Filed 9/16/15 P. v. Cabada and Martinez CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. JOSE CABADA and OLGA MARTINEZ, Defendants and Appellants.	2d Crim. No. B255599 (Super. Ct. No. 2011024253) (Ventura County)

Jose Cabada and Olga Martinez appeal their convictions by jury for child abuse (Pen. Code, § 273a, subd. (a))[1] and corporal injury of their four-year-old daughter (§ 273d, subd. (a)) with special findings that Martinez personally inflicted great bodily injury on the victim (§ 12022.7, subd. (d). Cabada and Martinez were sentenced to state prison for six years and 12 years respectively, and ordered to have no contact with the victim or her siblings. (§ 136.2, subd. (i)(1).) Appellants contend that the trial court erred in admitting evidence of prior acts of domestic violence (Evid. Code, §§ 1109, 352) and lacked the authority to order no contact with the victim's siblings. (§ 136.2, subd. (i)(1).) We modify the no-contact protective order to reflect that it expires in ten years and affirm the judgment as modified.

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

Facts and Procedural History

On July 6, 2011, Oxnard Police Officer Ohad Katzman responded to a domestic disturbance call in which Martinez pushed and scratched Cabada. Martinez gave a taped statement and was arrested for domestic violence. During the interview, Officer Katzman became concerned about the welfare of Martinez's four children (A. - age 6, G. -age 4, J. - age 4., who were unsupervised and running about the apartment, and I. - age 5 months).[2] J. had a serious scar on her back, pattern bruises on the lower back, a missing tooth and chipped molar, multiple bruises on her face and body, a scar on the upper lip, an abrasion on the right upper eyelid, a scar on the forehead, scars on the scalp with bald spots where hair had been pulled out, keloid scars on the right ear and nose, and healing ulcerations on the tongue and left side of the mouth.

Officer Katzman called Detective Erica Escalante and Ventura County Child Protective Services to investigate. Detective Escalante noticed a large V shaped scar on J.'s back that funneled down the back like a hot liquid burn. The scar tissue was smooth and lumpy and had a bubbly appearance. J. said that "Mommy put hot water [on me]." J. had blue and red bruises on her lower back where she was hit with a clothes hanger and bruises on the collarbone and shoulder consistent with a control hold. Detective Escalante had never seen a girl with so many bruises on her face.

J.'s twin sister, four-year-old G., said that Martinez hit J. with a belt for wetting her bed. The children's bedroom smelled of urine and had a pile of damp bedding on the floor. G. said that Martinez would get "super mad" and hit J. with a shoe or a belt, and that it happened "lots of times."

After the children were placed in protective custody. J. told social worker Carolina Serrano that Martinez was mad and poured hot water on her back. J. made similar statements to another social worker (Jenny Perez), a child care supervisor

[2] Cabada is the biological father of G., J. and five-month-old I. The stepbrother, A. (age six) has a different biological father.

(Rochelle Mosqueda), a supervisor at the Casa Pacific shelter care facility (Cynthia Norton), and to her fost-adopt parent (Thomas R.). J. told a preschool teacher (T. T.) that Martinez knocked her tooth out and constantly hit her. On many occasions, J. refused to go home and hid in the classroom and cried.

At trial, J. testified that Martinez threw hot water on her back, hit her a lot, and pulled her hair. J. stated that Cabada hit her on the back of the head with a brown belt.

In a taped interview, Cabada admitted hitting the children with a belt. Cabada said "if they're not gonna listen to me," that "you gotta let 'em know like you're not playing with 'em. . . ." Cabada admitted slapping J. in the face and bruising her a few times.

Dr. Todd Flosi, a pediatrician, examined J. and testified at length about her injuries. The doctor opined that the back burn was probably eight months old and consistent with a hot water burn. Doctor Flosi stated that a sunburn would not cause that depth of skin injury or type of scar pattern. J. was treated by two other pediatricians who agreed that the keloid scars on J.'s back were not caused by a sunburn. Doctor Flosi was concerned about the other injuries which were fairly fresh - "the scrapes, the bruises, the healing lacerations; again, the sheer number of them, the location of them, the fact that they occurred in fleshy areas of the body. . . , areas that are difficult to bruise. . . ." Many of the injuries, especially the ones inside the mouth, were caused by trauma to the head and face. Doctor Flosi opined that the combination of injuries (20 separate injuries), the bruise patterns, "and the location of injuries made it highly likely that the injuries were due to child abuse."

Appellants defended on the theory that the scar on J.'s back was caused by a sunburn that was not properly treated. Martinez testified that Cabada was never violent with the children but did on occasion discipline the children by spanking them. On cross-examination, Martinez admitted, that she and Cabada had domestic fights and that, on one occasion, Cabada slapped, punched, choked, and head-butted Martinez. On another occasion, Cabada battered Martinez when she was eight months pregnant with the twins.

Martinez further admitted that Cabada had a prior conviction for battering his own mother. Martinez had her own anger issues and stated that she was committed to the California Youth Authority for punching and kicking a girl, and for punching another girl and taking her pager and necklace.

Prior Acts of Domestic Violence

Appellants argue that the trial court erred in admitting prior acts of domestic violence pursuant to Evidence Code section 1109. Generally, evidence of a defendant's prior bad acts is not admissible to show the defendant's disposition to commit a criminal act. (Evid. Code, § 1101, subd. (a).) Evidence Code section 1109, subdivision (a)(1) is an express exception to the general rule and provides in pertinent part: "[I]n 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." Where the defendant is charged with child abuse, other acts of domestic violence are admissible to show defendant's propensity to commit such acts, providing the probative value of the evidence outweighs the potential for prejudice. (*People v. Ogle* (2010) 185 Cal.App.4th 1138, 1143; *People v. Johnson* (2000) 77 Cal.App.4th 410, 419-420.) "By its incorporation of [Evidence Code] section 352, section 1109, subdivision (a)(1) makes evidence of past domestic violence inadmissible only if the court determines that its probative value is 'substantially outweighed' by its prejudicial impact." (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531.)

Cabada - Prior Domestic Violence

Cabada asserts that the trial court erred in admitting two prior convictions for domestic violence: a 2007 misdemeanor conviction for corporal injury on Martinez and a 2007 battery conviction for striking his mother (M. H.). Cabada argues that the prior convictions do not involve children, are inflammatory, and are isolated incidents in which appellant lost his temper. The trial court ruled that the domestic violence convictions showed a propensity to commit "familial violence," were extremely probative, and did not create a substantial danger of undue prejudice. (Evid. Code, §

352.) It did not err. The domestic violence convictions show that Cabada, when angry, resorted to violence against family members. It showed a propensity to physically abuse female family members, both young and old, by striking them in the head or face in the confines of the home.

The domestic violence evidence was probative in judging the credibility of the witnesses and to show the absence of accident or mistake. The children were told to lie about J.'s injuries and say it was an accident. G. testified that the belt accidentally "swinged" on J., that J. "accidentally" swallowed her front tooth, that hot soup "accidentally poured" on J., and that Cabada "never hits" and "never gets mad." Martinez testified that she never saw Cabada act violently with the children.

The admission of prior acts of domestic violence to paint a person faithfully is not, of itself, unfair or an Evidence Code section 352 violation. (*People v. Johnson, supra,* 185 Cal.App.4th at p. 534.) Here, the domestic violence convictions presented a faithful picture of Cabada's propensity to physically abuse female family members.

Prior domestic violence evidence is an important factor in determining whether J.'s injuries were accidental. Evidence Code section 1101, subdivision (b) authorizes the admission of prior domestic violence to prove the absence of mistake or accident. "[T]he doctrine of chances teaches that the more often one does something, the more likely that something was intended, . . . rather than accidental or spontaneous. " (*People v. Steele* (2002) 27 Cal.4th 1230, 1244.) Child abuse is a "secretive offense, shrouded in a private shame, embarrassment, and ambivalence on the part of the victim, as well as intimacy with and intimidation by the perpetrator. The special relationship between victim and perpetrator in both domestic violence and [child] abuse cases, with their unusually private and intimate context, easily distinguishes these offenses from the broad variety of criminal conduct in general. Although all criminal trials are credibility contests to some extent, this is unusually - even inevitably - so in domestic and [child] abuse cases, specifically with respect to the issue of victim credibility." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1313.)

The trial court found that the domestic violence convictions were relatively close in time and "not so similar or so egregious as to cause me concern that the jury would convict Mr. Cabada of these current charges just because they hear evidence of these misdemeanor convictions. [¶] . . . [¶] So on 352 analysis, I find the defendant's two prior misdemeanor convictions for domestic violence, given the time frame, given the familial relationships . . . with the victim in those cases, and the fact that the codefendant [i.e., Martinez] is one of the victims of one of the earlier crimes of domestic violence all outweigh the prejudicial value of that information." Cabada makes no showing that the decision to admit the domestic violence evidence was arbitrary, capricious, or patently absurd. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1337.)

Cabada argues that the domestic violence convictions were inflammatory because the prosecution's case was based on his negligent failure to stop the child abuse. The evidence clearly shows that Cabada played an active role in J.'s physical abuse. In a taped statement, Cabada admitted hitting J. with a belt and slapping and bruising her. This was corroborated by J., G., and A., who stated that Cabada hit J. with a shoe or belt. A. told Detective Escalante that Cabada hit J. with a shoe every day. When the detective asked "where," A. pointed to the back, butt, arms, head, and feet.

Prior domestic violence is unduly prejudicial under Evidence Code section 352 only if it uniquely tends to evoke an emotional bias against the defendant as an individual and has very little effect on the issues.[3] (*People v. Johnson, supra,* 185

[3] The jury received a CALCRIM 852 instruction that the uncharged domestic violence evidence could only be considered as it related to Cabada's or Martinez's individual guilt. The jury was instructed: "The People presented evidence that both defendants committed domestic violence that was not charged in this case, specifically: evidence of Defendant Martinez scratching and pushing Cabada on July 6, 2011 and Defendant Cabada's prior convictions for battery, vandalism and inflicting corporal injury to his child's parent. [¶] . . . [¶] If you decide that . . . either defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that that defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that that defendant was likely to commit the crimes of child abuse and corporal injury to a child, as charged here. If you conclude that either or both defendants committed the uncharged domestic violence, that conclusion is only one

Cal.App.4th at p. 534.) "The prior incidents of domestic [violence] introduced in this case were no more egregious than the charged offense, and posed no danger of confusing the jury." (*People v. Jennings, supra,* 81 Cal.App.4th at p. 1315.) Cabada admitted slapping and bruising J. and pulling her by the hair. Cabada was also present when Martinez scalded J. with the hot water and did not help J. But for the admission of the prior domestic violence convictions, there is no reasonable probability that Cabada would have received a more favorable verdict. (*People v. Ogle, supra,* 185 Cal.App.4th at p. 1145.)

Martinez - Uncharged Domestic Violence

Martinez argues that the trial court erred in admitting evidence that she quarreled with Cabada before she was arrested on July 6, 2011. In a taped statement, Martinez told Officer Katzman that she was "really, really, really pissed off" and pushed and scratched Cabada on the back. The prosecution argued that "fighting with a spouse or a girlfriend or boyfriend is similar to using -- resorting to violence against children" and probative of Martinez's disposition to commit the charged crimes. Defense counsel argued that Martinez was not Mirandized (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]) but conceded that "we are obviously going to hear about the [Evidence Code section] 1109 between [Martinez] and the father of her children, Mr. Cabada." The trial court overruled the *Miranda* objection and asked if there was any other objection. Martinez's trial counsel responded "No."

Having failed to object on Evidence Code section 352 or 1109 grounds, Martinez is precluded from raising the issue on appeal. (Evid. Code, § 353, subd. (a);

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factor to consider along with all the other evidence. It is not sufficient by itself to prove that that defendant is guilty of the alleged offenses."

The jury was also instructed on a parent's right to spank a child for disciplinary purposes. "The punishment, however must be necessary and not excessive in relation to the individual circumstances. [¶] The People must prove beyond a reasonable doubt that the force use was not justifiable. If the People have not met this burden, you must find the defendants not guilty of the crimes charged." (CALCRIM 3405.)

People v. Kipp (2001) 26 Cal.4th 1100, 1124; *People v. Partida* (2005) 37 Cal.4th 428, 435.) Waiver aside, Martinez makes no showing that the domestic violence evidence lacked probative value or was unduly prejudicial. The evidence was properly admitted to show that Martinez had a propensity to resort to violence when angry, that she took her anger out on family members, and that J.'s injuries were not accidental.

Martinez contends that the uncharged domestic violence evidence is too tenuous to be of probative value. We disagree. The July 6, 2011 incident showed that Martinez had the propensity, when angry, to strike or scratch her victims on the back. Martinez told Officer Katzman that she "accidentally scratched" Cabada as they quarreled about rent money. After J. was physically abused in the same apartment, Martinez told the children to say it was an "accident." Domestic violence fueled by anger and money concerns was a common theme. G. testified that Martinez got "super mad" when there was no money to buy milk and hit J. with a belt and a shoe. The trial court reasonably concluded that the July 6, 2011 scratching incident was far less inflammatory than the charged acts of child abuse. (See e.g., *People v.* Poplar (1999) 70 Cal.App.4th 1129, 1139; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1338.) Appellants make no showing that the jury would have returned a more favorable verdict had the uncharged domestic violence evidence been excluded. (*People v. Watson* (1956) 46 Cal.2d at 818, 836.)

No Contact Order

Appellants argue, and the Attorney General agrees, that the trial court erred in issuing a no contact order that has no termination date. Section 136.2, subdivision (i)(l) authorizes a no contact protective order for a maximum period of 10 years.[4] We, accordingly, modify the no contact order to provide that it expires in 10 years.

[4] When appellants were sentenced in 2014, former section 136.2, subdivision (i)(1) provided in pertinent part: "In all cases in which a criminal defendant has been convicted of a crime of domestic violence as defined in Section 13700, . . . the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with the victim. *The order may be valid for up to 10 years*, as determined by the court." (Italics added.)

Appellants claim that J. was the only victim and that the trial court lacked authority to order no contact with J.'s siblings. Appellants forfeited the error by not objecting. On the merits, postconviction no contact orders may issue to protect the victim's immediate family where the family members are physically or emotionally harmed. (§ 136.2, subd. (i)(1); *People v. Clayburg* (2012) 211 Cal.App.4th 86, 92; see e.g., *People v. Beckemeyer* (July 2, 2015 D065565) __ Cal.App.4th __, __ [2015 DJDAR 7778, 7780] [victim's son who was assaulted during domestic violence incident qualifies as a victim for purposes of postconviction no contact order].)

In *People v. Clayburg, supra,* 211 Cal.App.4th 86 (*Clayburg*), defendant was convicted of stalking her ex-husband who fathered their daughter. The trial court issued a no contract order to protect the ex-husband and daughter pursuant to section 646.9, subdivision (k)(1). (*Id.*, at p. 88.) On review, we rejected the argument that the trial court was only authorized to order no contact with the victim (i.e., the ex-husband). "Here, daughter is a person who suffered emotionally and who was traumatized by appellant's conduct. . . . Surely, this is a person who is within the 'wider net' of the second sentence of the statute [i.e., section 646.9, subdivision (k)(1)]." (*Id.*, at p. 91.) The postconviction no contact order was tantamount to a civil restraining order and consistent with article 1, section 28, subdivision (e) of the California Constitution which provides that " '[t]he term "victim" also includes a person's spouse, parents, children, siblings, or guardian. . . .' [Citation.]" (*Id.*, at p. 92.)

The language of section 646.9, subdivision (k)(1)[5] is nearly identical to the remedial language in section 136.2, subdivision (i)(1) which provides in pertinent part: "It is the intent of the Legislature in enacting this subdivision that the duration of any

[5] Section 646.9, subdivision (k)(1) provides in pertinent part: "The sentencing court . . . shall consider issuing an order restraining the defendant from any contact with the victim, that may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, *and the safety of the victim and his or her immediate family*." (Italics added.)

restraining order issued by the court be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family." For the reasons stated in *Clayburg*, we hold that a trial court may issue a postconviction no-contact order to protect the sibling of a child abuse victim where the sibling was traumatized by defendant's domestic violence. In the instant case, horrific acts of child abuse were carried out in the presence of the siblings. The physical abuse was so extreme that A. and G. called 911 on separate occasions. To narrowly read section 136.2, subdivision (i) to limit the no contact order to J. alone yields a grotesque caricature of the Legislature's purpose. (*Clayburg, supra,* 211 Cal.App.4th at p. 91.)

Appellant's reliance on *People v. Delarosarauda* (2014) 227 Cal.App.4th 205 is misplaced. There, the court narrowly construed section 136.2, subdivision (i)(1) to prohibit contact with the victim (a cohabitant) but not the victim's children (defendant's son and stepdaughter). (*Id.*, at pp. 210-211.) The victim testified that defendant "never touched" the children. (*Id.*, at p. 211.) Because the children were not harmed, the trial court "lacked authority to issue the no-contact protective order as to the children under section 136.2, subdivision (i)(1)." (*Id.*, at p. 212.) The court in *Delarosarauda* held that *"Clayburg* is factually distinguishable. There, the evidence established that the defendant stalked the named victim and the victim's child, causing both to suffer emotional harm. On those facts, a protective order could have been issued covering the child under section 136.2, subdivision (i)(1), as the child was a 'natural person with respect to whom there is reason to believe that any crime as defined under the laws of this state . . . is being or has been perpetrated or attempted to be perpetrated.' (§ 136, subd. (3).)" (*Id.*, at p. 212.)

Although J. was the primary target of the child abuse, the siblings were also subjected to physical and emotional abuse. Cabada admitted using a belt on the children and grabbing G. by the hair. G. reported that Cabada hit her with a knife and the older half-brother, A., reported that Martinez hit J. and G. with a belt.

The probation report recommended that appellants have no contact with the children. Appellants did not object, and for good reason. Before sentencing, J. and I.

were adopted by different families. Ventura County Child Protective Services successfully placed A. with his natural father and paternal grandmother but G. (J.'s twin sister) underwent 11 failed placements due to hypersexual and aggressive behaviors. The social worker, Rachel Berry, reported that the children were traumatized and will have issues for life. In all her years of working for Child Protective Services, "this is the worst case" Berry has ever dealt with.

The overriding purpose of postconviction no-contact orders is to protect the safety of the victim and the victim's immediate family. This case cries out for such an order. Section 136.2 does not require that J.'s siblings suffer the same physical harm as J. "A contrary construction would, in our view, defeat justice." (*Clayburg*, *supra*, 211 Cal.App.4th at p. 89.)

Conclusion

Cabada and Martinez were sentenced on March 14, 2014 and ordered to have no contact with the children. The no-contact protective order is modified to reflect that it expires on March 13, 2024. (§ 136.2, subd. (i)(1).) The judgments, as modified, are affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Patricia M. Murphy, Judge

Superior Court County of Ventura

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