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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RAUL PEREZ, Defendant and Appellant.	B251137 (Los Angeles County Super. Ct. No. TA126661)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kelvin D. Filer, Judge. Affirmed as modified.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Raul Perez guilty of one count of making criminal threats and two counts of possession of a firearm by a felon. The charges arose out of an incident in which Perez threatened to shoot his girlfriend. On appeal, Perez argues the trial court erred by admitting evidence of a prior incident of domestic violence between Perez and his girlfriend. We modify the judgment and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 16, 2013, Perez was in Compton with Jesusa Soriano, his long-term girlfriend and the mother of his five children. They were at Soriano's parents' home. Soriano and Perez were arguing because she had been talking to another man. At some point during the argument, Perez was locked out of the house. He banged on the door and yelled he had a gun. Soriano's brother and mother each called 911.

Los Angeles County Sheriff's Deputy Robert Padilla responded to the call. Soriano looked visibly nervous. Her voice was "shaky." Soriano told Padilla that Perez was in the house with a silver handgun and he had threatened to shoot her. She explained she and Perez had been arguing and Perez was very angry. Soriano ran into the house and locked the door because she was afraid of what Perez might do. Soriano recounted that Perez ran to the door with the silver handgun and began banging on the door, demanding to be let in. Soriano told Perez to put the gun away. Perez continued banging on the door. He said if Soriano did not let him in he would shoot her and her parents. Soriano told Padilla she was afraid for her safety and her family's safety, so they all went outside to the front of the house to wait for law enforcement to arrive.

Soriano's mother told Padilla she heard Perez shout that he was going to shoot her and kidnap Soriano. Soriano's mother also told Padilla that Perez stayed in a back room of the garage, where he stored weapons behind a wall. After Soriano's mother gave the officers permission to search for the guns, they searched the back room and found two silver or chrome semiautomatic pistols. When Perez spoke to deputies, he denied having a gun in his possession. Soriano wrote a statement that night describing the incident. In the statement, she wrote that Perez was banging on the door with a black gun he had before New Year's, which he usually kept in the back room of the house.

The next day, January 17, sheriff's department detective Anthony Willis went to Soriano's family's home in Compton to interview Soriano. Soriano told Willis she and Perez got into an argument because he was "trying to kick his meth habit," his temper was "really bad" in the weeks leading up to the incident, and he accused Soriano of cheating on him. Soriano told Willis she and Perez were yelling, then the argument began to get out of control. Perez started making threats so she ran into the house and locked the door. Perez banged on the door loudly and yelled he was going to kill her. Soriano was scared; her mother called 911. Soriano told Willis she had not seen a gun, but she thought he had one because she had seen him with a gun before, and because the banging on the door sounded like metal on metal. Soriano's mother told Willis she heard Perez threatening to kill Soriano.

At trial, Soriano denied hearing Perez threaten to kill anyone or kidnap anyone. She testified she composed a written statement on the night of the incident because a deputy told her if she did not, the deputies would call "child services" to have her children taken away, and also because she was angry. She denied speaking to Willis, or anyone from the sheriff's department in person on January 17. She also denied Willis's account of what she told him. Soriano's mother further denied telling the deputy Perez said he would shoot her and kidnap Soriano. She also denied telling the deputy she knew Perez had guns or where they were kept. Soriano's mother further denied speaking to Willis or any person from the sheriff's department on January 17. All of the witnesses present during the incident who testified—Soriano, Soriano's mother and brother, and Perez's father—indicated they did not see Perez with a gun during the January 16 incident.

The prosecution offered as evidence a number of telephone calls between Perez and Soriano that were recorded while Perez was in jail following the incident. On the day of the incident, Soriano told Perez the police officer made her write a statement that she had seen a gun and threatened to call "children's services" if she did not.
The following colloquy ensued:

"[Defendant]: You should have never have even told them a statement that you seen a gun. I didn't even do nothing.
"[Soriano]: I know you didn't do nothing Raul.
"[Defendant]: But you put it in a statement that's going to say it's my gun.
[¶] . . . [¶]
"[Soriano]: We need. I wish you would have never got those guns. I wish you would have fucking . . . . I had told you so many times. [¶] . . . [¶]
"[Soriano]: Well how did they know where the guns were at?
"[Defendant]: I don't know. They found them. They're not mine though.
[¶] . . . [¶] I know they're not mine. Because you know what? They didn't find my gun. My gun is hidden somewhere else inside your house. My gun is black. You hear me? You hear me? [¶] . . . [¶] My gun is black. Not chrome."

Later in the conversation, Soriano told Perez: "I miss you, but I wish you weren't like this." After explaining that she would recant her statement to police she said: "I thought it was a gun. I guess it wasn't." Perez answered: "Yeah, because I never had a gun." As the conversation continued, defendant asked Soriano to promise that she would not talk to other men while he was incarcerated. He later explained that he loved Soriano and "That's why I went crazy. Because I love you. I can't see you doing nothing for no other man or talking to another man because I would go crazy for you."[1] In subsequent calls, Perez told Soriano how she, her mother, and his father should describe the incident to authorities and in court.

Law enforcement had been called to the Soriano home on another occasion in June 2012. Soriano's mother called 911 and reported that Perez was arguing, fighting, and banging against the walls. She told the 911 operator Perez hit Soriano in the face and she fell to the ground. Evidence of the June 2012 incident was admitted at trial over a

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[1] In another call on January 19, Perez told Soriano: "I don't see why the fuck—I will fucking tell you that I will fucking kill you and I'll kill myself, and it's so fucking stupid, man. Man, you're right, it is fucking selfish, man. How can I fucking even think like that, you know? It's just that like you know me . . . about another man really fucked me up in the head, you know, to say those stupid things like—man, I can't believe I acted so stupid. You know what I mean? . . . That's why I'm gonna get rid of all the fucking—every gun that I have. Everything. All the shit—I'm getting rid of all that shit. I'm not gonna have none of that around me, so I won't fucking act crazy like that no more, okay?"

defense objection. Soriano's mother testified she believed Perez hit Soriano, but Soriano later said Perez had only pushed her. Soriano testified that she tried to intervene in an argument between Perez and her mother; when she got in between them, she fell on their feet. She denied that Perez pushed her. Perez was never charged with a crime related to the incident.

The jury found Perez guilty of one count of making criminal threats to Soriano (Pen. Code, § 422, subd. (a)), and found true the allegation that he personally used a handgun within the meaning of Penal Code section 12022.5, subdivision (a). The jury also found Perez guilty on two counts of possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)). The trial court sentenced Perez to a total state prison term of seven years eight months.

DISCUSSION

I. The Trial Court Did Not Abuse its Discretion By Admitting Evidence of Prior Domestic Violence

On appeal, Perez asserts the trial court erred in admitting evidence of the June 2012 incident. Perez contends the court abused its discretion under Evidence Code section 352 (section 352). We disagree.

Background

Before trial, the defense sought to exclude any evidence of the June 2012 incident. Perez contended the evidence was inadmissible under section 352 because it was more prejudicial than probative and would consume an undue amount of time. The prosecutor argued the June 2012 incident was not unduly remote and the witnesses relevant to the evidence were the same individuals who would testify as to the charged crimes. The prosecutor also asserted the June 2012 incident was less serious than the charged crimes, thus there was no risk of unfair prejudice to the defendant. The court concluded evidence of the June 2012 incident was relevant and would not be unduly time consuming. The court further found the relevance of the evidence was not outweighed by any prejudice. Later, defense counsel again objected to the evidence, arguing a single incident was not sufficient to show Perez had a propensity to engage in domestic violence. The prosecutor

responded that, in accord with Evidence Code section 1109, the prosecution would use the past instance of domestic violence to show Perez acted in conformity with that past behavior, and to show Soriano had a reasonable fear. The court concluded the prosecutor's intended use of the evidence was proper.

At trial, the prosecutor asked Soriano's mother about the June 2012 incident and her 911 call to police; the defense cross-examined her on the incident. The defense subsequently asked Soriano about the June 2012 incident, and the prosecution questioned her on redirect. Testimony regarding the June 2012 incident took up fewer than 15 pages of the reporter's transcript.[2]

Discussion

Under Evidence Code section 1101, "evidence of a person's character or a trait of his or her character," including in the form of "evidence of specific instances of his or her specific conduct" is "inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) However, under Evidence Code section 1109, subdivision (a)(1), "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."[3] Thus, "[s]ection 1109, in effect, 'permits the admission of defendant's other acts of domestic violence for the purpose of showing a propensity to commit such crimes. [Citation.]' [Citation.]" (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232 (*Brown*).)

"The admission of prior acts as propensity evidence encompasses both charged and uncharged acts. [Citations.] Moreover, evidence of a prior act may be introduced as propensity evidence even if the defendant was acquitted of criminal charges based upon

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[2] The prosecutor played the recorded 911 call to the jury. Although the trial court reporter did not transcribe the call as played to the jury, the transcript of the call takes up five pages of the clerk's transcript.

[3] There are exceptions under Evidence Code section 1109, subdivisions (e) and (f), none of which are applicable here.

that act. [Citation.] [¶] Even if the evidence is admissible under section 1109, the trial court must still determine, pursuant to section 352, whether the probative value of the evidence is substantially outweighed by the probability the evidence will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. [Citation.] The court enjoys broad discretion in making this determination, and the court's exercise of discretion will not be disturbed on appeal except upon a showing that it was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*Brown, supra*, 192 Cal.App.4th at p. 1233.)

The trial court did not abuse its discretion in this case. Evidence of the June 2012 incident was highly probative. " ' "The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense." ' [Citation.] Section 1109 was intended to make admissible a prior incident 'similar in character to the charged domestic violence crime, and which was committed against the victim of the charged crime or another similarly situated person.' [Citation.]" (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531-532 (*Johnson*).) Here, the facts of the June 2012 incident were similar in many relevant respects to the charged crime. The June 2012 incident involved the same victim and one common witness, Soriano's mother, and involved similar facts. Specifically, in the June 2012 incident, Perez was at Soriano's family's house, he was arguing with Soriano's mother, there was evidence he hit or pushed Soriano, and Soriano's mother felt the need to call 911. In the January 2013 incident, Perez was at Soriano's family's house, he was arguing with Soriano, he threatened Soriano and her family, and Soriano's mother and her brother felt the need to call 911.

In addition, the June 2012 incident was not remote. This factor heightened the probative value of the evidence. (*Johnson, supra*, 185 Cal.App.4th at p. 534 ["Remote prior conduct is, at least theoretically, less probative of propensity than more recent misconduct."].) We also disagree with Perez's argument, unsupported by any legal authority, that evidence of the June 2012 incident was not admissible because, as a single incident, it was insufficient to establish Perez's propensity to commit domestic violence.

While multiple incidents may create a stronger showing of propensity, nothing in the language of section 1109 or related caselaw suggests evidence of a defendant's prior acts of domestic violence is only admissible if there is a pattern of domestic violence consisting of multiple incidents. Even one prior act of domestic violence may be relevant to show the defendant had a propensity to commit a charged act of domestic violence. In this case, the similar circumstances of the two incidents, including that Soriano was the victim in both, rendered the June 2012 incident relevant and probative as evidence tending to show Perez had a propensity to commit domestic violence against Soriano.

As to prejudice, the trial court could reasonably conclude there was little risk of confusion of the issues. Although the June 2012 incident was recent compared with the charged crime, there was some separation of time, and, while the facts were similar, there were differences that distinguished the two incidents. The court also concluded presentation of the evidence would not be unduly time consuming—the reasonableness of this conclusion was borne out by the fact that the eventual testimony regarding the incident took fewer than 15 full pages of the transcript. (*Johnson, supra*, 185 Cal.App.4th at p. 533; *People v. Cabrera* (2007) 152 Cal.App.4th 695, 706.) The trial court could also reasonably conclude the June 2012 incident was no more aggravated or inflammatory than the charged crime. Although there was evidence Perez actually hit Soriano during the June 2012 incident, or knocked her to the ground, the evidence of the charged crime indicated Perez threatened to shoot Soriano and her family. Given the seriousness of the charged crimes, the trial court could properly conclude evidence of the June 2012 incident would not " ' " 'uniquely [tend] to evoke an emotional bias against the defendant as an individual and . . . [have] very little effect on the issues' " ' [citation], or . . . [invite] the jury to prejudge ' " 'a person or cause on the basis of extraneous factors.' " ' [Citation.]" (*Johnson, supra*, at p. 534.)

Perez also asserts the trial court erred in admitting the evidence because it was used not to show that Perez had the propensity to commit acts of domestic violence, but to impeach the testimony of Soriano and her mother. Perez contends, section 1109 does not authorize the admission of evidence of prior acts of domestic violence for

impeachment purposes. This argument is not persuasive. The record indicates the evidence of the June 2012 incident was in fact offered to show Perez had the propensity to commit acts of domestic violence, and to establish that, in conformity with his past conduct, he engaged in an altercation in January 2013 and threatened to shoot Soriano.

Moreover, under Evidence Code section 1101, even otherwise inadmissible character evidence may be admissible when offered for purposes other than showing a propensity to act in a particular manner of a specific occasion. (Evid. Code, § 1101, subds. (b), (c).) As one court noted, "[e]ven before the enactment of section 1109, the case law held that an uncharged act of domestic violence committed by the same perpetrator against the same victim is admissible: 'Where a defendant is charged with a violent crime and has or had a previous relationship with a victim, prior assaults upon the same victim, when offered on disputed issues, e.g., identity, intent, motive, etcetera, are admissible based solely upon the consideration of identical perpetrator and victim without resort to a "distinctive modus operandi" analysis of other factors.' [Citation.]" (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1026.) Thus, we must reject Perez's argument.

The trial court did not abuse its discretion in finding evidence of the June 2012 incident was not substantially more prejudicial than probative under Evidence Code sections 352 and 1109, subdivision (a)(1).

II. The DNA Penalty Assessment Must Be Stricken

Perez argues and the People concede the trial court improperly imposed a DNA penalty assessment. We agree and strike the assessment.

At sentencing, the trial court imposed a $1500 restitution fine (Pen. Code, § 1202.4, subd. (b)); a court operations assessment of $120 (Pen. Code, § 1465.8, subd. (a)(1)); and a $90 criminal conviction assessment (Gov. Code, § 70373). The court also assessed and stayed a parole revocation fine of $1500 (Pen. Code, § 1202.45). The accompanying minute order and the abstract of judgment further reflect that the court imposed a DNA penalty assessment of $20 (Gov. Code, § 76104.7).

Under Government Code section 76104.7, in addition to a penalty levied under Government Code section 76104.6, the court must levy a penalty "upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses," for deposit into the state's DNA Identification Fund. (Gov. Code, § 76104.7, subds. (a), (b).) However, under subdivision (c)(1), the additional penalty does not apply to a restitution fine. (*People v. Hawkins* (2012) 211 Cal.App.4th 194, 204.) Penal Code section 1465.8 regarding the court operations assessment provides: "The penalties authorized by Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code . . . do not apply to this assessment." (Pen. Code, § 1465.8, subd. (b); *People v. Valencia* (2008) 166 Cal.App.4th 1392, 1396.) Likewise, Government Code section 70373, which authorizes the criminal convictions assessment, provides in subdivision (b): "The penalties authorized by Chapter 12 (commencing with Section 76000) . . . do not apply to this assessment."

In light of this statutory framework, we agree with the parties that a penalty under Government Code section 76104.7 was not authorized in this case. The $20 DNA penalty assessment must be stricken.

DISPOSITION

The trial court is ordered to issue an amended abstract of judgment that does not impose a $20 DNA penalty assessment pursuant to Government Code section 76104.7. The trial court is further ordered to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J. GRIMES, J.