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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

VAUGHN WINSLOW,

Defendant and Appellant.

B292984

(Los Angeles County
Super. Ct. No. LA088169)

APPEAL from a judgment of the Superior Court of Los Angeles County. Susan M. Speer, Judge. Affirmed.

Lillian Hamrick, 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, Michael C. Keller and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Vaughn Winslow appeals the judgment entered following a jury trial in which he was convicted of three counts of injury to a person with whom he had a dating relationship (Pen. Code, § 273.5, subd. (f)(1); counts 1, 2, 6¹), one count of assault with caustic chemicals (Pen. Code, § 244; count 4), and one count of assault by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(4); count 5) as a lesser included offense of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)). Appellant admitted a prior prison term allegation, and the trial court sentenced appellant to a state prison term of 8 years 4 months.

Appellant contends the trial court erred in admitting evidence of past uncharged domestic violence pursuant to Evidence Code² section 1109. We disagree and affirm.

FACTUAL BACKGROUND

Victor

Appellant and Victor met on-line around June 2015, and their relationship became sexual about one month later. With no place to live, appellant soon moved into Victor's apartment. They lived together for the next three years except for five months when appellant was in jail. In the beginning of the relationship, appellant was affectionate, but over time he became jealous and controlling, at times forcing Victor to stay in his room and

¹ On the People's motion after the close of evidence, the trial court dismissed count 3, which also charged a violation of Penal Code section 273.5, subdivision (f)(1).

² Undesignated statutory references are to the Evidence Code.

frequently taking Victor's car. Eventually appellant became physically abusive: he hit Victor, grabbed him by the neck, and on two occasions he threatened Victor with a knife.

The October 1, 2017 incident (Count 1)

On October 1, 2017, appellant and Victor got into an argument. Still arguing, they got into the car, and appellant punched Victor in the face. Eventually Victor got out of the car and called a friend who took him to the Van Nuys police station. There, Victor made a domestic violence report, and an officer took photographs of Victor's injuries, which included bleeding around his eye. Victor also had scratches on his arm, which were consistent with his statements to police.

The October 26, 2017 incidents (Counts 2, 4, 5)

On the morning of October 26, 2017, appellant hit Victor in the face again. Then he bit Victor's thumb hard enough that Victor had to hit appellant to force him to release his finger. Appellant also bit Victor on the thigh above his knee. Victor had not threatened or struck appellant before the attack.

Just before noon that day, Victor reported the incident at the Van Nuys police station. Victor had abrasions and swelling on his left cheek, a bite on his thumb that passed through the fat layer of the skin into the muscle, and a bite mark which had broken the skin on his knee. Police took photographs of Victor's injuries. During his interview, Victor was very emotional and nervous. He cried several times and seemed embarrassed.

On the evening of October 26, 2017, Victor called 911 after appellant had struck him again. During the call appellant struggled with Victor, trying to take the phone away from him. Later that night appellant sprayed insecticide in Victor's face and on his chest. Victor had closed his eyes but could still feel some burning in his eyes. He wiped his face and eyes with a wet towel

and called 911 again. Police responded to the call and found Victor alone in the apartment. Victor made another domestic violence report, and an officer took photographs of him.

Dr. Michael Levine testified that the insecticide appellant sprayed on Victor contains two toxins. Depending on the amount and route of exposure, these can cause numbness or tingling, irritation, lung injury, and permanent corneal damage leading to vision impairment.

The November 3, 2017 incident (Count 6)

Sometime in the morning of November 3, 2017, Victor and appellant got into an argument at the gym and pushed each other before returning to the car. When they got into the car, Victor told appellant he was going to the police. Victor drove to the police station, whereupon appellant hit him and left.

Maiesha Brown was at the West Valley police station when she saw a car with two male occupants pull into the parking lot. She witnessed appellant punch Victor more than five times. Victor had his hands up to protect himself but did not fight back. When Victor appeared to attempt to open the door, appellant reached across and grabbed him. Eventually appellant exited the vehicle and ran away.

Victor walked into the police station just as Brown was reporting what she had seen. In his report of the incident, Victor explained he had driven to the police station because appellant was agitated and had been abusive toward Victor in the past. Victor had redness and swelling in and around his right eye, and it appeared a vein in his eye had burst. The officer on duty asked Victor if he needed an ambulance, but Victor said no.

Anthony

Anthony met appellant in June 2012 through an on-line dating app. Their relationship soon became sexual, and a month

after they had met, Anthony let appellant move in with him because appellant told him he had nowhere to live. At the start of the relationship there were no problems, but appellant gradually became verbally and then physically abusive. Appellant choked, punched, and bit Anthony multiple times over the course of their relationship and would sometimes block him from leaving a room when Anthony tried to walk away from an argument. Appellant also threatened to harm members of Anthony's family and his dogs.

During an argument on August 12, 2012, Anthony told appellant he would have to move out. Appellant began choking Anthony while telling Anthony he loved him and begging Anthony not to throw him away. Anthony realized he was not safe in the apartment and decided to leave, but appellant grabbed a knife and threatened to hurt himself as he pointed the knife at Anthony to keep him from leaving. The neighbors called the police, and responding officers arrested appellant. Appellant suffered a conviction based on the incident and spent time in an inpatient drug rehabilitation program.

Appellant came back into Anthony's life in early January 2013, and the abuse resumed in August 2013, with appellant punching and choking Anthony again. On that occasion, Anthony questioned appellant about not attending his rehab program, and appellant became violent. Appellant struck Anthony on the knee with an air purifier, he punched Anthony in the face, splitting his lip open, he head-butted and punched Anthony in the head, and he swung a small table at Anthony. Appellant also tried to strike Anthony with a lamp but missed. Police arrived and took photographs of the injuries to Anthony's face and knee.

Defense evidence

Appellant testified in his own behalf. He denied ever pulling a knife on Victor. He also denied having a fight with Victor on October 1, 2017, asserting that he was with his friend Jonathan that day. Appellant testified that he was living with Jonathan³ on October 26, 2017. Although he did not specifically recall what he did that day, he denied hitting, biting, or spraying Victor with insecticide. Appellant also denied involvement in any incident with Victor on November 3, 2017, averring that he was in New York for a funeral on that day.

Appellant explained that when he used the knife in the August 2012 incident with Anthony, he was threatening to kill himself. Appellant also testified that although their arguments sometimes got “physical,” appellant would punch and choke Anthony only in self-defense because Anthony was “almost twice [his] size.” Appellant’s conflicts with Anthony centered around appellant’s drug use. After his arrest in August 2013, appellant accepted another offer for drug rehabilitation, but he failed the program and was sentenced to prison.

DISCUSSION

Admission of Evidence of Prior Acts of Domestic Violence Under Section 1109

1. Relevant background

Over defense objection, the trial court admitted evidence of uncharged prior incidents of domestic violence involving Anthony

³ The parties entered a stipulation that for seven to 14 days in October 2017, appellant stayed at the residence of Jonathan Garcia in Northridge.

under section 1109. In admitting evidence of the August 2013 incident, the court explained:

“It’s alleged that the defendant attacked [Anthony]. He threw an air purifier at him, a table lamp, punched him, he threatened to kill him, result[ing] in injuries that I believe were a laceration only, bruises. [¶] I don’t see how that’s substantially more prejudicial than probative. It’s very similar to the facts, as I understand them, in this case. His conviction was for a [Penal Code section] 273.5 felony. It’s of the same magnitude and seriousness [as] the current offenses or less so. It certainly shows a pattern of conduct. I think it’s prejudicial, but it is more probative than prejudicial.”

In ruling the evidence of the August 12, 2012 incident admissible under section 1109, the trial court declared:

“All right. Again, this is within the 10-year period of 1109. The court has found there was proper discovery as required by the code. It’s alleged in this incident with the same victim, [Anthony], that there was an argument. He attempted to choke the victim, punch him. There were threats. He did retrieve a knife, although there was no stabbing. He head-butted the victim. [¶] The court will make the same findings. This is no more serious than the current alleged offenses. In fact, it’s less serious. It was a misdemeanor conviction. It’s within 10 years. It is prejudicial, but it is probative under 1109 to show a pattern of conduct. The court finds under 352 it is more probative than prejudicial.”

2. Legal principles

Ordinarily, evidence of prior criminal conduct is inadmissible to show a defendant’s predilection to commit other criminal acts. (Evid. Code, § 1101, subd. (a).) However, in cases involving sexual offenses and domestic violence, the Legislature

has created exceptions to the general prohibition against propensity evidence. (Evid. Code, §§ 1108, 1109; *People v. Brown* (2011) 192 Cal.App.4th 1222, 1232; *People v. Reyes* (2008) 160 Cal.App.4th 246, 251.) In domestic violence cases, section 1109⁴ “ ‘permits the admission of defendant’s other acts of domestic violence for the purpose of showing a propensity to commit such crimes.’ ” (*Brown*, at p. 1232.)

The rationale underlying this exception is that by admitting evidence of a defendant’s other acts of domestic violence to show a disposition to commit acts of domestic violence, the statute eliminates any presumption that “the charged offense was an isolated incident, an accident, or a mere fabrication.” (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1876 (1995–1996 Reg. Sess.) June 25, 1996, p. 3 (Assembly Analysis of Senate Bill 1876); see *People v. Falsetta* (1999) 21 Cal.4th 903, 916–917 (*Falsetta*) “[b]y reason of section 1108, trial courts may no longer deem ‘propensity’ evidence unduly prejudicial per se”.) “Thus, the statute reflects the legislative judgment that in domestic violence cases, as in sex crimes, similar prior offenses are ‘uniquely probative’ of guilt in a later accusation. [Citation.]

⁴ Section 1109 provides in relevant part: “(a)(1) Except as provided in subdivision (e) or (f), in 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.” Under subdivision (e), “[e]vidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.”

Indeed, proponents of the bill that became section 1109 argued for admissibility of such evidence because of the ‘typically repetitive nature’ of domestic violence.” (*People v. Johnson* (2010) 185 Cal.App.4th 520, 532 (*Johnson*); Assem. Analysis of Sen. Bill 1876, *supra*, at pp. 6–7.)

“ ‘ “The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense.” ’ ” (*Johnson, supra*, 185 Cal.App.4th at p. 531.) Thus, before a trial court may admit evidence of other acts of domestic violence it must, by balancing the factors set forth in Evidence Code section 352, determine whether the probative value of the evidence “ ‘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.’ ” (*People v. Williams* (2013) 58 Cal.4th 197, 270 (*Williams*); *People v. Fruits* (2016) 247 Cal.App.4th 188, 202 (*Fruits*).)

“ ‘ “ ‘[P]rejudicial’ ” ’ ” in the context of the court’s section 352 analysis “ ‘ “is not synonymous with ‘damaging.’ ” ’ ” (*Williams, supra*, 58 Cal.4th at p. 270; *Johnson, supra*, 185 Cal.App.4th at p. 534.) “The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. ‘[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is “prejudicial.” ’ ” (*People v. Karis* (1988) 46 Cal.3d 612, 638; *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.) Rather, evidence subject to exclusion under section 352 as unduly prejudicial is evidence “ ‘ “which uniquely tends to evoke an emotional bias against defendant as

an individual and which has very little effect on the issues.” ’ ’ ’
(*Williams*, at p. 270; *Fruits*, *supra*, 247 Cal.App.4th at p. 205.)

Other factors relevant to the section 352 analysis include: whether the prior act of domestic violence is more inflammatory or egregious than the current offense; whether the presentation of the evidence would consume inordinate time at trial; the likelihood that the jury might confuse the prior incident with the charged offense; whether the prior domestic violence occurred recently or is remote in time; and whether the defendant was convicted and punished for the prior offense. (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119; *Johnson*, *supra*, 185 Cal.App.4th at pp. 533–535; see *Falsetta*, *supra*, 21 Cal.4th at p. 917.)

We review the trial court’s exercise of discretion in admitting or excluding evidence under section 352 for abuse and will not disturb the court’s ruling “except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10; *Fruits*, *supra*, 247 Cal.App.4th at p. 202.)

3. *The trial court did not abuse its discretion in admitting evidence of appellant’s prior acts of domestic violence.*

We conclude that the trial court’s decision in this case to admit the evidence of appellant’s past acts of domestic violence was neither arbitrary, capricious, nor patently absurd.

Appellant challenges the probative value of the prior domestic violence evidence on the ground that it lacked similarity to the offenses charged in this case. In so arguing, appellant attempts to distinguish the nature of the relationships he had with Anthony and Victor, contrasting the romantic and intimate

qualities of his more stable relationship with Anthony with the platonic roommate relationship he had with Victor. But section 1109 requires only that the propensity evidence be another act of domestic violence, and trivial differences between the relationships out of which the domestic violence arose are irrelevant to the analysis of similarity of the acts under section 352.

Appellant also asserts that the alleged acts of violence in his relationship with Anthony—punching, hitting, choking, biting, throwing things—are so common to all domestic violence cases as to lack any probative value in this case. However, neither section 1109 nor 352 calls for the prior and current incidents of domestic violence to share unique characteristics as a prerequisite for admission.

Characterizing the evidence in the case as weak and claiming that the jury likely credited the defense in convicting on the lesser included offense to assault with a deadly weapon and failing to reach a verdict on count 3,⁵ appellant argues that the trial court erred in admitting the propensity evidence because it was unduly prejudicial. We disagree.

⁵ Appellant states that the jury “did not reach a verdict on Count 3” (injury of a person with whom he had a dating relationship in violation of Penal Code section 273.5, subdivision (f)(1)). While technically true, this statement is highly misleading. In fact, the jury had no occasion to reach a verdict on count 3 because the trial court dismissed the count pursuant to Penal Code section 1385 on the People’s motion before the case was submitted to the jury.

All of the factors which might have justified exclusion of the evidence as more prejudicial than probative were notably absent in this case. Appellant's violent conduct toward Anthony was less inflammatory than the current offenses. Indeed, the acts Anthony described were more benign than appellant's attacks on Victor, which included spraying Victor in the face with a caustic chemical.⁶ Anthony's testimony also consumed relatively little time at trial—just under 20 pages of a trial transcript consisting of nearly 200 pages. Further, given the fact that the two victims testified separately about entirely different incidents, the likelihood that the jury might confuse the prior incidents with the charged offenses was negligible. Finally, as the trial court found, the prior incidents of domestic violence were recent in time, occurring within 10 years of the current charged offenses. Indeed, appellant's abusive relationship with Victor began only two years after his abuse of Anthony had ended.

In short, Anthony's testimony about appellant's violence toward him in the course of their prior relationship provided the clearest possible showing of appellant's propensity for domestic violence without causing undue prejudice. The trial court properly exercised its discretion in admitting the evidence

⁶ In this regard, appellant overstates the significance of the jury's conviction on the lesser included offense of assault by means of force likely to cause great bodily injury rather than assault with a deadly weapon. Contrary to appellant's interpretation, the verdict merely indicates the jury found that the insecticide appellant sprayed in Victor's face is not a deadly weapon, not that Victor's injuries were exaggerated.

pursuant to section 1109 by carefully weighing its probative value against any possible prejudicial effect.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.