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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 SEVEN

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>NICHOLAS ALSPAUGH,<br><br>Defendant and Appellant. | B283253<br><br>(Los Angeles County Super. Ct. No. BA442649) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed.

John F. Schuck, 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, Zee Rodriguez and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Nicholas Alspaugh stole items from a drugstore and attacked two citizens who tried to stop him from escaping. A jury convicted him of robbery and battery. Alspaugh argues the trial court erred in excluding evidence that would have supported his claim in connection with the battery conviction that he acted in self-defense. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *The Robbery*

Cindi Cruz, a loss prevention officer at a drugstore in Los Angeles, saw Alspaugh walk into the store. He took two items off the shelf, concealed them under his jacket, and walked quickly past the cash registers toward the front door. Cruz ran in front of him and tried to identify herself. Alspaugh pushed her against the door and ran out of the store. Cruz ran after him, but was unable to catch him after he turned a corner and left the store's parking lot.

### B. *The Pursuit*

Efrain V. and his wife, Gloria V., were in their car in the drugstore parking lot when they saw Alspaugh run out of the store with Cruz chasing him. Alspaugh appeared to have something under his arm, and Cruz was yelling for help. Efrain asked Cruz which way Alspaugh had gone. Efrain drove out of the parking lot in the direction Cruz pointed. Cruz called the police.

Efrain caught up to Alspaugh near Venice Boulevard, stopped his car, got out, and walked across the street to where Alspaugh was. He told Alspaugh "to hand over . . . the things

that he had stolen from the young lady." Alspaugh hit Efrain several times in the head and chest and pushed him into the street. Efrain landed on his back. He heard squealing tires and "felt the impact" of a car.

Gloria got out of the car and went to Efrain. She told Alspaugh to give her the things he had taken. Alspaugh pulled Gloria behind a truck and threw her to the ground. He got on top of her, touched her genital area, and tried to remove her jeans. Alspaugh put his knee on her neck, restricting her ability to breathe, and punched her in the genital area. Gloria turned her head to breathe and yelled for help. She bit Alspaugh, and he loosened his grip. She tried to stand up and escape, but Alspaugh grabbed her leg and pulled her back down. He continued hitting her while she screamed for help. A car pulled over, and Alspaugh ran away.

C. *The Witnesses*

Oscar Gutierrez was driving in the area when he saw Alspaugh and Efrain struggling. Gutierrez saw Alspaugh hit Efrain, push him into the street, and run away. Although Gutierrez did not see a car hit Efrain, he saw Efrain in the street, apparently unconscious, and Gloria next to him. Gutierrez asked if they needed help, and then called the 911 emergency operator.

Gutierrez saw Alspaugh get on a bus and walk to the back without paying. Gutierrez followed the bus while talking to the 911 operator. Gutierrez saw Alspaugh get off the bus and enter a fast food restaurant. Gutierrez relayed this information to the 911 operator. Several police cars arrived, and officers arrested Alspaugh inside the restaurant.

Ivan Aragon was driving on Venice Boulevard when he "saw the traffic kind of stopped a little bit." He saw a man run across the street, followed by an older man and a woman. He saw a car hit the older man, at which point he called the 911 emergency operator. The man who had been hit by a car flew into the air, landed in the street, and was "just laying there" without moving.

D. *The Aftermath*

Gloria waited with Efrain until the police and an ambulance arrived. Efrain was conscious but confused and unaware of what had occurred. The ambulance took him to the hospital. The police took Gloria and Cruz to the fast food restaurant, where they both identified Alspaugh.

Los Angeles Police Officer Joseph Oyama spoke with Gloria, who told him Alspaugh had tried to pull down her pants and touched her vagina over her clothing. Officer Oyama went to the hospital, where he spoke to Efrain, whose injuries, in the officer's opinion, did not appear to have been caused by a car.

Efrain could not remember anything that happened to him between the time Alspaugh pushed him to the ground and waking up in the hospital. He was in a lot of pain and disoriented. He was released the following day but walked with crutches for more than a week.

E. *The Verdict*

The jury found Alspaugh guilty of second degree robbery for the drugstore theft and battery with serious bodily injury for the attack on Efrain. The jury found Alspaugh not guilty of sexual battery on Gloria. The trial court sentenced Alspaugh to the

middle term of three years for the robbery conviction and a consecutive term of one year (one-third the middle term of three years) for the battery conviction, for a total prison term of four years.

## DISCUSSION

Efrain had prior convictions for "prostitution" in 1992 and misdemeanor willful infliction of corporal injury on a spouse (Pen. Code, § 273.5) in 2006. Efrain also had an arrest for battery on a spouse (*Id.*, § 243, subd. (e)(1)) in 2001. The trial court admitted Efrain's 2006 conviction, but excluded evidence of the conduct underlying the 2006 conviction and of the 2001 incident.

Alspaugh argues the trial court abused its discretion and violated his constitutional rights by precluding him from introducing "evidence of [Efrain's] 2001 domestic violence arrest" and "more detailed evidence of" the 2006 conviction. Alspaugh contends the trial court's exclusion of "the additional evidence of [Efrain's] violent tendencies" deprived him of the right to present his defense of self-defense to the charge of battery against Efrain.

### A. *Relevant Proceedings*

The court and counsel discussed these incidents twice during the trial. The first time was after counsel gave their opening statements and the court had excused the jurors for the day. According to counsel for Alspaugh, the 2006 conviction arose out of an incident where Efrain "began to choke [Gloria] with two hands around her neck. And he told her, 'If you call the police, I'm going to take your son away. And you can't do anything

because I'm not going to leave a mark.' And then . . . the officers did observe redness around both sides of her neck." When the court asked what happened in the 2001 incident, the prosecutor answered, "It says detention only, reason unknown."

Counsel for Alspaugh argued that the 1992 and 2001 incidents involved moral turpitude, but counsel conceded they were old. Counsel for Alspaugh stated: "The one from 2006, it was a conviction. And other than the fact that, yes, it is a crime of moral turpitude and that's something I could impeach him on, it also does show that he can be violent, which I believe we're entitled to also—under the Evidence Code to introduce."

The prosecutor noted that the 2006 crime was against Efrain's spouse. She argued: "I don't think that it is similar to any of the facts here. If the court is inclined to allow it, I ask that it just be the fact of the conviction and [the defense] not be allowed to go into the details of the conviction."

The trial court found that the 1992 and 2001 incidents had no probative value. The court found, however, "that the probative value outweighs any prejudice with respect to the 2006 conviction in that, as I understand from the opening statement of the defense, there is going to be some challenge to the amount of violence or getting involved in a situation that didn't concern them with respect to [Efrain]. And so I do think that there is some probative value as to something involving battery and violence, no matter who the victim is, and knowing that it is a crime of moral turpitude. So I would limit it to, 'In 2006, you were convicted of misdemeanor domestic battery. Is that correct?'"

The second time the court and counsel discussed the incidents of domestic violence involving Efrain was during

Gloria's testimony at trial. On direct examination, Gloria stated that Alspaugh hit and pushed Efrain. When the prosecutor asked her how many times Alspaugh hit him, she answered, "It pains me to say this, but he hit him a lot of times." She stated that her "husband is a little chubby, and he doesn't have any experience in fighting. Well, he really couldn't defend himself, the poor guy."

During a recess, counsel for Alspaugh noted that Gloria "indicated that her husband does not fight. That, I believe, opens the door for me to be able to ask more in detail about these incidents, including the 2001 one because it was also pertaining to her. Both the 2001 and 2006 are incidents of violence against her. And it's a person she's saying does not fight."

The trial court observed that Alspaugh was "quite tall," six feet one or two inches. The court stated: "The problem that I have with opening up this can of worms is that . . . she's obviously not the same size as the defendant. And so whether or not her husband has hit her, slapped her in some sort of argument, . . . doesn't, to me, go to the credibility of whether or not she is telling the truth about whether her husband wouldn't fight back in a situation where a much taller man is attacking him. So I think it[ ] . . . has very limited probative value and is greatly outweighed by the time and the confusion that it would cause. Because we're talking about completely different situations."

The trial court instructed the jury pursuant to CALCRIM No. 316 that, if the jury found a witness committed a crime or other misconduct, the jury could consider that fact in evaluating the witness's credibility. The court also instructed the jury pursuant to CALCRIM No. 925 that, to prove Alspaugh was guilty of battery on Efrain, the People had to prove beyond a

reasonable doubt that Alspaugh did not act in self-defense. The court also instructed the jury on the law of self-defense, including on mutual combat and contrived self-defense.

During closing argument, counsel for Alspaugh asked the jurors to consider, in evaluating Efrain's credibility, that Efrain "changed his versions of the events." Counsel pointed out that Efrain denied "being physical at all," but Gutierrez "saw them fighting." Counsel for Alspaugh argued Efrain had "a conviction for domestic violence. So, again, this makes his version not credible that he was just going to ask for the [return of the stolen] item nicely." Counsel for Alspaugh also argued that Efrain's injuries did not "match the force that's alleged" to have been used by Alspaugh and that Efrain's injuries were more likely caused by a struggle with Alspaugh. Counsel argued: "So the People have to prove to you beyond a reasonable doubt that Mr. Alspaugh did not act in self-defense. Is it more likely that [Efrain] went out to start something and to grab him? You are to judge his credibility." Citing Aragon's testimony, counsel for Alspaugh contended it was more likely that Efrain's "injuries were as a result of getting hit by a car[.] That's what it looks like."

B. *Applicable Law and Standard of Review*

Evidence of a witness's prior misconduct involving moral turpitude that results in a misdemeanor conviction is admissible for impeachment purposes. (*People v. Clark* (2011) 52 Cal.4th 856, 931; see *People v. Smith* (2007) 40 Cal.4th 483, 512 ["'[p]ast criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach, subject to the court's discretion under

Evidence Code section 352"'].) Because such misconduct may suggest a willingness to lie, it is relevant to the witness's credibility. (*People v. Anderson* (2018) 5 Cal.5th 372, 408; see *People v. Woodruff* (2018) 5 Cal.5th 697, 763 ["Evidence Code section 352 considerations aside, evidence of misdemeanor misconduct is admissible to impeach a witness so long as it involves moral turpitude"].) The trial court has broad discretion under Evidence Code section 352, however, to exclude evidence of prior misconduct involving moral turpitude where the probative value of the evidence is substantially outweighed by its potential for prejudice, confusion or undue consumption of time. (*People v. Edwards* (2013) 57 Cal.4th 658, 722; *Clark*, at pp. 931-932.) Because the court's discretion under Evidence Code section 352 "is broad, 'a reviewing court ordinarily will uphold the trial court's exercise of discretion.'" (*Anderson*, at p. 407; see *People v. Contreras* (2013) 58 Cal.4th 123, 157, fn. 24 ["trial courts have broad discretion to exclude impeachment evidence other than felony convictions where such evidence might involve undue time, confusion, or prejudice"].)

Evidence of prior misconduct of the victim may also be admissible under Evidence Code section 1103. "'As a general rule, evidence that is otherwise admissible may be introduced to prove a person's character or character trait. ([Evid. Code,] § 1100.) But, except for purposes of impeachment (see [Evid. Code,] § 1101, subd. (c)), such evidence is inadmissible when offered by the opposing party to prove the defendant's conduct on a specified occasion ([Evid. Code,] § 1101, subd. (a)), unless it involves commission of a crime, civil wrong or other act and is relevant to prove some fact (e.g., motive, intent, plan, identity) *other than a disposition to commit such an act* ([Evid. Code,]

§ 1101, subd. (b)).' [Citation.] The Evidence Code, however, establishes several exceptions to this general rule. . . . Pursuant to [Evidence Code section 1103,] subdivision (a)(1), in a criminal action, the defendant is permitted to offer evidence of the victims 'character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct)' in order 'to prove conduct of the victim in conformity with the character or trait of character.' . . . Once the defendant has offered such evidence, the prosecution is permitted to offer its own character evidence of the victim to rebut the defendant's evidence. (Evid. Code, § 1103, subd. (a)(2).)" (*People v. Fuiava* (2012) 53 Cal.4th 622, 695.)[1]

As with the admission of evidence of the victim's past conduct for impeachment purposes, the trial court retains discretion under Evidence Code section 352 to exclude evidence that is otherwise admissible under Evidence Code section 1103. (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 700; *People v. Gutierrez* (2009) 45 Cal.4th 789, 827-828; see *People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1456-1457 ["even though the evidence was relevant and admissible pursuant to Evidence Code section 1103, the trial court did not abuse its discretion by excluding the evidence because the evidence was weak on the

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1 "Further, if the defendant has offered 'evidence that the victim had a character for violence or a trait of character tending to show violence,' the prosecution is permitted to offer '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)' in order 'to prove conduct of the defendant in conformity with the character or trait of character.'" (*People v. Fuiava*, *supra*, 53 Cal.4th at pp. 695-696.)

issue of [the victim's] credibility and would require an undue consumption of time"]; *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448 ["[l]ike all proffered evidence, character evidence" under Evidence Code section 1103 "is subject to exclusion under [Evidence Code section 352]"].)

### C. *The Trial Court Did Not Err, and Any Error Would Be Harmless*

The trial court did not abuse its discretion in excluding evidence of the 2001 incident under Evidence Code section 352. The incident was remote, approximately 15 years before the trial in this case. (See *People v. Mireles* (2018) 21 Cal.App.5th 237, 246-247 [no abuse of discretion in excluding remote misdemeanor convictions]; *People v. Muldrow* (1988) 202 Cal.App.3d 636, 647 ["'[t]he nearness or remoteness of the prior conviction is also a factor of no small importance'"]; cf. *People v. Carter* (2014) 227 Cal.App.4th 322, 329-330 [no abuse of discretion in admitting evidence of 11-year-old misdemeanor convictions for impeachment purposes].) In addition, as the People point out, Alspaugh did not present any evidence about the incident that occurred all those years ago. (See *People v. Chatman* (2006) 38 Cal.4th 344, 373 [a defendant's failure to make an offer of proof or present any evidence of conduct underlying a misdemeanor conviction, so that the reviewing court does "not know what the underlying conduct was, whether or how it would have been significant, how defendant would have attempted to prove it, or whether he could have done so," normally makes the argument the trial court should have admitted evidence of the underlying conduct noncognizable].) The absence of any evidence Efrain was

charged with any offenses in connection with the 2001 incident further supported the trial court's exercise of discretion. (See *People v. Rogers* (2013) 57 Cal.4th 296, 331 ["[b]ecause all other crimes evidence in a sense may be viewed as 'inherently prejudicial' [citation], "'uncharged offenses are admissible only if they have *substantial* probative value"'"].)

The trial court also did not abuse its discretion in admitting the 2006 misdemeanor domestic battery conviction but not admitting evidence of the facts underlying the conviction. The trial court had discretion under Evidence Code section 352 to exclude evidence otherwise admissible under Evidence Code section 1103, subdivision (a), "if admitting the evidence would have confused the issues at trial, unduly consumed time, or been more prejudicial than probative." (*People v. Gutierrez*, *supra*, 45 Cal.4th at p. 828.) Although the conduct offered to show the victim's character for violence under Evidence Code section 1103, subdivision (a), may not have to be similar to the victim's conduct the defendant claims caused him to act in self-defense (cf. *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1175-1176 [defendant's introduction of evidence under Evidence Code section 1103, subdivision (a), that the victim was a violent person might allow the prosecution in a murder case to introduce evidence of the defendant's prior domestic violence incident under Evidence Code section 1103, subdivision (b)], similarity of the two incidents is a factor in measuring the probative value of the evidence under Evidence Code section 352. (*People v. Wright* (1985) 39 Cal.3d 576, 587-588; cf. *People v. Cordova* (2015) 62 Cal.4th 104, 133-134 [similarity of offenses a relevant factor in determining whether to admit

evidence of uncharged sex offenses under Evidence Code sections 1108 and 352].)

As the trial court found, Efrain's actions in 2006, reportedly of choking his wife and threatening to take away their child, had little if any relevance to whether he acted in conformity with a tendency for violence by allegedly attacking a younger and larger man to help recover stolen items. Introducing evidence about an unrelated domestic violence incident also would have consumed a significant amount of time, including a potential minitrial on the facts of the 2006 incident, and likely would have confused the jurors about why they were hearing evidence about a decade-old incident involving the victim. Admitting the fact of the conviction but not all the facts underlying the conviction was not an abuse of discretion. (See *People v. Gutierrez*, *supra*, 45 Cal.4th at p. 827 [trial court did not abuse its discretion "by excluding evidence of the victim's misdemeanor battery conviction, an event entirely unrelated to defendant"]; *People v. Carter* (2005) 36 Cal.4th 1215, 1259, fn. 30 ["proffered testimony regarding [the victim's] alleged alcoholism was marginally relevant and likely would have consumed an undue amount of court time"].)

Finally, any error in excluding the facts underlying the 2006 conviction was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) because there is no reasonable probability the result would have been different had the trial court admitted evidence of the 2006 incident. (See *People v. Trujeque* (2015) 61 Cal.4th 227, 280 [reviewing Evidence Code section 352 argument "under the reasonable probability standard for prejudice" of *Watson*]; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1103 [applying *Watson* standard to claimed

abuse of discretion under Evidence Code section 352]; *People v. Marks* (2003) 31 Cal.4th 197, 227 ["the application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of *Watson*"].)

The trial court's ruling allowed Alspaugh to use the fact of Efrain's 2006 domestic violence conviction to argue he was not guilty of battery because he acted in self-defense. (See *People v. Gutierrez*, *supra*, 45 Cal.4th at p. 827 [misdemeanor battery conviction is relevant and admissible under Evidence Code section 1103 to prove victim's propensity for violence].) Counsel for Alspaugh used Efrain's 2006 domestic violence conviction both to support Alspaugh's argument that he acted in self-defense in a physical conflict Efrain initiated and to attack Efrain's credibility.[2] In arguing Alspaugh acted in self-defense, counsel stated that Efrain "chased a total stranger without knowing what exactly he had done" and that Efrain admitted "he was willing to risk his life. He has a conviction for domestic violence." Counsel emphasized: "You expect to believe that a man who has been convicted of domestic violence, that would hit a person that he loved, would just go after a stranger and just politely ask for something back? He was in it for the glory.

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[2] Misdemeanor convictions, as opposed to the underlying conduct, are not admissible for impeachment purposes. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 373; *People v. Hall* (2018) 23 Cal.App.5th 576, 589.) Counsel for Alspaugh, however, used Efrain's 2006 misdemeanor conviction both to impeach Efrain's testimony and to argue Alspaugh acted in self-defense.

They are not good Samaritans."[3] Although Alspaugh argues his trial attorney "would have been able to make a much more effective closing argument" had the trial court admitted additional evidence of the 2006 conviction, the fact that Efrain had a prior conviction for domestic violence in 2006 was enough for counsel to make the self-defense argument based on that incident.

In addition, the evidence of Alspaugh's guilt on the battery charge was overwhelming. (See *People v. Jackson* (2013) 221 Cal.App.4th 1222, 1241 [any error under Evidence Code section 352 was harmless where evidence of the defendant's guilt was overwhelming]; see also *People v. Doolin* (2009) 45 Cal.4th 390, 439 [any "evidentiary error" under section 352 was harmless under either *Watson* or *Chapman v. California* (1967) 386 U.S. 18, 24 where "[t]here was overwhelming evidence of defendant's guilt"].) Alspaugh sought to introduce evidence of the facts underlying Efrain's 2006 domestic violence conviction to support his argument he was not guilty of battery because he acted in self-defense. There was, however, virtually no evidence Alspaugh acted in self-defense. There was no evidence that Efrain initiated the physical conflict with Alspaugh, that Alspaugh actually and reasonably believed he had to defend against imminent harm, or that Alspaugh used

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[3] As noted, the trial court instructed the jury pursuant to CALRIM No. 316: "If you find that a witness had committed a crime or other misconduct, you may consider that fact only in evaluating the credibility of the witness's testimony." Alspaugh does not challenge the propriety of giving this instruction, nor does he argue the trial court erred in refusing to give or not giving sua sponte an instruction under Evidence Code section 1103.

only as much force as was necessary under the circumstances. (See *People v. Casares* (2016) 62 Cal.4th 808, 846; *People v. Nguyen* (2015) 61 Cal.4th 1015, 1066.) The evidence was that Efrain, who thought Alspaugh had stolen the items from Cruz, asked Alspaugh to return them, and Alspaugh "reacted and started" hitting Efrain and shoved him into the street. Efrain denied he hit Alspaugh, and Gloria testified Efrain did not hit Alspaugh. While counsel for Alspaugh argued to the jury that Gutierrez said "he saw two men fighting," what Gutierrez actually stated was that, although he saw two men "struggling," Alspaugh was "the one that had done the hitting."

### D. *The Trial Court Did Not Violate Alspaugh's Due Process Rights*

"'"As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.'" [Citation.] Rather, '[c]ourts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.'"' (*People v. Ghobrial* (2018) 5 Cal.5th 250, 283; see *Taylor v. Illinois* (1988) 484 U.S. 400, 410 ["[t]he accused does not have an unfettered right to offer testimony that is . . . otherwise inadmissible under standard rules of evidence"].) Thus, "the routine application of provisions of the state Evidence Code law does not implicate a criminal defendant's constitutional rights." (*People v. Jones* (2013) 57 Cal.4th 899, 957.)

Nevertheless, a trial court's exercise of discretion to exclude evidence under Evidence Code section 352 "must yield to a defendant's due process right to a fair trial and to the right

to present all relevant evidence of *significant* probative value to his or her defense." (*People v. Cunningham* (2001) 25 Cal.4th 926, 998-999; accord, *People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1063-1064.) While "the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right. [Citation.] Accordingly such a ruling, if erroneous, is 'an error of law merely,' which is governed by the standard of review announced in [*Watson*]." (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 999; accord, *People v. Masters* (2016) 62 Cal.4th 1019, 1079.) Such a ruling is not a refusal to allow the defendant """to present a defense, but only a rejection of some evidence concerning the defense."""" (*People v. Sedillo*, *supra*, 235 Cal.App.4th at p. 1064.)

The trial court's rulings under Evidence Code section 352 did not deny Alspaugh his due process right to a fair trial. The trial court excluded evidence of the details of what happened between Efrain and Gloria in 2006, but the court admitted Efrain's conviction for domestic violence. As noted, Alspaugh argued from the evidence of this conviction that Efrain was a violent person. The trial court's ruling did not violate Alspaugh's due process rights because it excluded only some of the evidence of Efrain's past conduct Alspaugh sought to use to show he acted in self-defense.

## DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.