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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

OMAR ARENAS LUNA,

Defendant and Appellant.

B263669

(Los Angeles County
Super. Ct. No. BA420294)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Garcia, Judge. Affirmed.

Grace White, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

Omar Arenas Luna appeals from his conviction of corporal injury to a cohabitant, contending there was insufficient evidence to support the jury's verdict and that the trial court erred by allowing evidence concerning Luna's conversations with his psychotherapist. We affirm because there was substantial evidence to support the verdict and because Luna had waived the psychotherapist-patient privilege.

FACTS AND PROCEDURAL HISTORY¹

On December 27, 2013, Luna punched his live-in girlfriend, Gabriela V., in the head three times while she was visiting Luna's daughter at the hospital following the child's appendectomy. Gabriela had earlier learned that Luna was cheating on her, but stayed with him even though he became angry when questioned about the subject. When Gabriela spotted hickies on Luna's neck, she asked, "[W]hy was he doing that to me." Luna denied her accusations and said she was crazy.

Gabriela told Luna he had to move out of their house. Luna said that Gabriela was the one who should leave, then grabbed her by the throat and pushed her against the wall of the daughter's hospital room. Gabriela had trouble breathing, but was able to say once more that Luna had to move out. She tried to push Luna's arms away and managed to scratch his neck. Luna then punched Gabriela twice in the head. Gabriela sat down in a chair and Luna punched her again. The three blows left her with a broken nose and a cut under her left eye that required stitches. She also had bruises on her left arm.

A hospital attendant entered the room and summoned a nurse after noticing Gabriela's injuries. Luna told the nurse that Gabriela had fallen. When Gabriela was taken to the hospital's emergency room, she told the doctor who treated her that Luna had hit her. Luna was arrested after the police were summoned and Gabriela told them that Luna had attacked her. Luna appeared uninjured to the officers. He was charged with one count of corporal injury to a cohabitant (Pen. Code, § 273.5, subd. (a)), along with a sentence enhancement allegation for having inflicted great bodily injury (Pen. Code,

¹ In accord with the usual rules on appeal, we state the facts in the manner most favorable to the judgment. (*People v. Acevedo* (2003) 105 Cal.App.4th 195, 197, fn. 1.)

§ 12022.7, subd. (e)), and one misdemeanor count of child endangerment. (Pen. Code, § 273a, subd. (b).)

Maria Christina Aguilera, the other woman in Luna's life, testified that when she met Luna, she believed Luna and Gabriela were about to separate. Gabriela came to her workplace, told her to stay away from Luna, and threatened to get her fired. After the hospital incident, Gabriela sent Aguilera text messages and e-mails calling her a whore and telling her to stay away from Luna. Aguilera had never seen Luna become angry or physically aggressive. Luna's brother Marco also testified that he had never seen Luna become angry or hit someone.

Luna testified that his relationship with Gabriela soured because of her jealousy about other women and the time Luna spent with his children. Luna had told Gabriela not to visit the hospital on the day of the incident because the daughter's mother would be there, and the mother and Gabriela did not get along. Gabriela had been away for a few weeks, and when she entered the hospital room she asked Luna what he had been doing. Luna said he did not want to talk and told Gabriela to calm down. She lunged at him and asked what was "going on with your neck?" Gabriela pulled down Luna's shirt and scratched his face, chest and arm. In response, Luna grabbed her wrists, told her to calm down and "leaned her against the wall."

Gabriela continued to argue with Luna, threatening to take his car and throw out his clothes. Gabriela grabbed Luna's arm and dug in her nails. Luna "extended" his arm. Because he was looking at his daughter, he did not see what happened next, but believed that Gabriela slipped and fell, possibly due to the slippery floors and a cell phone case that had been dropped on the floor. Luna denied grabbing Gabriela by the neck or striking her in any fashion, and claimed her injuries occurred when she slipped and fell.

Luna complained that Gabriela took money from his wallet, along with his watch and car keys, after he was arrested. He also noted that she moved back in with him for a month after the incident.

On cross-examination, the prosecutor asked Luna whether he had told his psychotherapist that he had pushed Gabriela. This prompted a defense objection on the

ground of the patient-psychotherapist privilege. (Evid. Code, § 1014.) The prosecutor noted that defense counsel had earlier planned to call the psychotherapist and that the privilege had been waived because defense counsel turned over the psychotherapist's report during pretrial discovery. (Evid. Code, § 912.) The trial court overruled the objection. Luna equivocated as to whether he told the therapist he had pushed Gabriela or had extended his arm, or whether the therapist had misinterpreted what he had said. Eventually, Luna testified that he mentioned to his therapist that he had pushed to the left, but meant it in the sense of extending his arm.

DISCUSSION

1. The Judgment Is Supported By Substantial Evidence

The crime of inflicting corporal injury on a cohabitant or spouse requires the direct application of force that results in physical injury. (Pen. Code, § 273.5; *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1477.) Luna contends we must reverse because there was insufficient evidence that he struck Gabriela.

In resolving a substantial evidence challenge, our concern is not whether the evidence establishes guilt beyond a reasonable doubt. Instead, we review the entire record in the light most favorable to the prosecution to determine whether it contains substantial evidence: evidence that is reasonable, credible, and of solid value that would allow a rational jury to find that all the elements of the charged offense were committed. (*People v. Jimenez* (2015) 242 Cal.App.4th 1337, 1353-1354.) Evidentiary conflicts, including evidence that appears justifiably suspicious, are not enough to warrant reversal: it is for the trier of fact to determine witness credibility and resolve conflicting evidence. (*Ibid.*) If the evidence would allow a reasonable trier of fact to reach conflicting conclusions, there is by definition substantial evidence. (*People v. Riley* (2015) 240 Cal.App.4th 1152, 1165-1166.)

Although Luna acknowledges these concepts, his analysis ignores them. Instead he contends that Gabriela should not be believed because she came to the hospital despite being asked not to, and because domestic disputes frequently result in false accusations of

violence, and because he testified at trial, his testimony was credible and Luna's was not. Setting aside the accuracy of the last two assertions, the very nature of Luna's argument undermines it. The existence of these acknowledged evidentiary conflicts was for the jury to resolve. Nothing in Gabriela's testimony was so inherently improbable to render it unworthy of credence as a matter of law.²

2. *The Patient-Psychotherapist Privilege Was Waived*

Luna contends that the trial court erred by allowing the prosecutor to impeach him with a statement to his psychotherapist that he had pushed Gabriela because those statements were privileged. (Evid. Code, § 1014.) Apart from setting forth the statutory language, however, Luna does not address whether he waived the privilege by producing the therapist's report before trial. We therefore deem the issue waived. (*EnPalm, supra*, 162 Cal.App.4th at p. 775.) In any event, the trial court concluded that defendant had waived the privilege by voluntarily disclosing the psychotherapist's report to the prosecution. Substantial evidence supported that ruling.

² Luna's opening appellate brief suffered from several defects: he did not support his statement of facts with any record citations (Cal. Rules of Court, rule 8.204(a); he had no discussion, analysis, or citation to legal authority concerning the substantial evidence issue (*EnPalm, LLC v. Teitler* (2008) 162 Cal.App.4th 770, 775 (*EnPalm*)); and he did not include his patient-psychotherapist privilege argument under a separate heading (rule 8.204(a)(1)(B)). His appellate reply brief did include record citations and a bare-bones analysis and discussion of the substantial evidence issue, but did not address further the evidentiary issue. (*In re Marriage of Brandes* (2015) 239 Cal.App.4th 1461, 1484, fn. 10 [issues not raised in opening brief are waived].)

Most puzzling is the assertion at the start of his opening appellate brief that we are obliged to conduct an independent review of the record under *People v. Wende* (1979) 25 Cal.3d 436, 440-442, to determine "whether the record reveals any issues which would, if resolved favorably to appellant, result in reversal or modification of the judgment." This assertion shows a complete misunderstanding of the parameters and applicability of *Wende* review. Needless to say, the fact that Luna hired privately retained counsel who purported to raise and discuss issues on appeal makes clear that this is not a *Wende* appeal. (*People v. Placencia* (1992) 9 Cal.App.4th 422, 424-425; *People v. Johnson* (1981) 123 Cal.App.3d 106, 109-110.)

We exercise our discretion to overlook these defects, but urge counsel to familiarize herself with the rules and procedures of California appellate practice.

Luna attempts to raise another argument related to this issue – that the therapist’s report was unreliable because Luna denied saying that he pushed Gabriela. This issue also fails. First, the issue is waived because it was not the basis for Luna’s objection. (Evid. Code, § 353; *People v. Partida* (2005) 37 Cal.4th 428, 433-434.) Second, it is unsupported by analysis, discussion, or citation to authority. (*EnPalm, supra*, 162 Cal.App.4th at p. 775.) Third, no error occurred because Luna admitted telling his therapist that he pushed Gabriela, and it was for the jury to decide whether his explanation that he meant it as having extended his arm was true.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.