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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 3

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO CORDOVA,

Defendant and Appellant.

B232049

(Los Angeles County  
Super. Ct. No. BA370583)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Judith Champagne, Judge. Affirmed.

Maggie Shrout, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David  
E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Roberto Cordova was convicted of criminal threats and vandalism. He appeals the trial court's judgment on three grounds. Appellant first contends the court erroneously and in violation of his constitutional rights excluded the testimony of his only proffered witness. He also argues the court abused its discretion by improperly admitting two recorded jail phone call conversations between appellant and the alleged victim of his crimes, Edith B. Finally, appellant argues his admission of a prior serious felony was insufficient to impose a greater sentence. We reject all three arguments and affirm the judgment.

### **FACTS**

#### *1. Appellant's Turbulent Relationship with Edith*

Although appellant was married to another woman, he began dating Edith about six years before the events leading to this case occurred. Appellant and Edith had a son together and Edith had a son from another relationship.

In December 2009, appellant separated from his wife. In late February or March 2010, appellant, Edith and her two boys moved into an apartment together on East 49th Street in Los Angeles. Edith believed appellant was going to divorce his wife.

About two weeks after appellant and Edith started living together, their relationship began to deteriorate. According to Edith, the root of the problem was appellant's "infidelity." Edith believed appellant was still seeing and spending the night with his wife. Appellant and Edith argued frequently.

#### *2. Appellant's Act of Vandalism*

On April 13, 2010, appellant and Edith had a discussion in their apartment about her unhappiness with their relationship. At about 1:00 p.m., Edith exited the apartment to go to work. Appellant followed her and pleaded with her not to go and to continue their discussion. According to Edith, both she and appellant were "aggravated."

Edith went into her four-door Ford Explorer vehicle and locked the doors. Appellant approached the vehicle, began kicking the front driver's side door and demanded that Edith not leave. He then stood in front of the vehicle to block its path. Before Edith began driving, appellant jumped on the hood and kicked the windshield

about four times, shattering it. When appellant got off the hood, Edith drove away. Susan Kelly, Edith's neighbor, witnessed the incident and called the police.

3. *Appellant's Criminal Threat*

On April 14, 2010, appellant offered to pay for the repair of the windshield on Edith's vehicle. Edith agreed and they arranged to have the vehicle towed to a repair shop. While appellant was driving Edith and her son there, he began weaving in and out of traffic. According to Edith, appellant was engaged in "reckless driving." At one point, appellant grabbed Edith's arm<sup>1</sup> and stated: "If you ever leave me, I will kill you. You don't know what I am capable of."

Shortly after this incident, Edith sent several messages from her apartment on 49th Street to her friend Maria Velarde stating that she was scared to leave the apartment because defendant had threatened to kill her. Velarde or Edith's brother called the police. When two police officers arrived at the apartment, they found Edith there, afraid, nervous and crying. Edith told Officer Nestor Escobar about appellant's threat to kill her. Subsequently, at an interview in a police station, Edith confirmed her story to Detective Talya Higgs.

4. *Preliminary Hearing*

On May 10, 2010, Edith testified about the incidents of April 13 and 14, 2010, at a preliminary hearing. At that time, she stated appellant threatened to kill her in the manner we have described above.

5. *Amended Information*

In an amended information, the People charged appellant with (1) criminal threats in violation of Penal Code section 422<sup>2</sup> and (2) vandalism in violation of section 594. The information also alleged that appellant suffered a prior conviction of a serious or

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<sup>1</sup> There is conflicting evidence as to whether appellant grabbed Edith's arm or choked her.

<sup>2</sup> Except as otherwise stated, all statutory references are to the Penal Code.

violent felony or adjudication pursuant to section 1170.12, subdivisions (a) through (d) and section 667, subdivisions (b) through (i), as well as a previous conviction of a serious felony pursuant to section 667, subdivision (a)(1), namely a conviction on September 12, 2007, for violation of section 245, subdivision (a)(1), in Los Angeles County Superior Court.

6. *Trial*

The court held a jury trial in December 2010. At the trial, Edith confirmed most of the facts regarding the incidents on April 13 and 14, 2010, but she denied that appellant actually threatened to kill her. She claimed her testimony at the preliminary hearing was incorrect and that she did not “know” or “remember” whether she told police officers appellant had threatened to kill her. Edith also testified that she “embellished” a text message to Maria Velarde because she was upset about the windshield incident and the “excessive arguing” and “excessive screaming” between her and appellant.

The People impeached Edith by reading from the transcript of her preliminary hearing testimony and with the trial testimony of Ms. Velarde, Officer Escobar and Detective Higgs. The People also played for the jury an audiotape recording of a jail conversation between appellant and Edith. We shall discuss the contents of the recording *post*.

Appellant only proffered one witness, Debra Scott. After an Evidence Code section 402 hearing, the trial court declined to allow Scott to testify. We shall discuss this ruling *post*.

7. *The Verdict and Post-Trial Proceedings*

The jury returned a verdict of guilty on both counts. Appellant waived his right to a jury trial on whether he suffered a prior conviction. Subsequently, at a post-trial hearing, appellant waived his right to a bench trial on the issue and admitted the prior conviction.

The trial court sentenced defendant to three years in state prison for count 1 and seven months for count 2, to run concurrently with his sentence for the first count. The court also imposed an additional three-year sentence pursuant to section 1170.12,

subdivisions (a) through (d) and section 667, subdivisions (b) through (i), plus an additional five-year sentence pursuant to section 667, subdivision (a)(1). In total, defendant received an 11-year sentence in state prison, less credit for time in custody and good behavior.

On February 24, 2011, the trial court entered judgment against appellant. Appellant filed a timely notice of appeal.

### **DISCUSSION**

1. *The Court Did Not Abuse Its Discretion or Violate Appellant's Constitutional Rights by Excluding the Testimony of Debra Scott*
  - a. *The Court's Ruling at the Evidence Code Section 402 Hearing*

During the trial, after Edith testified, the court held a hearing pursuant to Evidence Code section 402 on whether defendant could call Debra Scott as a witness. Scott testified at the hearing that she was a neighbor of appellant and Edith, and that she often heard the couple quarrel. She further testified she could hear Edith screaming at appellant and, on one occasion, heard Edith break dishes and other things. On that occasion, according to Scott, Edith told Scott she was going to kill appellant. Scott further stated that "some days had passed" between the last incident she witnessed and the incident involving appellant breaking Edith's windshield, which she did not witness.

The People objected to allowing Scott to testify before the jury on the grounds that her entire testimony was irrelevant and her testimony regarding Edith's alleged statement was inadmissible hearsay. Appellant argued Scott's testimony was relevant because it showed that Edith had a motive to lie and was biased.

The court ruled that Scott could not testify before the jury. In explaining its ruling, the court stated that in light of Edith's testimony about appellant's infidelity, the couple's arguing, and the problems in her relationship with appellant, Scott's testimony about events that occurred several days before the alleged crimes at issue "adds nothing to the case."

b. *Standard of Review*

We review a trial court's rulings excluding evidence under an abuse of discretion standard. (*People v. Fuiava* (2012) 53 Cal.4th 622, 667-668.) To prevail under this standard appellant must show the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) Under Evidence Code section 354, moreover, we cannot reverse a judgment by reason of the trial court's erroneous exclusion of evidence unless the error resulted in a miscarriage of justice.

c. *The Trial Court Did Not Abuse Its Discretion in Excluding Scott's Testimony*

Evidence Code section 352 provides: "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."

Here, Scott's proffered testimony had little, if any, probative value. She was not a percipient witness to the alleged crimes. Scott only witnessed events that occurred at least several days before the alleged crimes and that had no direct connection to the incidents at issue.

Under Evidence Code sections 210 and 780, Scott's testimony was arguably relevant to show Edith's motive and bias, which relates to her credibility.<sup>3</sup> Appellant contends Edith's acrimony toward him motivated her to make false statements to the

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<sup>3</sup> Evidence Code section 210 states: " '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 780 provides: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [¶] . . . [¶] (f) The existence or nonexistence of a bias, interest, or other motive."

police. Edith readily admitted at trial, however, that at the time she made her statements to the police, her relationship with appellant had deteriorated so much she wanted to stop living with him. She also acknowledged the couple was arguing excessively and that she was very upset about what she considered appellant's "infidelity." The trial court thus could have reasonably concluded that Scott's testimony was redundant and necessitated an undue consumption of time. This was not an arbitrary, capricious or patently absurd decision. We therefore reject appellant's argument that the trial court abused its discretion by precluding Scott from testifying before the jury.

d. *The Court's Ruling Did Not Violate Appellant's Constitutional Rights*

Appellant argues that the trial court's alleged erroneous exclusion of evidence violated his Fifth, Sixth and Fourteenth Amendment rights to present a defense. He did not, however, make this argument in the trial court. He instead argued Scott should be permitted to testify pursuant to the provisions of the Evidence Code. Thus, to the extent appellant contends on appeal that Scott should have been allowed to testify for a different, constitutional reason, he has forfeited this argument. (*People v. Thornton* (2007) 41 Cal.4th 391, 427 [Defendant's claim that he was deprived of his Sixth Amendment rights was forfeited because he did not raise the claim in the trial court]; *People v. Partida* (2005) 37 Cal.4th 428, 435 [Defendant prohibited from arguing the trial court violated his due process rights by excluding evidence pursuant to Evidence Code section 352 "for a reason different from his trial objection."].)<sup>4</sup>

Even if this argument were not forfeited, it fails on the merits. The application of ordinary rules of evidence does not infringe upon a criminal defendant's rights to due

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<sup>4</sup> Appellant did not forfeit a very narrow constitutional argument on appeal, namely that if the trial court erroneously excluded Scott's testimony under the Evidence Code, this has the purported *additional* legal consequence of violating his constitutional right to present a defense. (*People v. Partida, supra*, 37 Cal.4th at p. 435 [Defendant "may argue that the asserted error in admitting the evidence over his Evidence Code section 352 objection had the additional legal consequence of violating due process."].)

process, including the right to present a defense. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) “ ‘Although completely excluding an accused’s defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused’s due process right to present evidence.’ ” (*Id.* at p. 428.) Here, the trial court did not completely prohibit appellant from presenting evidence. Rather, it excluded one witness from testifying regarding a relatively narrow and uncontested issue, namely the turbulent relationship between appellant and Edith several days before the vandalism and criminal threat incidents. Thus the trial court’s ruling—even if it were erroneous (it was not)—did not implicate appellant’s constitutional right to present a defense. (Cf. *id.* at p. 427 [“His attempt to inflate garden-variety evidentiary questions into constitutional ones is unpersuasive.”].)

e. *We Do Not Reach the Issue of Miscarriage of Justice*

Because we conclude that the trial court did not abuse its discretion by excluding Scott’s testimony, we do not reach the issue of whether the trial court’s evidentiary ruling resulted in a miscarriage of justice.

2. *The Trial Court Did Not Abuse Its Discretion by Allowing the Audiotape Recordings of Appellant’s Jail Conversations with Edith*

a. *The Audiotape Recordings*

At trial, the People played for the jury audiotape recordings of telephone conversations between appellant and Edith and presented to the jury transcripts of the recordings. During the recorded conversations appellant repeatedly referred to a previous conversation between the couple and urged Edith to talk to his lawyer. He stated, for example: “Remember what we talked about then? [¶] When we were living together? [¶] That’s what, go tell her [appellant’s lawyer] that . . . .” Subsequently, appellant stated: “Go talk to my attorney, and I swear to God, that this . . . all be fixed. [¶] Just tell her you know, you was mad because you saw some pictures.”

Appellant also stated: “Man, I was about to eat me a burrito when they came and got me. [¶] . . . [¶] And I didn’t even run, cuz I was like, you know what? [¶] I was under the impression that when we had talked about it, everything was cool and that you



were going to keep your end of the bargain. [¶] Talk, my attorney said, talk to her and she'll straighten all that shit out." He then later said, "Remember what we talked about?"

After the recordings were played for the jury, the deputy district attorney and Edith had the following dialogue:

"Q From the time you talked to the police and the detective to when you had this phone call, what did you and the defendant talk about when he is referring to, in this conversation, you and he talked about it?

"A I honestly do not know what he [appellant] is talking about.

"Q During the conversation, he is telling you go talk to his lawyer and tell her what we talked about. Do you remember hearing that?

"A Yes.

"Q. Did you say what are you talking about, I don't understand?

"A No, but I did not do that which he asked me to do because I did not know what it was exactly he was asking of me."

b. *Appellant Did Not Forfeit His Evidence Code Section 352 Objection*

Appellant contends that the trial court abused its discretion by not excluding this evidence pursuant to Evidence Code section 352. The People argue that appellant forfeited this argument by not properly raising the objection below. We shall conclude the argument was not forfeited.

An objection to the admission of evidence is not preserved on appeal unless it is "so stated as to make clear the specific ground of the objection." (Evid. Code, § 353, subd. (a).) "In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented." (*People v. Scott* (1978) 21 Cal.3d 284, 290; accord *People v. Samuels* (2005) 36 Cal.4th 96, 120.)

In this case, the trial court held an Evidence Code section 402 hearing regarding the admissibility of the audiotapes. At that hearing, appellant's attorney Melissa Mammenga did not specifically object to the admissibility of this evidence.

Subsequently, outside the presence of the jury and before the audiotapes were played for the jury, Ms. Mammenga asked for a ruling regarding the recordings. When the court asked her what the issue was, she responded: “The recordings themselves, whether or not they are even relevant.” The court and Ms. Mammenga then had the following dialogue:

“The Court: I don’t see any problem in terms of relevance.

“Ms. Mammenga: Because of the different interpretations, it will become confusing to the jury.

“The Court: Not at all. They are going to reach their own conclusions what is on the tape. . . .

“Ms. Mammenga: Then it may force my client to have to waive his 5th Amendment rights in order to explain the second interpretation of these transcripts.

“The Court: That is not the basis to exclude evidence that is otherwise probative, relevant and admissible.”<sup>5</sup>

When read in context, the record indicates that the trial court understood the issue presented. Although she did not specifically cite Evidence Code section 352, appellant’s counsel argued the audiotapes were irrelevant and would confuse the jury, which are factors the court must consider on both sides of the Evidence Code section 352 weighing process. This was enough to preserve an Evidence Code section 352 objection on appeal.

c. *The Trial Court Did Not Abuse Its Discretion by Permitting the People to Play the Audiotape Recordings to the Jury*

Evidence is probative if it is “material, relevant, and necessary.” (*People v. Thompson* (1980) 27 Cal.3d 303, 318, fn. 20.) Viewing the recordings in a light most favorable to the People,<sup>6</sup> we find that the audiotapes had substantial probative value.

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<sup>5</sup> Ms. Mammenga also raised a concern regarding appellant’s reference in one of the recordings to a prior arrest and argued that if the court were inclined to allow the audiotape to be admitted, it should omit the portion relating to the prior arrest. After the deputy district attorney agreed to this request, the court ordered that the audiotape be so edited before it was played for the jury.

The People argued Edith changed her story regarding whether appellant threatened to kill her at appellant's behest, or pursuant to an agreement with him. The recordings support this theory because they indicate appellant and Edith had reached some sort of "bargain" and that appellant was not concerned about running from the police because "everything was cool" after he talked to Edith. This evidence is not only relevant, it is material because it applies to one of the central issues of this case, namely whether appellant actually threatened to kill Edith. While the evidence was not crucial to the People's arguments because they had a great deal of direct evidence that appellant indeed threatened to kill Edith, it was nonetheless substantially probative.

Moreover, contrary to appellant's contention, the trial court could have reasonably found that the probative value of the evidence was not substantially outweighed by the probability that its admission would confuse the jury. Of course the jury could have interpreted the recordings differently than the prosecution suggested. But as the trial court correctly stated, that is not a basis to exclude otherwise probative evidence. Jurors are regularly presented with evidence that can be reasonably interpreted in more than one way. Determining the meaning, if any, of such evidence is an inherent part of the jury's fact finding responsibility. The trial court therefore did not abuse its discretion by overruling appellant's Evidence Code section 352 objection and admitting recordings into evidence.

d. *We Do Not Reach the Issue of Miscarriage of Justice*

Because we conclude that the trial court did not abuse its discretion by admitting the audiotape recordings, we do not reach the issue of whether the trial court's evidentiary ruling resulted in a miscarriage of justice.

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<sup>6</sup> " 'We must indulge in every presumption to uphold a judgment, and it is defendant's burden on appeal to affirmatively demonstrate error—it will not be presumed. [Citation.]' " (*People v. Tang* (1997) 54 Cal.App.4th 669, 677.)

3. *Appellant's Admission of His Prior Felony Conviction Was Grounds for an Enhanced Sentence*

Appellant admitted that in 2007 he was convicted of violating section 245, subdivision (a)(1). At the time of the conviction, this statute provided that it was a felony to commit an “assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury . . . .”<sup>7</sup> (Stats. 2004, ch. 494, § 1, p. 4040.) A violation of section 245, subdivision (a)(1) may or may not have consisted of a “serious felony” within the meaning of both the so-called “Three Strikes” law (§ 667, subds. (b)-(i)) and the five-year enhancement statute (§ 667, subd. (a)(1)). If the defendant personally inflicted great bodily injury (§ 1192.7, subd. (c)(1)) or he personally used a dangerous or deadly weapon (§ 1192.7, subd. (c)(23)) in the commission of the crime, it was a serious felony, requiring the court to impose sentencing enhancements pursuant to the Three Strikes law and the five-year enhancement statute.<sup>8</sup>

Appellant argues that his admission was vague and that he did not specifically admit his prior conviction was of a crime falling within the parameters of the Three Strikes law and the five-year enhancement statute. We disagree.

At a post-trial hearing, Deputy District Attorney Edwin Wakabayashi, appellant, appellant’s lawyer Melissa Mammenga, and the court had the following colloquy:

“Mr. Wakabayashi: As to – do you admit pursuant to Penal Code section 1170.12 [subds. (a)-(d)], and [section] 667 [subds. (b)-(i) (the Three Strikes law)], and Penal Code

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<sup>7</sup> The statute has since been amended. (Stats. 2010, ch. 178, § 53, p. 865; Stats. 2011, ch. 15, § 298, p. 379; Stats. 2011, ch. 39, § 9, p. 1724; Stats. 2011, ch. 182, § 1, p. 2393.)

<sup>8</sup> In support of appellant’s motion to dismiss the prior conviction, appellant’s counsel described the previous case as an “assault with a deadly weapon.” Counsel also stated: “Mr. Cordova [appellant] got out of his car and hit the other vehicle with a baseball bat. That was the charge for which he was convicted of.”

section 667 [subd. (a)(1) (five-year enhancement statute)], do you admit that you suffered the following conviction in Case Number VA102199.

“A violation of Penal Code section 245 [subd. (a)(1)] on or about September 12 of 2007, in Los Angeles County Superior Court, do you admit that prior conviction?

“The Defendant: I admit that prior conviction.

“Mr. Wakabayashi: Does counsel join in the admission . . . stipulate to a factual basis?

“Ms. Mammenga: Yes.

“Mr. Wakabayashi: The People join.

“The Court: The court finds that Mr. Cordova has knowingly, understandingly and voluntarily waived his right to a court trial . . . . [¶] The court finds a factual basis and accepts the admission.”

By admitting that “pursuant to” the Three Strikes law and the five-year enhancement statute he suffered a conviction of section 245, subdivision (a)(1), appellant admitted that his prior conviction was indeed a serious felony requiring sentence enhancements under those statutes.

Appellant’s reliance on *People v. Encinas* (1998) 62 Cal.App.4th 489 (*Encinas*) is misplaced. There, the defendant did *not* admit his prior conviction. He instead demanded a trial. (*Id.* at p. 491.) At the trial, the People presented evidence showing defendant was convicted of violating section 245, subdivision (c)—assault on a peace officer. That crime can be committed in two ways, only one of which is a serious felony for purposes of the Three Strikes law and the five-year enhancement statute. (*Encinas*, at p. 491.) Because the evidence did not clearly indicate whether the previous conviction was a serious felony, the Court of Appeal reversed the trial court’s sentence enhancements. (*Id.* at p. 492.) Here, by contrast, appellant not only admitted he was previously convicted of violating section 245, subdivision (a)(1), he admitted that his prior conviction was “pursuant to” the Three Strikes law and five-year enhancement statute. The present case therefore is distinguishable from *Encinas*.

**DISPOSITION**

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.