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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.

MARIO AGUILAR,

Defendant and Appellant.

B282336

(Los Angeles County
Super. Ct. No. NA102974)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed.

California Appellate Project, Jonathan B. Steiner and Joshua Schraer, 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, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David A. Wildman, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Mario Aguilar (defendant) of one count of attempted murder (Penal Code,¹ §§ 664/187, subd. (a); count 1) and three misdemeanor counts of child abuse (§ 273a, subd. (b); counts 2-4). On appeal, defendant contends reversal is compelled because the trial court erroneously admitted irrelevant and highly prejudicial evidence that he had served a prior prison term.² We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and the victim, Amanda L., had three children together. At the time of the offenses, the children were six, three, and two years of age.

Defendant was incarcerated from December 2014 to mid-September 2015.³ The victim decided in mid-2014 to end her romantic relationship with defendant. She told him in December

¹ Undesignated statutory citations are to the Penal Code.

² Defendant originally contended his trial counsel was ineffective for failing to object to the evidence. In the respondent's brief, however, the Attorney General noted defense counsel did object, but was overruled. We granted defendant's request to file a supplemental opening brief. Defendant withdrew his original argument and asserted the current challenge.

³ Defendant was convicted of making criminal threats against the victim's brother. The jury was never told any of the specifics of this offense. Prompted by a written question from one juror, counsel stipulated to the jury's being advised "that due to the defendant's status, he was not allowed to carry a deadly or dangerous weapon." This latter point did not generate an appellate issue.

2014 “that she wasn’t going to wait for him while he was in jail.” Their communications when he was in prison were limited to his phone calls to speak with the children.

The victim moved during the time defendant was in prison, but she gave him her new address upon his release because she “wanted him to have that civil relationship with my kids, and at that point in time I didn’t feel he was a threat.” Between defendant’s release from custody in September 2015 until he attacked her on October 18, 2015, he telephoned multiple times every day. The communications “started off civil and throughout that time just progressed into anger, jealousy, you know, with him calling so much and following me around, just wanting to control my every move.” Defendant called the victim on her cell phone and at the retail store where she worked, on the store’s business line.

He wanted to resume a romantic relationship. She always told him no; but on October 17, 2015, she “was just fed up with all of his harassing and stalking . . . [and] told him that when he was in jail [she] was in another relationship with someone else.” Defendant, who previously threatened to kill her if she were ever with another man, “just blew up, you know. He - - at first he hangs up the phone. Then he calls me back, and he’s just, you know, ‘I can’t believe you would do something like that.’”

Defendant texted several times the next day, October 18, 2015, and advised he was coming to her apartment. He arrived in the late afternoon. Defendant, the victim, and their children went to the apartment complex’s laundry room. Video from apartment security cameras captured defendant’s several attempts to touch and put his arms around the victim as they

walked and her rebuffing the advances. The group returned to the victim's apartment.

The children remained in the living room watching television and defendant followed the victim into her bedroom, asking whether they were going to work on their relationship. The victim reiterated she was not going to resume a relationship with him. Defendant said "he can accept the fact that I was with somebody else, as long as we are gonna work on our relationship." When the victim made it clear they were not going to be together, defendant said, "You know what's gonna happen next" and pulled a knife from his pocket.

Defendant stabbed the victim 27 times. The children, hearing her screams, ran into the bedroom. Defendant stopped the attack, folded his knife, and left the apartment. He later telephoned his sister and told her he had just killed the victim.

The victim did not die, however. She called 911 for help and was rushed to the hospital. Many of her injuries, including the insertion of a tube into her chest cavity to drain blood from internal bleeding, were treated in the emergency department; but she needed emergency surgery to repair a perforated diaphragm and a puncture wound to her spleen. The victim remained hospitalized for days.

Defendant was charged with one count of attempted murder in violation of sections 664 and 187, subdivision (a) (count 1), and three misdemeanor counts of child abuse in violation of section 273a, subdivision (b) (counts 2-4). Before trial, the trial court and counsel discussed a number of potential evidentiary issues in an Evidence Code section 402 hearing. The prosecutor explained she anticipated defendant would assert the current offense was attempted voluntary manslaughter under a heat of

passion theory, rather than attempted premeditated murder, because the victim told defendant right before the attack that she was romantically involved with another man. The prosecutor argued it was “extremely relevant for the jury to have a full understanding of the stability/instability of the relationship between defendant and victim during the time that led up to the incident.” The prosecutor contended the jury should be told defendant had previously been convicted of committing a crime against the brother of the current victim, the current victim broke off their relationship before defendant went to prison, and, given the nature of the crime, defendant was not permitted to communicate with the current victim: “I don’t have to go into what [defendant] did to the family beyond the fact that [defendant] was convicted of a crime against [the victim’s] brother and that [defendant] was not allowed to communicate with [the victim]. I don’t have to go into what [defendant] actually did to [the victim’s] brother.”

Defendant objected: “I’m limiting my case and my questioning in my case to when he was released in September 2015, that period between September 2015 and October 18th of 2015 [¶] It’s only relevant to get in . . . his prior conviction . . . in the case-in-chief and there’s very high probative value, as opposed . . . to get into facts [of] what happened between [defendant] and [the victim’s] brother.”

Referring to the prosecution’s trial brief, the trial court ruled the prosecution could present the evidence it discussed “on page 6 line 22 to line 27 1/2.” There, the prosecution stated, “The victim will testify that her romantic relationship with the defendant ended in late 2014. That prior to that there were already problems between her and the defendant, where he

threatened if she was with anyone else he would kill her, and she separated from him. Once he was sent to prison for threatening and going after her brother, she made it clear that she wanted nothing to do with him. While in prison the defendant was not even allowed to communicate with the victim. His communication started when he was released [in] 2015.”

Later in the same hearing, defense counsel again sought “exclusion of . . . any testimony of [defendant] being in prison as being highly prejudicial and not relevant to this case. I am noting my objection for that specific thing, but I do believe, based on the court’s prior ruling, that the court is going to allow that over my objection.” The trial court overruled defendant’s objection.

Both the victim and her employer testified defendant was imprisoned until the month before the attack. Neither witness testified why defendant was in prison. The jury was never told the victim’s brother was the victim of the earlier crime.

Defendant did not testify. A domestic violence detective called as a witness by the defense testified the victim stated she told defendant of her involvement with another man just before the attack, not the day before. Defendant’s father testified his son and the victim appeared to be in a dating relationship in the month before the attack.

The jury convicted defendant of all charges. As to count 1, the jury found the attempted murder was willful, deliberate, and premeditated; defendant personally used a deadly and dangerous weapon; and defendant personally inflicted great bodily injury. Defendant admitted to the trial court he had been convicted of a prior strike within the meaning of sections 667, subdivision (d) and 1170.12 and one prior serious felony within the meaning of

section 667, subdivision (a), and had served two prior prison terms within the meaning of section 667.5, subdivision (b).

The trial court sentenced defendant to state prison for 26 years to life. His motion for a new trial, based on substantial evidence of provocation/heat of passion that should have reduced the charge to attempted voluntary manslaughter, evidentiary errors in permitting the jury to learn defendant had been in prison, and the prosecutor's misconduct in arguing to the jury that defendant brought the knife to the victim's house when the evidence only showed he "produced a knife from his pocket," was denied. Defendant timely appealed.

DISCUSSION

The sole issue on appeal is whether the trial court prejudicially erred in permitting both the victim and her employer to testify defendant was in prison between December 2014 and September 2015. Defendant claims the admission of this irrelevant and more-prejudicial-than-probative testimony of his incarceration compels reversal (Evid. Code, §§ 210, 352).⁴ We disagree.

⁴ Evidence Code section 210 provides, "Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

Evidence Code section 352 states, "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."

Trial Testimony and Closing Argument

At trial, the victim referred to defendant's imprisonment on several occasions. Her testimony included the following: She ended her relationship with defendant "the day he got arrested;" she told defendant she "wasn't going to wait for him while he was in jail;" defendant would call her from prison to speak to the children, but her communication with him was primarily limited to answering the telephone and giving it to the children; defendant was released from prison in September 2015; when defendant was released from prison their children continued to live with her; she told defendant while he was in prison that she was in a relationship with someone else; and from the time defendant was released from prison to October 18, 2018, the date of the attack, she was in communication with the other person with whom she was having the relationship.

The victim's employer also referred to defendant's incarceration during her testimony. She said the victim's demeanor changed in December 2014—she laughed, smiled, and "seemed brighter." The victim told her employer she was happier because defendant "had gone to prison." She said that in September 2015, the victim's demeanor changed again—"she was upset, [and] became a little bit more withdrawn and reserved"—and the victim told her the change was because defendant "got out of prison."

The prosecutor did not mention defendant's prior prison term during her closing argument to the jury. Defense counsel said only that the victim went to defendant's parents' house after defendant got "out of prison."

Analysis

We review a trial court's evidentiary rulings, including those made outside the jury's presence during an Evidence Code section 402 hearing, for abuse of discretion. (*People v. Rogers* (2013) 57 Cal.4th 296, 326 (*Rogers*); *People v. Williams* (1997) 16 Cal.4th 153, 196-197.) We will not disturb a ruling "unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*Rogers, supra*, 57 Cal.4th at p. 326, internal quotation marks omitted.)

Pretrial, the trial court determined defendant's incarceration was both relevant and probative "in establishing the defendant's mens rea, intent, and lack of sudden quarrel or heat of passion . . . and the probative value [was] not substantially outweighed by any danger of undue prejudice of the jurors believing that because of his prior prison commitment, he somehow more than likely is guilty." Defendant's incarceration was marginally relevant to these issues, and the ruling permitting the victim to testify defendant had been incarcerated was within the trial court's discretion.

The victim's employer should not have been permitted to testify that defendant was in custody, but that error was harmless in this case. And even were we to conclude the trial court erred in allowing the victim to so testify, any such combined error still was not prejudicial.

Defendant's custody status for 10 of the 11 months before the attack tended to make the defense theory of voluntary manslaughter by reason of heat of passion more, rather than less, credible. Evidence of defendant's prison term explained why there were not ongoing substantive communications, much less a

relationship, between the victim and defendant for approximately nine months. It provided context for the minimal contact between defendant and the children and tended to explain defendant's sudden barrage of daily calls and texts beginning in September 2015. The evidence of incarceration also explained why defendant could accept the victim's seeing someone while he was away, but not once he returned.

The lynchpin in the defense case was defendant's sudden rage at learning the victim was dating someone. Knowing defendant had been in prison would appear to make the jurors more receptive to his claim of provoked heat of passion when he learned upon his release that the victim had moved on to another relationship. An unexplained absence would suggest defendant had been in a position to maintain a relationship with the victim, but simply chose not to because his ardor for her had cooled, thereby undermining his claim that he acted in a sudden rage.

Nor do we agree with defendant's argument that the trial court's ruling permitted evidence that "was akin to inadmissible character evidence . . . [and] [t]he trial court could have easily ruled that the evidence concerning the nature of [the relationship between defendant and the victim] was admissible while excluding the evidence of [defendant's] prior imprisonment." The nature of the relationship was defined in part by defendant's having been incarcerated. The trial court did not abuse its discretion when it permitted the victim to offer that evidence. (*Rogers, supra*, 57 Cal.4th at p. 326.)

DISPOSITION

The judgment is affirmed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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