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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY KEITH FOREMAN, Defendant and Appellant.	B283561 (Los Angeles County Super. Ct. No. BA452661)

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

Brian C. McComas, 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, Assistant Attorney General, Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

The adult children of defendant Jeffrey Foreman's girlfriend arrived at defendant's home unannounced in the middle of the night to retrieve belongings their mother left at his house. They verbally and physically sparred with defendant, who ultimately shot one of them in the thigh. During defendant's ensuing trial for assault with a firearm and possession of a firearm by a felon, both children alluded to prior domestic violence between defendant and their mother. Defense counsel promptly objected to their testimony as contrary to a pretrial agreement and twice moved for a mistrial. The trial court denied the motions for mistrial, and defense counsel declined a curative instruction. The jury found defendant guilty of both offenses.

Defendant now contends the trial court erred in denying the motions for mistrial. He argues that the witnesses' statements not only unduly prejudiced him but also constituted testimonial hearsay that violated his right to confrontation. We disagree and affirm.

PROCEDURAL HISTORY

An amended information charged defendant with one count of assault with a firearm (Pen. Code, § 245, subd. (a)(2))[1] and one count of unlawful possession of a firearm by a felon (§ 29800, subd. (a)(1)).[2] The amended information alleged as to the assault count that defendant personally used a handgun and inflicted great bodily injury on the victim (§§ 12022.5, 12022.7, subd. (a)).

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

[2]The amended information also charged defendant with attempted murder (§§ 187, subd. (a) & 664) and related enhancements (§ 12022.53, subds. (b), (c), & (d)), but the trial court granted defendant's section 995 motion to set aside that count.

It also alleged that defendant suffered a prior conviction within the meaning of section 667.5, subdivision (b). Defendant pled not guilty to the charges and denied the allegations.

A jury found defendant guilty of the charged offenses but found the enhancement allegations not true. Defendant later admitted the prior conviction. The trial court sentenced him to the midterm of three years on the assault count and imposed an additional one year for the prison prior, for a total sentence of four years. The court imposed the midterm of two years on the possession count, but stayed that sentence pursuant to section 654.

Defendant timely appealed.

FACTUAL BACKGROUND

Tyra Wallace testified that her mother was dating defendant on December 17, 2016; defendant was in his fifties at the time. Around 2:00 a.m. that morning, Tyra's[3] mother called and told her there was "something going on" between her and defendant. Tyra's mother further told Tyra that she had left some of her belongings at defendant's house and asked Tyra to go get them for her. Tyra called defendant's phone but he did not answer. She also called the police to ask for help retrieving the items from defendant, because she knew her mother and defendant "had been drinking" and "didn't know if he would be physical." The police told Tyra she would have to wait for assistance because they were responding to a homicide. Tyra decided not to wait for the police; she and her friend Destiny, both of whom were 20 years old at the time, drove to defendant's house to retrieve the items.

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[3]We refer to Tyra Wallace and her brother, Tramell Wallace, by their first names to avoid confusion.

Tyra parked in defendant's driveway and knocked on his door. Defendant's elderly mother let Tyra inside after she "told her the situation between Jeff and my mother," namely that her mother "needed her car and her keys back" from defendant. Tyra saw defendant shortly after she entered the house; she said "he looked shocked, like he was wondering what I was doing there." Tyra and defendant "got into a verbal dispute." She then "ran upstairs to the bedroom" to look for her mother's belongings.

Defendant followed her and initiated a shoving match. During the scuffle, Tyra saw defendant reaching for a small silver gun that was concealed beneath a pillow on the bed. Tyra ran back downstairs and exited the house before defendant grabbed the gun. She returned to her car and called her older brother, Tramell Wallace, who was 28 at the time. Tyra asked Tramell to come get their mother's keys. She told him that defendant hit her, and that he had a gun. Tramell told her to leave and wait for him, so she drove around the corner.

Tyra testified that Tramell[4] arrived about five to seven minutes later. He parked his car in the middle of the street outside defendant's house. Tyra got out of her car and walked over to Tramell's car. Destiny remained in Tyra's car, which was parked several houses down. Tramell stayed in his car and used his cell phone to call defendant. Tramell testified that defendant did not answer, so he left at least one and possibly two angry voicemails for defendant. Tramell testified that he was angry "[b]ecause of the way my car - - he took my mother car [*sic*]."

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[4]Tramell was accompanied by his friend, Charles Queen, who was also about 28 years old. Queen remained in the car until after Tramell was shot.

At some point, Tyra knocked on defendant's front door. At Tramell's urging, she then retreated to the street, where Tramell remained in his car. Tramell yelled "Come outside" and "Give me my mom's stuff."

Defendant eventually exited his house. Tyra testified that Tramell and defendant began verbally arguing; Tramell testified that "[i]t wasn't even an argument," "[i]t was more like I was really just looking for the keys." According to Tyra, Tramell "was upset because this isn't the first time something like this has happened." While defendant was exchanging words with Tramell, Tyra saw defendant reach into his right pocket about four times. Tramell heard defendant say "Get away from here, or I'll shoot you."

Tyra nevertheless approached defendant and demanded the keys. Defendant responded by pushing her in the arms and chest. This physical confrontation angered Tramell, who got out of his car and approached defendant. Tramell testified that he "pointed my fist" at defendant and "swung it." Tyra testified that defendant and Tramell were "swinging" at each other for about a minute or two, though Tramell testified that defendant never swung back at him.

Tyra testified that defendant "reached into his pocket and pulled out the gun and shot." Tyra testified that defendant's arm was "a little bit under" shoulder height as he fired the gun at Tramell, who was "two, three feet" away from him. Tyra saw blood on Tramell's pants. Tyra testified that defendant ran toward Tramell and yelled something to the effect of, "Get the fuck out of here before I steal your car." Tramell heard defendant say, "I'll take your car." Tramell realized he had been shot in the right thigh as he ran to his car.

Tyra called 911 at 4:22 a.m.; the prosecutor played the 911 call for the jury. During the call, Tyra told the operator that defendant "pulled a gun out on me and we just want my mom's car back [*sic*] I brought my brother so he can get my mom's car back." When the operator asked Tyra, "[W]hen did this happen," she responded, "like a couple, I don't know, like a couple of hours ago"; Tyra testified that she meant that was when defendant initially took her mother's car. She further explained to the 911 operator, "my mom's boyfriend took my mom [*sic*] car he won't give us back her keys, he pulled out a gun on us so we just trying to get our mom [*sic*] stuff back so we can go home."

Los Angeles Police Department officer William Hines testified that he responded to Tyra's 911 call. He found Tyra and Tramell on the scene. Tyra was "extremely upset" and Tramell was "agitated" and "appeared to be somewhat in shock or disbelief." Tramell told Hines he thought he had been shot and showed Hines his leg. Hines "observed a gunshot wound through-and-through to his right thigh." He called an ambulance for Tramell and then, with additional officers, surrounded defendant's house. Defendant came out of his home and was taken into custody without incident; Hines did not see any injuries on him. No gun was recovered from defendant or his home.

Defendant's adult daughter, Candice Foreman, testified that she was sleeping at her father's house in the early morning hours of December 17, 2016 when she was awakened by the doorbell and yelling. She stayed in her room and later heard yelling outside. She recognized defendant's voice and heard other "angry" voices as well. At some point, she heard a loud bang. Defendant came back into the house after she heard the bang and

walked upstairs. Candice did not remember telling police officers that she saw someone push defendant before she heard the bang and saw a flash, or that defendant "brought a gun to a fist fight."

DISCUSSION

Defendant argues that the court should have granted a mistrial. He contends that both Tyra and Tramell violated a pretrial agreement barring discussion of "any alleged DV [domestic violence] incidents or auto theft or anything like that" that occurred between defendant and their mother,[5] thereby putting testimonial hearsay before the jury, violating his confrontation clause rights, and depriving him of a fair trial. We conclude the court did not abuse its discretion in denying his requests for mistrial.

I. Background

Prior to trial, counsel and the court had the following colloquy:

Defense counsel: "With respect to Ms. Natasha White [Tyra and Tramell's mother], there is an incident alleged earlier, at some point earlier before the actual conduct that makes up this case between my client and Ms. White that gave rise to Ms. White's adult children going to my client's residence.

"It's my understanding, based on our conversations off the record, that [the prosecutor] will introduce that the adult children, one of them being the alleged victim in the matter, went

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[5]Defendant also asserts that Hines violated the order when he testified, in response to a question asked by defense counsel during cross-examination, that Tramell told him that "[h]e was upset about the way his mother was treated and also about him being shot." Defense counsel did not object to this testimony at trial or request a mistrial after its admission. Any arguments related to this testimony are accordingly forfeited.

to my client's home to retrieve their mother, Natasha White's, belongings that were at the home of my client.

"So that way there will be no discussion of any alleged DV [domestic violence] incidents or auto theft or anything like that.

"The Court: Is that correct, [prosecutor]?

"[Prosecutor]: That's correct.

"The Court: Okay."

It does not appear that defense counsel made a formal motion in limine to exclude evidence of prior incidents between defendant and his girlfriend, or that the court made a formal ruling excluding the evidence. The above colloquy is the only pretrial discussion of the issue that appears in the appellate record.

On direct examination, the prosecutor asked Tyra what she told defendant's mother when she answered the door: "And you told her that you were there to get my mom's stuff?" Tyra responded, "I told her that Jeff had beat –" before being interrupted by an objection from defense counsel. At sidebar, the court noted that it had heard Tyra's entire statement, "I told her that Jeff had beat my mom up," but said it was not clear that the jury heard the full statement because "[t]here were several people talking at the same time." Defense counsel stated that she was "almost certain the jury heard" the "extremely prejudicial" statement and asked for a mistrial. She did not assert that the statement was testimonial hearsay or argue that it violated the confrontation clause. The court took the request under submission.

After the lunch recess, defense counsel reiterated her objection to Tyra's statement: "I made an express 402 for this particular reason. I didn't want . . . any of the witnesses to

mention anything about that uncharged, [*sic*] behavior for which he's never been convicted, in front of the jury. [¶] . . . [¶] It puts the defense, in these kinds of situations, in a tenuous position. Of course you want the instruction because you don't want them to consider because it's unalleged conduct. But at the same time you don't want to draw any further attention to it." The court said it understood her concern and invited her to "keep thinking about" whether she wanted a curative instruction.

The court ruled, however, that Tyra's statement did not "rise[] to the level of a mistrial." It explained that Tyra did not have any direct knowledge of what may have occurred between defendant and her mother, and, moreover, her statement "really has nothing to do with the defense [of self-defense], which I think is a strong defense since he is in his home and his home is being barged into in the middle of the night." Nevertheless, the court offered "to do whatever curative thing" defense counsel preferred. The court also explicitly warned the next witness, Tramell, that any sort of "confrontation between your mother and the defendant here, Mr. Foreman, that happened before you ended up going over to the house," was not "relevant in the proceeding" and directed him, "[d]on't bring it up at all." Tramell said he understood.

Yet while complaining about a headache and "serious meltdown" he claimed to be experiencing on the stand, Tramell urged the jury to "think about the fact that I have been mistreated, and my mom been mistreated [*sic*]. And I have to go through this." The prosecutor immediately asked for a recess; defense counsel added, "And a 402."

At sidebar, defense counsel argued that Tramell intentionally violated the court's order despite being expressly

cautioned about it less than an hour earlier. She again requested a mistrial, arguing, "Now this is the second time that the same jury has heard the same thing I 402'd over and over and over again. . . . We can't unring the bell. My client's character is being dragged through the mud for something he's never been charged with. Now this jury is wondering, well, what happened?" The prosecutor responded that the jury already knew that Tyra and Tramell believed defendant had "taken something from their mother." Defense counsel replied, "[t]hat would be fine if it were just something happened, then they could think they broke up. They got in an argument. They just don't want to see each other. That's one thing. [¶] If he just said 'mistreated' without Tyra saying, 'he beat my mother up,' that would be one thing. Those things combined together are completely and totally unfair to my client. It muddies his character. And now I'm fighting a charge that's not even there. That's the problem."

The court agreed with the prosecutor: "The word mistreated can be interpreted in a lot of different ways. And she could have been mistreated because the defendant wouldn't give her her [*sic*] car back or her car keys back. He didn't say anything with respect to violence." It continued, "I mean, obviously, the jury knows that there is some sort of dispute going on because that's the basis of the whole thing, that something happened between your client, the defendant, and these people's mother." The court ruled, "I don't think that it's sufficient for a mistrial." It again offered to provide a curative instruction, though it acknowledged that such an instruction "would kind of perhaps emphasize" the issue.

Defense counsel ultimately decided not to request a curative instruction. During closing, she argued that defendant

acted reasonably under the circumstances and shot Tramell to defend himself, his family, and his property. She also argued that Tyra and Tramell "were looking for vengeance because they were upset because of whatever happened between my client and their mother."

II. Standard of Review

We apply the deferential abuse of discretion standard when reviewing rulings on motions for mistrial. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.) "'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.]'" (*Ibid.*) Such cases are exceptional. (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1429.) "'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]' [Citation.]" (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1068.) A witness's volunteered statement can provide the basis for a finding of incurable prejudice. (*People v. Wharton* (1991) 53 Cal.3d 522, 565.)

Defendant agrees that abuse of discretion is the appropriate standard, but urges us to review the "components" of his argument concerning testimonial hearsay "more thoroughly," under the de novo standard. We do "independently review whether a statement was testimonial so as to implicate the constitutional right of confrontation." (*People v. Nelson* (2010) 190 Cal.App.4th 1453, 1466; see also *People v. Mayo* (2006) 140 Cal.App.4th 535, 553 ["We review the trial court's determination as to the admissibility of evidence (including the application of the exceptions to the hearsay rule) for abuse of discretion [citations] and the legal question whether admission of the

evidence was constitutional de novo."].) However, as the Attorney General points out, defendant failed to object to Tyra's or Tramell's testimony on hearsay or confrontation clause grounds below; his counsel's objections focused exclusively on the prejudicial nature of the testimony. Defendant argues that the "pretrial ruling excluding the evidence was 'sufficiently clear and express'" to negate any forfeiture. We disagree.

The "pretrial ruling" was not a ruling by the court so much as an agreement by the parties to avoid discussion of certain evidence. Even if we were to equate such an agreement to a motion in limine, a motion in limine preserves an issue where "(1) a specific legal ground for exclusion was advanced through an in limine motion and subsequently raised on appeal; (2) the in limine motion was directed to a particular, identifiable body of evidence; and (3) the in limine motion was made at a time, either before or during trial, when the trial judge could determine the evidentiary question in its appropriate context." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 210.) Here, undue prejudice was the only legal ground defendant advanced as a basis for excluding the evidence. Moreover, the parties' agreement did not explain their reasoning, and the court did not consider or rule on the hearsay or testimonial nature of the evidence. Defendant therefore has forfeited any argument that the evidence was testimonial hearsay that violated his confrontation rights.[6] (See *People v. Redd* (2010) 48 Cal.4th 691, 730 ["He did not raise an

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[6]Even if he had preserved the issue, we are not persuaded that the challenged statements meet the definition of hearsay (Evid. Code, § 1200, subd. (a)); they therefore cannot be testimonial hearsay (see *People v. Perez* (2018) 4 Cal.5th 421, 455).

objection below based upon the confrontation clause, and therefore has forfeited this claim."]; see also *People v.* Dykes (2009) 46 Cal.4th 731, 756 ["numerous decisions by this court have established the general rule that trial counsel's failure to object to claimed evidentiary error on the same ground asserted on appeal results in a forfeiture of the issue on appeal"]; Evid. Code, § 353.)

III. Analysis

After considering the statements to which defendant objected, the trial court concluded that they did not incurably prejudice defendant. This was not an abuse of discretion.

The court astutely observed that the nature of the case was such that "obviously, the jury knows that there is some sort of dispute going on because that's the basis of the whole thing, that something happened between your client, the defendant, and these people's mother." Otherwise, there would be no reason for Tyra and Tramell to be at defendant's house in the middle of the night in the first place. Defendant raised no objection to Tyra's uncontroverted testimony that her mother called her and asked her to retrieve some belongings, including keys, from defendant's home. Indeed, defense counsel acknowledged during the pretrial hearing that the prosecutor could introduce evidence that Tyra and Tramell "went to my client's home to retrieve their mother, Natasha White's, belongings that were at the home of my client," and mentioned "whatever happened between my client and their mother" during her closing.

Defense counsel also raised no objection to the 911 call, during which Tyra mentioned that defendant "took my mom [*sic*] car he won't us give us back her keys" and referenced events that had occurred "like a couple of hours ago"; Tramell's testimony

that he was angry because of the way defendant took his mother's car; Tyra's testimony that Tramell was upset "because this isn't the first time something like this has happened"; or Tyra's testimony that she told the police she feared defendant "would be physical" because he had been drinking. All of these statements provided a basis from which the jury could infer that defendant and his girlfriend had a tumultuous relationship, and that the girlfriend's property was at defendant's house because he had taken it or refused to return it to her. The brief and isolated statements by Tyra and Tramell about "mistreatment" and "beating" add little to this body of evidence. "A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Bolden* (2002) 29 Cal.4th 515, 555.) These statements, considered alone or together,did not meet this high threshold, particularly where it is unclear the jury heard the entirety of Tyra's statement.

Defendant alternatively argues that the statements entitled him to a mistrial because they prejudicially "detracted from the bona fide evidence of self-defense, defense of home, and defense of others." He contends that the case was a close one, as evidenced by the jury's rejection of the enhancement allegations,[7] and that the statements and the prejudice they caused tipped the balance in the prosecution's favor. He also suggests, paradoxically, that "the unsubstantiated domestic violence and auto theft allegations were so prejudicial that no limiting

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[7]The court remarked at sentencing that "the jury verdict is odd," and offered its "interpretation . . . that they were trying to send a message to everybody involved in the case that while the defendant is, in fact, technically guilty, that they felt that there were extenuating circumstances and that he shouldn't be judged as harshly as he would be in perhaps some other circumstance."

instruction could cure the violations of the pretrial order," yet "the lack of instruction only added to the prejudice imparted by the violations of the pretrial order." The trial court was within its discretion to conclude otherwise.

"'"To justify an act of self-defense [for an assault charge under section 245], the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him.'" [Citation.] In other words, the defendant's belief must both subjectively exist and be objectively reasonable. [Citation.] Additionally, '[t]he threat of bodily injury must be imminent' and the force used in response "'reasonable under the circumstances.'" [Citation.]" (*People v. Brady* (2018) 22 Cal.App.5th 1008, 1014.) The issue is not whether the defendant had reasonable grounds for believing he or she was in danger; it is "'whether a person of ordinary and normal mental and physical capacity would have believed he [or she] was in imminent danger of bodily injury under the known circumstances.' [Citation.]" (*Id.* at p. 1015.)

The statements at issue are of limited relevance to this objective inquiry. To the extent the jury heard them, they may even have bolstered defendant's self-defense argument by underscoring the anger Tyra and Tramell harbored toward defendant when they and their friends arrived at his home in the middle of the night, and the reasonableness of any fear he may have felt. Defense counsel may have recognized this possibility when she made the tactical decision to decline a curative instruction.

Moreover, we are not persuaded that the case was as close as defendant suggests. All four prosecution witnesses testified that they either saw or heard the gunshot or personally observed a gunshot wound on Tramell's leg. Defendant's theory of the

case, self-defense or defense of others, necessarily operated as a concession that he shot Tramell. The jury heard also heard evidence that substantially undermined defendant's argument that he acted in self-defense against four rowdy twenty-somethings who threatened him and his family. Tyra and Tramell's friends were not involved in the altercations. Defendant was the instigator of both physical confrontations with Tyra, who ran away when he attempted to grab his gun the first time. Rather than ignoring Tyra's second knock on the door, he elected to go outside, away from his family members, with his gun. He threatened to shoot Tramell long before the conflict became physical, and continued to threaten Tramell with property theft even after shooting him. In the face of this evidence and personal observation of the witnesses who provided it, the trial court did not abuse its discretion in concluding that defendant was not so prejudiced as to warrant a mistrial.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J. MICON, J.*

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