowingly and maliciously prevent[ing] or dissuad[ing] any witness or victim from attending or giving testimony at any trial, proceeding or inquiry authorized by law." A "witness" is defined as a natural person "(i) having knowledge of the existence or nonexistence of facts relating to any crime, or (ii) whose declaration under oath is received or has been received as evidence for any purpose, or (iii) who has reported any crime to any peace officer . . . , or (iv) who has been served with a subpoena issued under the authority of any court in the state . . . , or (v) who would be believed by any reasonable person to be an individual described in subparagraphs (i) to (iv), inclusive." (§ 136, subd. (2).) A "victim" is a natural person "with respect to whom there is reason to believe that any crime . . . is being or has been perpetrated or attempted to be perpetrated." (§ 136, subd. (3).)

Using the CALCRIM pattern jury instruction, the trial court instructed the jury that, to find appellant guilty of this offense, it had to find, "1. The defendant maliciously tried to prevent or discourage Keshona Espinoza from attending and giving testimony at a judicial proceeding; [¶] 2. Keshona Espinoza was a witness to or victim of a crime; [¶] AND [¶] 3. The defendant knew he was trying to prevent or discourage or actually prevented or discouraged Keshona Espinoza from attending or giving testimony and intended to do so." (CALCRIM 2622.) It further instructed the jury that, "As used here, a witness means someone, or a person the defendant reasonably believed to be someone: [¶] Who knows about the existence or nonexistence of facts relating to a crime; [¶] Or [¶] Who has reported a crime to a peace officer or prosecutor; [¶] OR [¶] ` Who has been served with a subpoena issued under authority of any state or federal

court. A person is a *victim* if there is reason to believe that a federal or state crime is being or has been committed or attempted against him or her." (*Id.*)

During its deliberations, the jury asked two questions. Its first question stated: "Our understanding is that according to [CALCRIM 2622] we need to have reason to believe a crime occurred for which Keshona Espinoza was a victim or a witness. Is this correct?" The trial court responded that the jury could find Espinoza "is either a victim of a crime or a witness to a crime, or neither." It also referred the jury back to its prior instruction, CALCRIM 2622. The jury's second question stated, "Do we need to determine that there is a reason to believe that battery occurred or is Keshona's filing of a police report as a victim or a witness sufficient?" The trial court's answer to this question was, "To determine if there is reason to believe a crime occurred, you may consider any or all of the circumstances and information available at the time the telephone conversations occurred."

Appellant contends the trial court prejudicially erred in both its initial instructions and its answers to the jury questions. Specifically, appellant contends the trial court had a duty to instruct the jury that Espinoza could be considered a witness only if the jury also found reason to believe a crime had actually occurred. We are not persuaded.

The trial court has a duty to fully and fairly instruct the jury on general principles of law applicable to the case. (*People v. Blair* (2005) 36 Cal4.th 686, 744.) This includes a duty to instruct on every material issue presented by the evidence, including every material element of each offense presented to the jury. (*People v. Flood* (1998) 18 Cal.4th 470, 481.) We determine whether jury instructions are correct from the entire charge of the trial court, not from a consideration of parts of an instruction or from a single instruction considered in isolation. (*People v. Smithey* (1999) 20 Cal.4th 936, 963; see also *People v. Holt* (1997) 15 Cal.4th 619, 677.) We assume that the jurors are capable of understanding the instructions they are given. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1294.) "If a jury instruction is ambiguous, we inquire whether there is

a reasonable likelihood the jury misunderstood and misapplied the instruction." (*People v. Smithey, supra*, 20 Cal.4th at p. 963.)

There was no error here. The trial court instructed the jury in terms of CALCRIM 2622, that Espinoza was a "witness" if she was, or if appellant reasonably believed her to be "someone: Who knows about the existence or nonexistence of facts relating to a crime; [¶] or [¶] Who has reported a crime to a peace officer or prosecutor; [¶] or [¶] Who has been served with a subpoena . . . ." This language closely follows the statutory definition provided in section 136. "[T]he court need do no more than instruct in statutory language[,]" especially where, as here, appellant fails to request clarification or further explanation. (*People v. Poggi* (1988) 45 Cal.3d 306, 327.)

The trial court had no duty to augment the statutory definition of the term "witness" by instructing the jury that it must also find there was "reason to believe" a crime had actually occurred, e.g., that appellant had actually battered Espinoza. First, appellant never requested this clarification and has therefore waived any claim of error relating to it. (*People v. Marks* (2003) 31 Cal.4th 197, 237.) Second, appellant's proposed clarification would properly have been rejected as incorrect. Even if Espinoza's original crime report was untruthful, she would still meet the statutory definition of "witness," because she would be aware of the "existence or nonexistence of facts relating to [a] crime." (§ 136, subd. (2).)

Similarly, the trial court did not err in its responses to the jury's questions. "When the jury asks to be informed on any point of law arising out of the case, the trial court has a duty to help the jurors understand the legal principles that it is being asked to apply. [Citations.] The satisfaction of this obligation does not always require the trial court to elaborate on standard jury instructions already given. When the instructions were full and complete, the trial court has the discretion to determine what additional explanations are sufficient to satisfy the jury's request for information." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 589.)

Here, the jury first asked what would qualify Espinoza as a victim or witness. The trial court responded by paraphrasing its original instruction on that issue.

Appellant consented to that answer. As a result, he has waived the claim of error. (*People v. Dykes* (2009) 46 Cal.4th 731, 798; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.) Moreover, the trial court's answer was correct for the reasons stated above.

The jury next asked, "Do we need to determine that there is reason to believe that battery occurred or is Keshona's filing of a police report as a victim or a witness sufficient[?]" The trial court answered, "To determine if there is reason to believe a crime occurred, you may consider any or all of the circumstances and information available at the time the telephone conversations occurred." In effect, this answer directed the jury to consider all of the relevant facts in deciding whether Espinoza was a victim of, or witness to a crime. The trial court did not abuse its discretion in declining to give a more specific answer. "When a question shows the jury has focused on a particular issue, or is leaning in a certain direction, the court must not appear to be an advocate, either endorsing or redirecting the jury's inclination." (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1331.)

Finally, any error in the trial court's instructions did not result in a miscarriage of justice and was, therefore, harmless. (*Id.*) The evidence was overwhelming that, in his telephone conversations with her, appellant knowingly and maliciously tried to persuade or discourage Espinoza from testifying against him. In recorded telephone conversations on October 3 and 7, 2009, appellant repeatedly told Espinoza to change her telephone number, to stop talking to the prosecutor and to fail to appear in court as ordered. Overwhelming evidence also establishes that Espinoza meets the statutory definition of a witness or crime victim in that, "there is reason to believe that a federal or state crime . . . has been committed" against her. (§ 136, subd. (3).) Appellant admitted in the October 7 telephone conversation that he grabbed Espinoza by the hair and pulled her head back. During that same conversation, Espinoza insisted that appellant also hit her with a closed fist. Either of these incidents constitutes a spousal battery. (§ 243, subd. (e)(1).) Given this evidence, it is not reasonably probable that the jury would have reached a result more favorable to appellant if it had received more detailed instructions concerning the definitions of "victim" and "witness."

Malice Instruction

Section 136.1, subdivision (a)(1) prohibits "[k]nowingly and maliciously" preventing or dissuading a witness or victim from testifying. Subdivision (a)(3) of the same statute provides: "For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice." Section 136 provides that, " 'Malice' means an intent to vex, annoy, harm, or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice." (§ 136, subd. (1).)

The trial court correctly instructed the jury on the elements of the offense and on the statutory definition of the term "malice." Appellant now contends it erred because it failed to instruct the jury, sua sponte, concerning the presumption created by section 136.1, subdivision (a)(3. We are not persuaded.

Appellant did not request an instruction on the presumption created by section 136.1, subdivision (a)(3). Such an instruction would have been a "pinpoint" instruction, because it relates a particular fact (i.e., appellant's marital relationship to Espinoza) to an element of the offense on which the prosecution bears the burden of proof (i.e., malice), in an attempt to raise a doubt as to whether the prosecution carried its burden of proof on that element. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 669; *People v. Valdez* (2004) 32 Cal.4th 73, 111.) Pinpoint instructions " 'are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte.' " (*People v. Rogers* (2006) 39 Cal.4th 826, 878, quoting *People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

Trial Court's Discretion in Sentencing

Appellant contends the trial court abused its direction when it failed to strike his prior convictions for purposes of sentencing. We disagree. Appellant has 11 prior felony convictions, including a juvenile adjudication in 1990 for the robbery of a convenience store clerk (§ 211), a 1998 conviction as an adult, for dissuading witnesses to a shooting committed by two of his friends (§ 136.1), and three convictions for possession of cocaine and other controlled substances. (Health & Saf., § 11350.)

In ruling on his request to strike prior convictions in the interests of justice, the trial court stated that it was well aware of its discretion and had seriously considered appellant's request because the present offense, while serious, did not involve any serious physical injury or life-threatening behavior. However, after considering the nature of the present offense, the age of the robbery conviction, and appellant's character, background and prospects for the future, the trial court declined to strike any of the prior convictions. Among other things, the trial court noted that the present offense presented "a significant threat to the orderly administration of justice" and "arose out of an incident at least during which the defendant was violent or potentially violent . . . ." For the trial court, the present offense was made more seriousness by appellant's prior conviction for similar conduct. The trial court also noted that appellant had committed crimes of violence and had not remained crime free for any significant period in his life. He had been given multiple opportunities on probation and parole, and "has failed miserably." The trial court concluded, "I don't have any expectation at all that he would remain crime free if I were to grant his request."

The trial court did not abuse its discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) As our Supreme Court explained in *People v. Williams* (1998) 17 Call4th 148, 161, "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." The trial court should also consider society's legitimate interest in the orderly administration of justice, however, "no weight whatsoever may be given to factors extrinsic to the [three strikes sentencing] scheme, such as the mere desire to ease court

congestion or, a fortiori, bare antipathy to the consequences for any given defendant." (*Id.*)

Here, the trial court understood that it had discretion to strike appellant's prior serious felony convictions. It considered each of the factors relevant under *Williams, supra,* and did not rely on any improper factors in reaching its decision. To reverse the trial court's decision as an abuse of discretion, we would have to conclude that "its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony, supra,* 33 Cal.4th at p. 377.) Nothing in this record supports such a conclusion. There was no abuse of discretion.

Consideration of Prior Juvenile Adjudication

To preserve the issue for federal review, appellant contends the trial court violated his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution by considering a juvenile adjudication as a "strike." Our Supreme Court has already rejected this argument. (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1014-1015.) We are, of course, bound by *Nguyen, supra*, and we reject appellant's contention for that reason. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Conclusion

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Patricia M. Murphy, Judge

Superior Court County of Ventura

David Andreasen, under appointment by the Court of Appeal, FOR Defendant and Appellant.

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